Flight Standards District Office at Los Angeles, CA; Relocation

Notice is hereby given that on or about January 29, 1994, the Flight Standards District Office at 5885 W. Imperial Highway, Los Angeles, CA 90045 will be relocating to 2250 E. Imperial Highway, suite 140, Kilroy Airport Center, El Segundo, CA 90245. Services to the general public will continue to be provided by this office without interruption. This information will be reflected in the FAA Organization Statement the next time it is reissued. (Sec. 313(a), 72 Stat. 752; 49 U.S.C. 1354.)

Issued in Hawthorne, CA, on January 24, 1994.

Alex Hammond,

Regional Administrator, Western-Pacific Region.

[FR Doc. 94–3246 Filed 2–16–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

February 10, 1994.

The Department of Treasury has made revisions and resubmitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545–0023

Form Number: IRS Form 720

Type of Review: Resubmission

Title: Quarterly Federal Excise Tax Return

Description: Form 720 is used to report excise taxes due from retailers and manufacturers on the sale or manufacture of various articles, to report taxes on facilities and services, and taxes on certain products and commodities (gasoline and vaccines, etc.). It enables IRS to monitor excise tax liability for various categories on a single form and to collect the tax quarterly in compliance with the law and regulations (Internal Revenue Code 6011).

Respondents: Individuals or households, businesses or other for-profit, small businesses or organizations

Estimated Number of Respondents/Recordkeepers: 338,000

Estimated Burden Hours Per Respondent/Recordkeeper:

Form	Recordkeeping	Learning about the law or the form	Preparing and sending the form to the IRS
720	25 hr., 21 min	2 hr., 26 min	8 hr., 52 min.
Sch. A	2 hr., 23 min		2 min.
Sch. C Part I	2 hr., 38 min		2 min.
Sch. C Part II	11 hr., 58 min		12 min.
Sch. C Part III	14 min		

Frequency of Response: Quarterly

Estimated Total Reporting/Recordkeeping Burden: 10,003,900 hours

Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 94–3668 Filed 2–16–94; 8:45 am]

BILLING CODE 4830–01–P

Sunshine Act Meetings

Federal Register
Vol. 59, No. 33
Thursday, February 17, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Published February 9, 1994, 59 FR 6082.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: February 24, 1994, 2:00 p.m.

PLACE: Public Hearing Room, Suite 700, 625 Indiana Avenue, NW., Washington, DC 20004.

STATUS: Open.

CHANGE IN THE MEETING: The meeting date has been changed to March 11, 1994, 9:00 a.m., to accommodate Department of Energy witnesses.

Note: Any matter not discussed or concluded may be carried over to a later meeting.

FOR MORE INFORMATION CONTACT: Robert M. Andersen, (202) 208–6400.

Dated: February 15, 1994.

Robert M. Andersen,

General Counsel.

[FR Doc. 94–3808 Filed 2–15–94; 8:45 am]

BILLING CODE 6820–KD–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 59 FR 6676, February 11, 1994.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, February 16, 1994.

CHANGES IN THE MEETING: Change in the status of an item:

Proposed amendments to Regulation E (Electronic Fund Transfers) to cover Electronic Benefit Transfer (EBT) programs established by federal, state, or local agencies (proposed earlier for public comment; Docket No. R–0796) has been moved from the Summary Agenda to the *Discussion Agenda.*

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: February 14, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–3727 Filed 2–15–94; 9:31 am]

BILLING CODE 6210–01–P

Corrections

Federal Register
Vol. 59, No. 33
Thursday, February 17, 1994

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 931107–3307]

RIN 0693–AA70

Proposed Federal Information Processing Standard for Portable Operating System Interface (POSIX)—Part 2: Shell and Utilities

Correction

In notice document 94-1818 beginning on page 4034 in the issue of Friday, January 28, 1994, make the following corrections:

1. On page 4036, in the second column, in the third paragraph, in the first and second lines, "[*c/I*]" should read "[*c¦1*]" each place it appears.

2. On the same page, in the same column, in the sixth paragraph, in the second line, "*unmask*" should read "*umask*".

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

48 CFR Part 252

Defense Federal Acquisition Regulation Supplement; North American Free Trade Agreement Implementation Act

Correction

In rule document 94-447 beginning on page 1288 in the issue of Monday, January 10, 1994, make the following corrections:

252.225-7007 [Corrected]

1. On page 1291, in the first column, in section 252.225-7007(c), in the fourth line, after "country" insert "designated country".

2. On the same page, in the same column, in section 252.225-7007(d), in the last line "customer" should read "custom".

252.225-7037 [Corrected]

3. On page 1292, in the second column, in section 252.225-7037((f)(2)(iv), in the 10th line, "plan." should read "plant."

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP91-143-026]

Great Lakes Gas Transmission Limited Partnership; Revenue Sharing Report

Correction

In notice document 94-2903 appearing on page 6012, in the issue of Wednesday, February 9, 1994, in the first column, in the first line, the docket number should read as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93-ASW-40]

Proposed Modification of Class E Airspace: Harrison, AR

Correction

In proposed rule document 93-31698 beginning on page 68577 in the issue of Tuesday, December 28, 1993, make the following correction:

On page 68578, in the first column, in the file line at the end of the document, "FR Doc. 93-3" should read "FR Doc. 93-31698".

BILLING CODE 1505-01-D

federal register

Thursday
February 17, 1994

Part II

Department of Education

34 CFR Parts 668 and 682

Student Assistance General Provisions; Federal Family Education Loan Programs; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 668 and 682

RIN 1840–AB80

Student Assistance General Provisions; Federal Family Education Loan Programs

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Student Assistance General Provisions and Federal Family Education Loan program regulations. These amendments are needed to implement changes in the Higher Education Act of 1965, as amended (HEA), and to improve the monitoring and accountability of institutions and third-party servicers participating in the student financial assistance programs authorized by Title IV of the HEA (Title IV, HEA programs). The changes would establish requirements governing contracts between institutions and third-party servicers to administer any aspect of an institution's participation in those programs. In addition, the changes would strengthen sanctions against institutions for violations of Title IV, HEA program requirements and establish similar sanctions for third-party servicers. The changes also would establish standards of administrative and financial responsibility for third-party servicers that administer any aspect of a guaranty agency's or lender's participation in the Federal Family Education Loan programs.

DATES: Comments must be received on or before April 4, 1994.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Mr. Greg Allen, U.S. Department of Education, 400 Maryland Avenue SW., room 4318, Regional Office Building 3, Washington, DC 20202–5343.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Allen. Telephone (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 6 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Student Assistance General Provisions (34 CFR part 668) currently apply to all institutions that participate in the Student Financial Assistance Programs authorized by Title IV of the HEA. For purposes of these regulations, the Title IV, HEA Student Financial Assistance Programs include the Federal Pell Grant, Federal Family Education Loan (FFEL), Federal Direct Student Loan, State Student Incentive Grant (SSIG), Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) programs.

The FFEL program regulations (34 CFR part 682) govern the Federal Stafford Loan Program, the Federal Supplemental Loans for Students (Federal SLS) Program, the Federal PLUS Program, and the Federal Consolidation Loan Program, collectively referred to as the Federal Family Education Loan programs (formerly the Guaranteed Student Loan (GSL) programs). With respect to 34 CFR part 682, the Federal Stafford Loan, Federal SLS, Federal PLUS, and Federal Consolidation Loan programs are hereinafter referred to as the Stafford, SLS, PLUS and Consolidation Loan programs.

The Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239), enacted December 19, 1989, amended the HEA to authorize the Secretary to promulgate regulations governing the limitation, suspension, or termination of the eligibility of an individual or organization to contract with an educational institution to administer any aspect of the institution's participation in any Title IV, HEA program. That act further amended the HEA to authorize the Secretary to promulgate regulations to take emergency action against or to fine such an individual or organization.

The Higher Education Amendments of 1992 (Pub. L. 102–325), enacted July 23, 1992, amended the HEA to expand the Secretary's authority to regulate the activities of those individuals and organizations, now called *third-party servicers*. Further, Public Law 102–325 authorizes the Secretary to promulgate regulations that are applicable to third-party servicers to establish minimum standards with respect to sound management and accountability of the FFEL programs and include standards for financial responsibility and the assessment of liabilities for FFEL program violations. These proposed regulations would implement those statutory provisions. In addition, these proposed regulations would strengthen and clarify the procedures for fining an institution or limiting, suspending, or terminating its participation in any Title IV, HEA program, and make other minor changes.

The Secretary believes that establishing accountability guidelines for an institution's continued participation and the participation of an institution's third-party servicer in the Title IV, HEA programs is an important element in the general effort for better and more accountable schools, as called for in the National Education Goals.

Negotiated Rulemaking

Section 492 of the HEA contains procedural requirements that the Secretary is to follow in developing proposed regulations for parts B, G, and H of Title IV of the HEA, as amended by the Higher Education Amendments of 1992. Section 492(a) requires the Secretary to convene regional meetings to gain input on the content of proposed regulations. Section 492(b) requires the Secretary, subsequent to these meetings, to draft and submit regulations implementing parts B, G, and H to a negotiated rulemaking process.

In accordance with the requirements of section 492, the Secretary convened four regional meetings to discuss issues related to implementation of parts B, G, and H. The Secretary invited representatives of groups involved in student financial assistance programs, such as students, legal assistance organizations that represent students, institutions of higher education, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies. As a precursor to the regional meetings, the Secretary held a meeting in Washington, DC, in August 1992, to invite comments from interested parties as to the key issues that should be addressed at the regional meetings. At the four regional meetings, the Secretary provided participants with a list of issues, based upon those identified in the meeting in August 1992 that needed to be addressed in these proposed regulations. Regional meetings were held in New York, New York; San Francisco, California; Atlanta, Georgia; and Kansas City, Missouri during September 1992. Participants in the meetings were invited to nominate individuals to serve as participants in negotiated rulemaking sessions. The Secretary selected participants for the negotiations process from individuals nominated by groups participating in the regional meetings and attempted, to the extent possible, to have participants reflect the diversity of those participating in the student aid community.

Negotiated rulemaking sessions were held in April, June, and August 1993 in and around the environs of Washington, DC. Taking into account views

expressed at the regional meetings, the Department of Education prepared draft regulations on the main issues discussed. The draft served as the basis for the negotiated rulemaking process.

Regional Meeting Comments

In connection with these regulations, one issue was identified during the August meeting for discussion at the regional meetings: The requirement under section 487(c)(1)(C)(i) of the HEA for an audit of a third-party servicer's administration of an institution's, lender's, or guaranty agency's Title IV, HEA program. During the regional meetings, participants were asked for their recommendations on formulating the compliance standards against which a third-party servicer would be measured in these proposed regulations. Recommendations from the regional meetings varied.

Participants involved in the New York meeting suggested that the compliance standards for third-party servicers contracting with institutions should parallel institutional compliance standards.

Participants in San Francisco recommended that compliance standards for third-party servicers should be developed by an independent accounting firm but that the Department of Education should specify servicer activities that would need to be included in the annual compliance audit report. Participants at this meeting further suggested separate standards for different types of third-party servicers.

Participants meeting in Atlanta suggested that compliance audits of third-party servicers be limited to the area of their specific function; for example, with respect to loan servicers, the default rate of Title IV, HEA program loans should be an indicator of compliance with Title IV, HEA program requirements. Participants also recommended that a third-party servicer, and not the institution with which the servicer contracts, should be cited for any violation of an audit standard by that servicer. One participant recommended that the standards developed by the Association of Independent Certified Public Accountants should be used in the Department of Education's audit guide.

Participants attending the Kansas City regional meeting suggested that in devising audit standards for third-party servicers, the Secretary first should review the audit check list currently in use by the Office of Inspector General of the Department of Education for auditing third-party servicers. Participants did not consider consultants or software providers used by an institution to be included in the definition of *third-party servicer*. Participants suggested that the Department of Education devise a process for grading and validating software.

Regulatory Changes

The Secretary submitted a draft of the proposed regulatory language governing third-party servicers along with the issue described above for discussion at the negotiated rulemaking sessions. Consensus was reached on all major issues except where noted below.

The following summarizes the major changes in this notice of proposed rulemaking (NPRM):

Part 668—Student Assistance General Provisions

Section 668.1 Scope. Part 668 governs the administration of the Title IV, HEA programs by an institution and provides for various enforcement measures against institutions for any violations of program requirements by the institution or its agents. A third-party servicer, as an agent of an institution, must currently apply the requirements of part 668 to administer properly the Title IV, HEA programs on behalf of an institution. The Secretary proposes to specify that the requirements of the Student Assistance General Provisions regulations would be applied to a third-party servicer (as proposed to be defined in § 668.2) to the extent that the servicer administers any aspect of an institution's participation in a Title IV, HEA program. This proposal would enable the Secretary, for the first time, to directly oversee the conduct of third-party servicers. The Secretary also proposes to make clear that although the Secretary would hold a third-party servicer responsible for compliance with applicable regulations, an institution that contracts with the servicer always remains responsible for the servicer's compliance. This clarification merely restates the Department of Education's long-standing policy and requirements with respect to institutional responsibility.

Section 668.2 General definitions. These proposed regulations would incorporate the statutory definition of third-party servicer in section 481(f) of the HEA. Under that definition (as amended by the Higher Education Technical Amendments of 1993 (Pub. L. 103–208), enacted on December 20, 1993), a third-party servicer is an "individual, or any State, or private, profit or nonprofit organization" that contracts with an eligible institution to administer any aspect of the institution's participation in a Title IV, HEA program. The statutory definition includes additional elements applicable to a third-party servicer's administration of the FFEL programs. These aspects of the definition are addressed in a subsequent discussion on 34 CFR part 682.

The Secretary also proposes to include as part of the definition of third-party servicer examples of services which a third-party servicer could provide to an institution that the Secretary considers to constitute the administration of the institution's participation in a Title IV, HEA program. The Secretary believes that examples are necessary to alert those individuals and organizations that contract with an eligible institution of the specific activities that would be subject to the requirements proposed in these regulations.

The examples that the Secretary proposes to include in the definition of third-party servicer are primarily examples that show an obvious relationship to the administration of the Title IV, HEA programs. The Secretary proposes these examples to specifically detail which activities unequivocally constitute the administration of an institution's participation in the Title IV, HEA programs. While these examples are not all-inclusive, they do provide a baseline to judge other activities that could be deemed an aspect of the administration of an institution's participation in the Title IV, HEA programs.

The Secretary also proposes to include another set of examples that the Secretary believes do not constitute the administration of an institution's participation in the Title IV, HEA programs. For example, the Secretary does not consider the activity of publishing ability-to-benefit (ATB) tests to be a third-party servicer activity because publishers of ATB tests do not contract with institutions and under the statute would not fall within the definition of a third-party servicer.

As another example, the Secretary does not consider performing activities as a Multiple Data Entry Processor (MDE) to be included in the scope of third-party servicer activities. While an MDE could be considered to administer certain aspects of an institution's participation in the Title IV, HEA programs, an MDE is bound by other Department of Education requirements. Therefore, the Secretary does not believe it necessary to separately regulate MDE activities as part of these proposed regulations.

In general, the Secretary also proposes to exclude auditing activities from the scope of these regulations. Entities

performing audits are required to be impartial and independent entities with no vested interest in the Title IV, HEA programs. Further, while auditors provide services needed to comply with Title IV, HEA requirements, their services are not directly connected to the day-to-day administration of Title IV, HEA assistance. The Secretary, therefore, believes that auditing activities should not be included in the scope of these regulations.

Other proposed examples classified as being outside the scope of these regulatory requirements simply reinforce the Secretary's belief that certain activities performed by a third-party servicer that do not substantially affect the delivery of Title IV, HEA program aid do not constitute the administration of an institution's participation in the Title IV, HEA programs, (for example, contracting to warehouse records).

As a result of deliberations during the negotiated rulemaking sessions, Federal and non-Federal negotiators concluded that it was not necessary to include or exclude computer services or software providers from the proposed definition of third-party servicer or the examples provided. The negotiators concluded that computer software and computer services are simply technological means to assist in carrying out specific administrative functions. Accordingly, the Secretary invites public comment on whether an individual, State, or organization providing computer software and services represented to satisfy Title IV, HEA program requirements should specifically be included in what the Secretary considers to constitute a third-party servicer's administration of an eligible institution's participation in a Title IV, HEA program.

These proposed regulations would also make clear that an individual, State, or organization that engages in an excluded function is still considered to be a third-party servicer with respect to any other function that constitutes the administration of a Title IV, HEA program performed under a contract with an institution.

The Secretary further proposes to remove the terms *designated department official, initiating official,* and *show-cause official* from subpart G of this part and place them in § 668.2, because this section contains the general definitions applicable to all of part 668 and to all of the Title IV, HEA programs.

Section 668.11 Scope. The Secretary proposes that a third-party servicer's violation of an applicable provision of Subpart B of the Student Assistance General Provisions regulations may subject the servicer to a proceeding under subpart G. This change implements the statutory authority under section 487(c)(1) of the HEA to provide for the accountability of a third-party servicer's administration of any aspect of an institution's participation in the Title IV, HEA programs. Subpart G governs emergency actions or fines against an institution and the limitation, suspension, or termination of the institution's participation in a Title IV, HEA program. The Secretary proposes to add references to a third-party servicer in subpart G so as to provide for emergency actions and fines against a third-party servicer or the limitation, suspension, or termination of the servicer's eligibility to contract with an institution to administer any aspect of the institution's participation in a Title IV, HEA program (see the discussion beginning with § 668.81).

The Secretary also proposes to provide that if a third-party servicer violates an applicable provision of this subpart, the Secretary may also initiate an emergency action, a fine proceeding, or a limitation, suspension, or termination action against any institution under whose contract the servicer violated that provision. Because an institution has agreed to comply with all applicable Title IV, HEA requirements in its agreement with the Secretary, and because the institution must demonstrate under § 668.12 the capability to administer the Title IV, HEA programs, the Secretary emphasizes that the institution is always responsible for the actions of any of its employees, officers, or agents.

Section 668.12 Institutional participation agreement. The Secretary proposes to require an institution to agree, in its participation agreement, to be liable for all misused Title IV, HEA program funds, including those received on the institution's behalf by a third-party servicer, and to be liable for refunds, including those that a third-party servicer was required to pay on the institution's behalf. This provision emphasizes that an institution is always liable for the actions of its employees, officers, and agents regarding its participation in a Title IV, HEA program.

The Secretary also proposes to amend this section by adding new paragraph (b)(2)(vi) to reflect a new statutory directive under the HEA governing the past performance of individuals, agencies, or organizations affiliated with an institution. Under section 487(a)(16) of the HEA, an institution may not knowingly contract with or employ any individual, agency, or organization that has been or whose officers or employees have been convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Title IV, HEA program funds or been judicially determined to have committed fraud involving Title IV, HEA program funds. An institution may not contract with another institution or a third-party servicer that has been terminated under section 432 of the HEA involving the acquisition, use, or expenditure of funds under the Title IV, HEA programs, or that has been judicially determined to have committed fraud involving Title IV, HEA program funds.

The Secretary's proposed rules, in accordance with the consensus reached at the negotiated rulemaking sessions, would apply the prohibitions not only to instances of judicial determinations of criminal or fraudulent activity, but also to administrative determination of fraud and judicial or administrative determinations of any other material violations of law. Administrative proceedings are more frequent and often occur well in advance of related court proceedings. The Secretary believes that administrative proceedings afford sufficient due process, including notice, hearing, and review, to be relied upon for excluding individuals, agencies, or organizations under these provisions from applicable employment or contracting, if such a determination of culpability has been made. The Secretary believes that the reference to material violations of law is necessary, as Title IV, HEA funds are also endangered by the employment of those determined to have violated laws governing the handling of those funds, even if those violations do not rise to the level of fraud. For example, an institution should not employ a person or organization that has failed to pay refunds required under law.

Finally, these proposed regulations would include determinations of misuse of all Federal (as opposed to simply Title IV, HEA programs) funds and State or local government funds. For example, a person determined to have committed fraud in the acquisition of State educational grant funds could foreshadow a potential danger to the Title IV, HEA programs if that person were employed by an institution.

These additional requirements are needed to establish appropriate safeguards to protect the Title IV, HEA programs if serious questions are raised about the honesty and lawful conduct of an individual, agency, or organization that contracts with or is employed by an institution.

Section 668.13 Factors of financial responsibility. Section 498(e) of the HEA

introduces the concept of "substantial control" over an institution essentially by adopting the current regulatory concept of "the ability to affect substantially the actions of" an institution. Accordingly, the Secretary substitutes the new phrase where applicable in these proposed regulations. Further, the Secretary proposes to establish that an institution is not considered financially responsible—a condition of participation in the Title IV, HEA programs—if a person with substantial control over the institution—

(1) Has or had substantial control, either alone or in combination with members of his or her family, over another institution or a third-party servicer that owes liabilities for violations of Title IV, HEA program requirements, if those liabilities are not being properly repaid;

(2) Has family members who, alone or in combination with one another, exercise or exercised substantial control over the other institution or servicer; or

(3) Owes liabilities, or members of his or her family owe liabilities, for violations committed by the other institution or servicer, and the liabilities are not being properly repaid.

The institution could continue to be considered financially responsible if—

(1) The person repays a proportion of the liabilities equivalent to the amount of control held over the other institution or servicer;

(2) The institution can establish that the person does not, in fact, have substantial control over the institution; or

(3) The institution can establish that neither the person nor any of his or her family members in fact has or had substantial control over the other institution or servicer.

The definition of a family member (as currently defined in § 668.13(j)) refers to a parent, sibling, spouse, or child; spouse's parent or sibling; or sibling's or child's spouse.

Finally, the Secretary would apply the concepts of "substantial control" and "ownership interest" (as currently defined in section 498(e) of the HEA and § 668.13) to third-party servicers.

These provisions would expand the factors of financial responsibility of an institution to take into consideration substantial control over both other existing institutions (as opposed to only defunct institutions) and third-party servicers. Section 498(e) of the HEA clearly contemplates this expansion. Furthermore, these requirements are needed for the same reasons that similar requirements recently were adopted for persons with substantial control over defunct institutions. A person might be responsible for incurring liabilities for Title IV, HEA program violations because of his or her substantial control over third-party servicers or other institutions. The person could, nevertheless, have the same level of control over a participating institution while avoiding responsibility for repayment of those liabilities. These requirements are intended to prevent those persons from continuing to participate either directly or indirectly in the Title IV, HEA programs without assuming responsibility for their prior actions.

The Secretary also proposes technical changes to this section to remove as factors of financial responsibility the consideration of matters that would instead be included in § 668.12 as conditions for participation in the Title IV, HEA programs, for the reasons given in the discussion of that section.

Section 668.23 Audits, records, and examination. The Secretary proposes to specify that in addition to current requirements, an institution would be required to cooperate with a guaranty agency in whose program the institution participates and the State postsecondary review entity designated under subpart 1 of part H of Title IV of the HEA, in the conduct of audits, investigations, and program reviews. These requirements would clarify existing responsibilities to be accountable to authorized persons or organizations for the institution's activities with respect to the sound management of the Title IV, HEA programs. The Secretary further proposes to apply these requirements to a third-party servicer that contracts with an institution to administer any aspect of that institution's participation in a Title IV, HEA program. This change would merely clarify existing responsibilities of a third-party servicer, as an agent of an institution, to be accountable and provide access to authorized persons for the servicer's activities on behalf of the institution's participation in a Title IV, HEA program.

The Secretary proposes to add a requirement that a third-party servicer that administers funds or determines student eligibility under contract with an institution would be required to have prepared, at least annually, a compliance audit of all aspects of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer contracts. (This requirement would be satisfied by an audit report submitted in accordance with the Single Audit Act or Office of Management and Budget Circular A–133.) This requirement is necessitated by section 487(c)(1)(C) of the HEA.

The Secretary, however, believes that the contractual obligations of some third-party servicers do not necessitate audits of the servicers' activities. Accordingly, the Secretary proposes to require annual audits to be performed only by those servicers that administer funds or determine student eligibility on behalf of institutions. The consequences of the activities of those servicers to the integrity of the Title IV, HEA programs justify stricter accountability to the Secretary.

In addition, the Secretary proposes certain additional exceptions to the annual audit requirement in the discussion that follows. A third-party servicer that is required to have an audit performed would be excused from the annual audit requirement if that servicer contracts with only one participating institution and if that servicer's administration of a Title IV, HEA program would still be covered fully in that institution's compliance audit. (In proposed regulations to be published shortly after these, the Secretary intends to propose to excuse certain institutions from having an annual audit performed. If an institution were to be excused from an audit requirement, the activities of that institution's third-party servicer would not be fully covered, and thus the servicer would be required to have an audit performed to meet the requirements of this section). This provision would not harm the integrity of the Title IV, HEA programs as the servicer's activities still would be covered fully by the submission of an institution's compliance audit.

A third-party servicer that is required to have an audit performed and that contracts with more than one participating institution could have performed, to meet the requirements of this section, a single comprehensive compliance audit that covers all of the servicer's activities for all of the institutions that the servicer contracts with for Title IV, HEA program purposes, if the audit is conducted in such a way as to satisfy each individual audit requirement and if the audit covers all aspects of the servicer's administration of the participation in the Title IV, HEA programs of all institutions with which the servicer contracts. The Secretary believes that, by allowing third-party servicers to have one inclusive audit performed, instead of many individual audits, the burden associated with these regulations would be reduced (regulatory burden reduction is an objective under Executive Order (E.O.) 12866). Furthermore, the Secretary does not believe that this

provision would in any way affect the soundness of the information required by these regulations.

A third-party servicer would be required to have an audit performed at least once every two years if the servicer administers less than $1,000,000 under the Title IV, HEA programs for the period covered by the audit, or if the servicer's most recently submitted audit report did not contain any material deficiencies and was submitted in a timely fashion. Also, a third-party servicer would not be required to have an audit performed for any year in which the servicer administers less than $250,000 under the Title IV, HEA programs.

The Secretary is proposing these Title IV, HEA program fund thresholds, for purposes of exceptions to the audit requirements of this section, on the assumption that a large amount of Title IV, HEA program funds are not at risk in the case of a third-party servicer that administers less than $250,000 during the audit period. Similarly, the Secretary believes that a third-party servicer administering less than $1,000,000 in the Title IV, HEA programs during the audit period or whose most recently submitted audit report revealed no abnormal practices or material discrepancies in the servicer's administration of those funds, provided that the audit report was submitted in a timely fashion, would not be likely to endanger those funds. By proposing these exceptions to the audit requirements of this section, and thus limiting the scope of these provisions, the Secretary believes that the Department of Education will be able to concentrate on those third-party servicers that pose the greatest financial risk to the Title IV, HEA programs; these exceptions also reduce the administrative burden on those qualifying for the exemptions. The threshold amounts were extrapolated from similar exemptions to audit submission requirements for institutions under the Single Audit Act ($100,000 and $25,000) and increased by a factor of ten in order to cover third-party servicer activities because these entities generally contract with multiple clients and thus would administer greater amounts of Title IV, HEA program funds than any single institution.

These provisions are intended to parallel similar audit requirements for institutions (in proposed regulations to be published shortly after these). The intent is to minimize the burden associated with these regulations, both to the servicing industry and to the Federal Government, as called for under E.O. 12866. The Secretary believes that these exceptions would not harm the integrity of the audit oversight that Congress intended under section 487(c)(1)) of the HEA. Under that section and these regulations, the Secretary retains the authority to require any third-party servicer to have an audit performed on an annual basis if the Secretary believes it is necessary.

This section would be amended to provide that the servicer's first audit would cover the servicer's first full fiscal year after the effective date of these regulations and any period on or after the effective date of these regulations up to the beginning of the servicer's first full fiscal year. The Secretary believes that initial audits will be more useful and effective if they encompass an entire fiscal year. The Secretary also believes that allowing servicers additional time to prepare for the implementation of these regulations would enable servicers to comply more fully with these regulations as well as defray the costs associated with an audit of a partial fiscal year. Subsequent audits would, as required by statute, encompass the entire period since the servicer's previous audit.

A third-party servicer that is required to have an audit performed would be required to submit that audit to the Department of Education's Inspector General by the deadlines established in the audit guide developed by the Department's Office of Inspector General. The Secretary also proposes to apply the statutory requirements of section 487(c) of the HEA to third-party servicers such that the results of these audits would be made available to the appropriate authorities, as detailed in the discussion at the beginning of this section. (The Secretary intends to propose similar requirements for institutions required to have an audit performed in proposed regulations to be published shortly after these).

Section 668.24 Audit exceptions and repayments. The Secretary proposes to extend to a third-party servicer the provisions governing audit exceptions and determinations of audit liabilities that currently apply to institutions. These modifications would simply reflect the Secretary's current practice under this section as applied to a third-party servicer. In addition, an institution or a third-party servicer would have an opportunity to demonstrate within 45 days (35 days is mandated under the current regulations) of the Secretary's notification that the expenditure or compliance was proper. The Secretary is proposing 45 days to make the response period consistent with other reporting requirements in this part.

In addition, this section would be amended to specify additional steps that the Secretary may take to insure the payment of any liabilities that are owed. Under this section, if an institution or third-party servicer owes funds, the Secretary may determine that an administrative offset (as provided for under 34 CFR 30.28) is an appropriate alternative to collect those funds.

In the case of an institution or third-party servicer that provides surety or a guarantee for the benefit of the Secretary, such as a bond or letter of credit, the Secretary may determine it is necessary to collect from that surety or guarantee before the procedures under subpart H of this part are completed, if circumstances warrant.

The Secretary would collect a surety or guarantee before all available appeal procedures are completed—

(1) Where the need to provide relief to students or borrowers affected by the institution's or third-party servicer's actions, as applicable, that led to the assessment of liability, is more important than deferring collection activities until after the completion of appeal proceedings (for example, when unpaid refunds to the Title IV, HEA programs are identified, the Secretary may collect in advance of a final determination or exhaustion of appeal procedures, as the harm to students outweighs deferring collection); or

(2) Where the conditions under which a surety or guarantee are held do not provide adequate assurances that the surety or guarantee will be available for collection through the completion of available appeal proceedings.

These modifications would provide clarification in the regulations of the Secretary's existing practice and authority to collect from sureties or guarantees in accordance with their terms, prior to final determinations of liabilities or exhaustion of appeal procedures.

The Secretary also proposes to make clear that an institution is responsible for repayment of any funds owed by its servicer until those funds are repaid by the servicer. The Secretary considers this provision necessary because an institution is always responsible for the actions of its agents.

The Secretary proposes that if a determination is made to assess a liability against a third-party servicer, the servicer would be required to notify each institution under whose contract the servicer was assessed a liability of the Secretary's determination. The servicer would also be required to notify every institution that contracts with the servicer for the same service that the Secretary determined a liability is owed.

Final consensus on this particular language was not reached as negotiators believed that this provision essentially requires the notification of all institutions with which a servicer contracts. Negotiators objected to a notice being provided to institutions that a servicer contracts with that would not be directly affected by a determination from the Secretary to assess liability. A number of negotiators opposed this language on the ground that such a blanket notification unnecessarily damages a servicer's reputation among unaffected institutions. However, the Secretary believes that an institution that contracts with a third-party servicer should be informed of determinations by the Department of Education that the institution's servicer is improperly administering the Title IV, HEA programs, especially given the potential liability exposure to the institution. These notification requirements would arise only if the Secretary determines that a third-party servicer owes a liability based on an audit finding, after providing the institution or third-party servicer an opportunity to respond to an audit report response. By limiting the requirement for notice provided by a third-party servicer to institutions receiving the same service for which a liability was assessed, the Secretary believes that he has responded to any legitimate concerns raised by the negotiators.

Section 668.25 Contracts between an institution and a third-party servicer. The Secretary proposes to redesignate § 668.25, governing loss of institutional eligibility, as § 668.26 and to add a new § 668.25 that would establish minimum requirements for contracts between an institution and a third-party servicer. Proposed § 668.25 would allow an institution to contract with a servicer to administer aspects of the institution's participation in a Title IV, HEA program only to the extent that the servicer's eligibility to contract with that institution has not been limited, suspended, or terminated under the proceedings in Subpart G (as proposed to be amended). In addition, under these proposed regulations, a third-party servicer is considered eligible to contract with an institution to administer aspects of the institution's participation in a Title IV, HEA program to the extent that the servicer is not found to exhibit indicators of questionable past performance.

Indicators of questionable past performance would be—

(1) A limitation, suspension, or termination action by the Secretary against the servicer within the preceding five years;

(2) An audit finding during the servicer's two most recent audits amounting to at least five percent of funds received or administered by the servicer under the Title IV, HEA programs; and

(3) A citation within the preceding five years for the servicer's failure to submit a required audit report within an acceptable amount of time.

A third-party servicer that shows these indicators of questionable past performance with regard to the Title IV, HEA programs could not, under paragraph (d) of this section, contract with an institution unless the persons or entities with substantial control over the servicer agree to be responsible for any potential liability arising from the servicer's administration of the Title IV, HEA programs. In the case of a third-party servicer that has been subjected to a termination action, the servicer could not contract with an institution unless either the servicer or persons or entities with substantial control over the servicer (or both) provide financial guarantees (specified by the Secretary) to the Secretary for potential liabilities arising from the administration of the Title IV, HEA programs. These provisions are necessary to hold persons who have substantial control over a third-party servicer accountable for their past performance in the administration of the Title IV, HEA programs.

Any contract between an institution and a third-party servicer would have to require the servicer to agree to comply with all applicable Title IV, HEA program requirements, including using any Title IV, HEA program funds that the servicer administers and any earnings on those funds solely for Title IV, HEA program purposes. The servicer would have to agree to refer suspected instances of fraud and criminal activity to the Department of Education's Inspector General. These requirements would parallel those currently required of institutions in establishing an institution's administrative capability but add that the servicer would also have to refer suspected instances of fraud and criminal activity committed by the institution. The contract would have to require the servicer to agree to be liable to the Secretary, jointly and severally with the institution, for any violation by the servicer of any Title IV, HEA program requirement.

With regard to third-party servicer liability, a number of negotiators opposed the Secretary's proposed language, submitted to negotiators at negotiated rulemaking, requiring a third-party servicer to share liability with an institution for an infraction by the servicer of any Title IV, HEA program requirement. The negotiators offered three basic reasons for their opposition.

First, the negotiators stated that any imposition of liability would improperly interfere with the private contract between the servicer and the institution. The parties, in the view of the negotiators, should be free to decide how and if liability should be divided without Federal regulatory prescription.

The Secretary disagrees with this rationale. To ensure that the Title IV, HEA programs are properly administered and Federal funds are safeguarded, the Secretary has always required an institution to demonstrate that it is administratively capable and financially responsible. More and more institutions, however, are employing third-party servicers to administer their programs, thereby delegating responsibility to entities that the Secretary has not reviewed for administrative capability or financial responsibility. Because the Secretary does not directly approve or regulate the qualifications of these servicers, the Secretary believes that it is reasonable to require these servicers to stand behind their work and to be accountable to Federal taxpayers for any losses to Federal funds through the servicer's administration of the Title IV, HEA programs. Moreover, if the issue of liability is left to the discretion of the contracting parties, it is more than likely that some servicers will assume no responsibility for their actions. In proposing direct third-party servicer accountability to the Department of Education, the Secretary believes that institutions employing servicers to administer aspects of their participation in the Title IV, HEA programs would benefit from increased servicer integrity in fulfilling contractual obligations.

Second, the negotiators argued that it would be unreasonable to require a third-party servicer to be prepared to assume liability potentially far in excess of the fees earned by the servicer from the institution. Under this argument, the consequence of requiring third-party servicers to be liable for their actions would be to increase servicing fees charged to institutions and could make it economically impossible, in many cases, for institutions to contract with third parties for services related to the Title IV, HEA programs. The negotiators indicated that in some contracts, institutions specifically give up the right to hold a third-party servicer responsible for the consequences of the servicer's actions in exchange for a lower fee.

The Secretary does not believe that assumption of liability by servicers will make servicers unavailable to institutions. The Secretary believes that most servicers are, or should be, confident enough in the quality of their work to stand behind it financially. To the extent that a third-party servicer is unwilling to assume responsibility, it would seem to indicate that the servicer has no incentive to ensure compliance with the Title IV, HEA program requirements.

Third, the negotiators who objected to these proposed provisions claimed that the Department of Education does not impose similar constraints on its own contractors to assume contingent liability for the consequences of their actions.

The Secretary disagrees with this rationale. Those that contract with the Department of Education have different and more rigorous requirements imposed on them, both in their selection by the Department and in contracts into which the Department enters to ensure the proper use of Federal funds. The Secretary is able to select the Department of Education's contractors and retains the ability directly to enforce contractual provisions.

In an effort to respond to these objections during the negotiated rulemaking sessions, the Secretary suggested a compromise that would have limited joint and several liability of a third-party servicer for violations by the servicer of Title IV, HEA program requirements, in cases where the servicer was not an affiliate of the institution with which the servicer contracts. In those cases, joint and several liability would be capped at the fees and compensation received by the servicer from the institution during the period for which the liability is assessed. The Secretary suggested that, for the purposes of this section, an affiliate could be construed as a third-party servicer that—

(1) Is a parent or subsidiary corporation of the institution;

(2) Shares a person who exercises substantial control over the institution and servicer as defined in § 668.13; or

(3) Shares a common owner, partner, or officer with the institution.

The Secretary suggested this alternate language to decrease the financial risk for servicers that are not related parties to the institutions with which they contract. However, the Secretary believes that servicers that are linked to institutions should be fully accountable to prevent shielding of liability by shifting services to an affiliate. The Secretary invited reaction from the non-Federal negotiators on whether this compromise would sufficiently guard the integrity of the Title IV, HEA programs by providing the Secretary the means to ensure that a liability is repaid and the violation contributing to that liability is redressed and alleviate any legitimate objections raised by the negotiators.

The other negotiators did not accept the Secretary's offered compromise. Some negotiators would not agree to assumption of any liability by a third-party servicer. Thus, there was no consensus on this matter. Because consensus was not reached on either proposal, the Secretary is under no obligation to modify the position originally taken at the start of the negotiated rulemaking sessions. The Secretary therefore proposes regulations consistent with the position taken at the start of negotiated rulemaking because the Secretary believes that this proposal will best provide the greatest protection for Federal tax dollars in the form of Title IV, HEA program funds.

However, because the issue of joint and several liability was debated throughout the negotiated rulemaking sessions without resulting in consensus, the Secretary invites specific comment on this issue, and in particular on the Secretary's compromise rejected by the non-Federal negotiators, as explained previously.

Other contractual requirements would include, in the case of a third-party servicer disbursing or delivering funds under the Title IV, HEA programs or other funds to students, a requirement that the servicer confirm a student's eligibility before disbursing or delivering those funds to the student. A contract with that servicer also would require the servicer to agree to calculate and pay refunds and repayments in accordance with applicable Title IV, HEA program regulations.

Any contract with a third-party servicer would have to provide for the return to the institution of all applicable records and funds held by the servicer if either party terminates the contract, if the servicer stops providing services for the administration of a Title IV, HEA program, or if the servicer goes out of business or files a petition under the Bankruptcy Code. The servicer would have to return not only Title IV, HEA program funds, but also institutional or other funds held by the servicer for the purposes of the Title IV, HEA program for which the servicer no longer provides services.

Consistent with the time frames for other reporting requirements in 34 CFR part 600 that could affect an institution's eligibility or participation, this section also would require an institution to notify the Secretary, within 10 days, each time the institution enters into a new contract with a third-party servicer or significantly modifies an existing contract or if such a contract is terminated. The Secretary intends this provision to cover substantive modifications to existing contracts, such as the inclusion of additional responsibilities or any significant increase in the volume of work performed, and not to cover minor modifications such as a routine adjustment of the compensation owed to a third-party servicer due to inflation. This section also would require the institution to notify the Secretary, within 10 days, if a third-party servicer stops providing services for the administration of a Title IV, HEA program, goes out of business, or files a petition under the Bankruptcy Code. Any notification from an institution would have to include the name and address of the servicer. Upon the request of the Secretary, an institution that has a contract with a third-party servicer would have to provide information relevant to the contract and to the servicer's responsibilities for administering Title IV, HEA programs as well as a copy of the contract.

These changes are necessary for proper monitoring of and accountability for Title IV, HEA program funds. The requirement for a third-party servicer to agree in a contract to observe all applicable Title IV, HEA program requirements, special arrangements, agreements, and limitations is necessary to avoid situations where the servicer improperly argues that it cannot comply with these actions due to provisions in its contract with an institution.

The provisions governing the circumstances under which a third-party servicer must return records and funds to an institution are necessary to protect the interests of participating institutions and students in the event that a third-party servicer is no longer able to provide the services promised under a contract. In addition, the notification provisions would help keep the Secretary informed about those third-party servicers authorized to administer the Title IV, HEA programs on behalf of an institution, would assist the Secretary in providing appropriate materials and funds only to authorized third-party servicers, and would help the Secretary to obtain timely access to institutional records.

Section 668.81 Scope and special definitions. The Secretary proposes to amend this section to provide that the Secretary may initiate an emergency action against an institution or third-party servicer, fine an institution or

servicer or limit, suspend, or terminate the institution's participation in a Title IV, HEA program or the servicer's eligibility to contract with an institution to administer any aspect of an institution's participation in the Title IV, HEA programs, if the institution's servicer, acting under contract with the institution, violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation prescribed under the authority of Title IV of the HEA. This change also makes clear that an institution is always responsible for the actions of its servicers regarding its participation in the Title IV, HEA programs and remains subject to possible administrative action.

Section 668.82 Standard of conduct. The Secretary proposes to amend paragraph (a) of this section to add that a third-party servicer is also a fiduciary of the Department of Education. The Secretary also would amend paragraph (a) to provide that an institution or its third-party servicers would be required at all times to act with the competency and integrity sufficient to qualify the institution or servicer as a fiduciary. This change would clarify and emphasize the requirement that the fiduciary standard always applies and is not to be construed narrowly. The Secretary wishes to point out that this standard is not simply an additional requirement but, rather, it is a condition of initial and continued participation in or servicing of the Title IV, HEA programs. An institution or servicer cannot selectively avoid fiduciary responsibility.

This section would also be amended to specify that the Secretary would have the authority to initiate proceedings against a third-party servicer under this subpart if the servicer violates its fiduciary duty. The Secretary proposes to specify that the Secretary would have the authority to initiate a proceeding against an institution under this subpart if the institution's third-party servicer, acting under contract with the institution, violates the servicer's fiduciary duty. The Secretary wishes to emphasize that an institution is always responsible for the actions of its third-party servicers. The Secretary also proposes to make a technical amendment to clarify the meaning of paragraph (c) of this section. The Secretary's long-standing interpretation of these regulations is that a violation of an institution's fiduciary duty is grounds for termination, limitation, suspension, and fine proceedings—individually or in combination. As a result of the enactment of a statute authorizing the imposition of emergency actions, the Secretary also proposes to add emergency action to this list of potential consequences resulting from an institution's violation of the institution's fiduciary duty. An emergency action also would be applicable against a third-party servicer that violates its fiduciary duty.

The Secretary proposes to specify that an institution or third-party servicer violates its fiduciary duty if the servicer, an officer or employee of the servicer, or any person with substantial control over the servicer is guilty of or has been judicially determined to have committed a crime involving Federal funds. These provisions also would apply to a person, agency, or organization, or an officer or employee of an agency or organization with which the servicer contracts. A violation of fiduciary duty for these reasons would also constitute grounds for the termination of the participation of an institution under whose contract the servicer committed the violation. The Secretary proposes to expand the breadth of paragraph (d) of this section to parallel similar provisions proposed to be included in § 668.12, previously discussed, except that, in this case, these provisions would prohibit a third-party servicer (as opposed to the provisions of § 668.12 which prohibit institutions) from employing or contracting with persons or organizations that have questionable past performance with respect to government funds. Paragraph (d) would be similarly amended to include misuse of State and local government funds and administrative determinations of fraud or other material violations of law.

Finally, the Secretary proposes to amend paragraph (d) of this section. An institution or servicer, to remain qualified as a fiduciary, would have to meet the following requirement. If the institution or servicer becomes aware of a criminal conviction, or an administrative or judicial determination of fraud or other violation of law, by a person involved in the servicer's administration of an institution's participation in a Title IV, HEA program or a person with substantial control over the servicer, with respect to Federal, State, or local government funds, the institution or servicer would be required to protect the Title IV, HEA programs, including removing that person from Title IV, HEA program involvement or from exercising substantial control over the institution or servicer, as applicable.

In addition, if an institution or a third-party servicer becomes aware that a violation of, or failure to carry out, applicable statutes and regulations by the servicer's principals or affiliates (as those terms are defined in 34 CFR part 85), the institution or servicer is required to act to protect the Title IV, HEA programs, the beneficiaries of those programs, and the Federal Government from the risks occasioned by those events. These risks may include, but are not limited to, financial risks and risk to the reputation of the Title IV, HEA programs. An example of an action that an institution or servicer must take to protect the Title IV, HEA programs, their beneficiaries, and the Federal Government is the removal of all Title IV, HEA program administration duties from the assigned responsibilities of an individual. A violation of these proposed provisions would constitute grounds for the termination of the participation of an institution under whose contract the servicer committed the violation and the eligibility of the servicer to administer any aspect of an institution's administration of the Title IV, HEA programs. These amendments parallel similar changes made to the institutional participation agreement requirements under § 668.12.

The Secretary also proposes to amend this section to explain how a basis for debarment and suspension relates to the standard of fiduciary responsibility. Specifically, the Secretary proposes to redesignate current paragraph (e) of this section as paragraph (f) and to add a new paragraph (e). The new paragraph would specify that if an institution or servicer becomes aware that cause for suspension or debarment of any of the institution's or servicer's principals or affiliates (as those terms are defined in 34 CFR part 85) may exist, the institution or servicer is required to act to protect the Title IV, HEA programs in the same manner discussed in the previous paragraph, pending the outcome of a debarment or suspension action against that individual, or of proceedings that could give rise to suspension or debarment action against that individual.

A violation of these provisions by a third-party servicer would constitute grounds for the termination of the participation of an institution under whose contract the servicer committed the violation, if the institution knew or should have known of the causes for suspension or debarment. The violation, of course, would also constitute grounds for the termination of the eligibility of the servicer to administer any aspect of the institution's administration of the Title IV, HEA programs.

The Secretary invites comment on how to apply this requirement to owners and persons holding critical management positions at an institution or servicer. In the final regulations, the Secretary may modify these proposed regulations to address specifically their application to those persons.

These changes are needed to establish appropriate safeguards to protect the Title IV, HEA programs when serious questions are raised about the honesty and lawfulness of the conduct of an institution's or servicer's owners, officers, employees, associates, or contracted help whose duties involve the administration of or influence over the Title IV, HEA programs.

The Secretary holds an institution to the highest standard of care and diligence required of a fiduciary. The use of a third-party servicer confers that same standard on the servicer. However, the Secretary wishes to emphasize that the use of a third-party servicer does not in any way reduce the institution's responsibility to ensure compliance with Title IV, HEA program requirements.

The Secretary also proposes technical changes to this section to remove provisions governing lender participation in the FFEL programs that belong in 34 CFR part 682 and to incorporate provisions in 34 CFR part 682 concerning the consequences of a debarment or suspension on lender participation.

Section 668.83 Emergency action. The Secretary proposes to provide that an emergency action may be imposed on an institution or third-party servicer if the initiating official receives reliable information that a third-party servicer, acting under contract with the institution, is violating a Title IV, HEA program requirement. In an emergency action proceeding against a servicer, the official would also be required to notify each institution that contracts with the servicer of the emergency action. The Secretary believes that an institution that contracts with a third-party servicer should be kept informed of any administrative actions taken by the Department of Education against that servicer that might affect the administration of the institution's participation in the Title IV, HEA programs. To the examples of violations that may lead to an emergency action, the Secretary proposes to add a third-party servicer's lack of administrative ability to make appropriate refunds if students do not complete educational programs or periods of enrollment.

Any of these violations would be grounds for emergency action against a third-party servicer under this subpart. However, because an institution is always responsible for the actions of the institution's servicers, the Secretary believes that emergency action against the institution also may be necessary to prevent the likely loss of Title IV, HEA program funds.

The Secretary also proposes to include fraud committed by an institution or a third-party servicer as a specific example of a possible basis for emergency action. The Secretary proposes to provide an additional list of specific examples of fraud to emphasize the seriousness of these violations. Emergency actions based upon fraud are fully appropriate under existing regulations. The examples involve falsification of documents related to the Title IV, HEA programs, including—

(1) Documents pertaining to a student's eligibility;

(2) Documents submitted to the Department of Education, a guaranty agency, an independent auditor, a third-party servicer, or an institution by a third-party servicer;

(3) Documents pertaining to an institution's legal authorization to provide postsecondary education or to the accreditation or preaccreditation of the institution, the institution's educational programs, or the institution's additional campuses; and

(4) Documents pertaining to a servicer's loan collection activities (for example, due diligence activities), including activities that are not specifically required by the HEA or applicable program regulations.

Sections 668.84 Fine proceedings, 668.85 Suspension proceedings, and 668.86 Limitation or termination proceedings. The Secretary proposes to include, as a specific basis for any of these proceedings against an institution or a third-party servicer, a substantial misrepresentation of the institution's educational program, financial charges, or employability of the institution's graduates by an institution or servicer under contract with an institution, as applicable. The Secretary believes that substantial misrepresentation represents a clear indication of a deliberate intent to misuse Title IV, HEA program funds by deceptively encouraging enrollment, thus abusing the purpose of Title IV, HEA program funds, which is to provide equal access to a quality education for recipients of these funds. The Secretary is proposing to employ the full range of sanctions at the Secretary's disposal against this possible misrepresentation to preserve the integrity of the Title IV, HEA programs and to ensure the accountability of those who administer the programs.

The Secretary proposes to amend these sections to provide for the imposition of a fine against an institution or third-party servicer or the limitation, suspension, or termination of the institution's participation or the servicer's eligibility to contract with an institution to administer any aspect of that institution's participation in the Title IV, HEA programs if the institution's servicer, acting under contract with the institution, violates a Title IV, HEA program requirement. Under §§ 668.84, 668.85 and 668.86, if the Secretary begins a fine, suspension, limitation, or termination proceeding against a third-party servicer, the Secretary may also begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party commits a violation. These technical changes are needed to conform to the changes proposed to the scope of this subpart.

With respect to fine proceedings against third-party servicers, the Secretary proposes to amend § 668.84 to specify under the procedures for fine proceedings that a designated department official notifies each institution that is affected by the alleged violations identified as the basis for the fine proceeding. To the extent possible, the official also notifies each institution that contracts with the servicer for the same service affected by the alleged violation. This change would parallel the notification requirements that the Secretary has proposed under § 668.24(b). As explained in the prior discussion regarding notification requirements under § 668.24(b), there was no consensus during negotiated rulemaking on this proposed provision. Some negotiators opposed this requirement on the grounds previously noted. In addition, §§ 668.85 and 668.86 would require the official to notify each institution that contracts with a third-party servicer under a suspension, limitation, or termination proceeding.

Fine, limitation, suspension, and termination proceedings would all require the official to include in the notice to a third-party servicer the consequences of the action to the institution, including that the Secretary may fine, limit, suspend, or terminate the institution, as applicable. Given the potential consequences to an institution, the Secretary deems it proper to provide notice to each institution that could be affected of the Secretary's intent to seek a sanction against the servicer, whether the Secretary also intends to seek a sanction against the institution or not. Even if the Secretary does not begin a fine, limitation, suspension, or termination proceeding against an

institution, the Secretary believes that the institution should be kept informed of the status of any proposed sanction against the institution's servicer. Imposition of the sanction could have an effect on the institution's participation in a Title IV, HEA program. Further, the Secretary believes that an institution should be informed if its servicer's administration of a Title IV, HEA program is called into question. That information would permit the institution to make informed judgments about the institution's continued use of the servicer, and take corrective action prior to the outcome of any administrative proceeding.

Sections 668.87 Prehearing Conference and 668.88 Hearing. The Secretary proposes to add references to third-party servicers to conform to the proposed changes in the scope of this subpart.

Section 668.89 Authority and responsibilities of the hearing official. The Secretary proposes to amend this section to make clear that a hearing official is bound by all applicable statutes and regulations. This change would codify in the regulations the existing responsibility of the hearing official.

Section 668.90 Initial and final decisions—Appeals. This section would be amended to add references to third-party servicers to conform to the proposed changes in the scope of this subpart. In addition, paragraph (a)(3) of this section would be amended to reflect changes proposed under §§ 668.12 and 668.82 dealing with the past performance of individuals, agencies, or organizations that are affiliated with an institution, including, as applicable, third-party servicers.

The Secretary proposes to add a new restriction on a hearing official's authority to modify a proposed sanction against an institution or third-party servicer. If a designated department official brings a termination action against an institution or servicer for engaging in fraud, and a hearing official finds that the institution or servicer has engaged in fraud, the hearing official must uphold the termination. The examples of fraud listed in this section are the same as those proposed for § 668.83 concerning emergency action.

The Secretary believes that if an institution or third-party servicer engages in fraud involving a Title IV, HEA program, the institution's participation in the program should be terminated or the servicer's eligibility to contract with an institution to administer any aspect of that institution's participation in the Title IV, HEA programs, as applicable, should be terminated. The Secretary does not believe that a lesser sanction that permits the institution or servicer to continue to participate in the program or in the case of a third-party servicer to be eligible to contract, is a sufficient safeguard against the likely abuse of Title IV, HEA program funds.

The Secretary proposes to amend paragraph (c)(1) of this section so that in a fine, limitation, or termination proceeding, the hearing official's initial decision automatically becomes the Secretary's final decision in 30 days (20 days is mandated under the current regulations) after the initial decision is issued and received by both parties unless that initial decision is questioned before the Secretary. The Secretary is proposing these new timeframes to make them consistent with other reporting requirements in this part. The Secretary does not believe that a ten-day difference in an institution's or servicer's right to appeal an initial decision would unduly affect the integrity of the Title IV, HEA programs.

The Secretary also proposes to make technical changes in paragraph (a)(3)(iv) of this section to correct typographical errors that inadvertently appeared in final regulations published in the **Federal Register** on July 31, 1991 (56 FR 36698).

Section 668.91 Filing of requests for hearings and appeals; confirmation of mailing and receipt dates. The Secretary proposes to add references to third-party servicers to conform to the proposed changes in the scope of this subpart.

Section 668.92 Fines. The Secretary proposes to add references to third-party servicers in this section to conform to proposed changes governing the imposition of fines in other sections of this subpart.

This section would also be amended to provide for the consideration of the size of the servicer's business (including the number of institutions and student accounts served by the servicer) in determining the amount of a fine against a servicer. This provision would be similar to the provision already in place in this section that requires consideration of the size of an institution in determining the amount of a fine against the institution. The Secretary also proposes to take into account, in the case of a violation by a third-party servicer, the degree to which the servicer can provide evidence that the institution contributed to that violation and the extent to which repeated mechanical systemic unintentional errors contributed to that violation. For purposes of this section, repeated mechanical systemic unintentional errors would be counted as a single violation. This provision was requested by non-Federal negotiators to cover cases where errors in computer systems result in multiple violations. The Secretary proposes to adopt these measures in the interest of fairness to a third-party servicer in cases where a minor programming error leads to hundreds or thousands of violations. While the Secretary believes that all resulting losses should be compensated for by the institution or servicer, fines need not be unduly multiplied. The Secretary specifically invites comment on whether this provision is sufficiently specific and not excessively broad and effectively balances the Federal interest in ensuring compliance with the realities of computer processing.

The Secretary also proposes to provide for the consideration of the amount of liability owed by an institution or third-party servicer on the misuse of Title IV, HEA program funds or refunds in determining the gravity of the institution's or servicer's violation, as applicable, of a Title IV requirement. The number of students affected by the violation also would be a consideration in that determination. The Secretary intends these provisions to serve as guidelines for evaluating the gravity of a violation.

Section 668.93 Limitation. The Secretary proposes to add references to third-party servicers in this section to conform to proposed changes governing the imposition of limitations in other sections of this subpart. The Secretary also proposes that a limitation on a third-party servicer's eligibility to contract with institutions to administer any aspect of an institution's participation in the Title IV, HEA programs could include a limit on the number or size of institutions with which the servicer may contract, the number of accounts (borrower or loan accounts) that the servicer may service under contract, an increase or reduction in the responsibilities allowed or required of the servicer under a contract, or a requirement for the servicer to obtain surety assuring the servicer's ability to meet financial obligations.

The Secretary believes that these limitations are necessary to address the probable causes of improprieties in which a third-party servicer might engage. By limiting the number or size of institutions or accounts that a third-party servicer may serve (including, for example, requiring the servicer to transfer existing accounts back to the institution) the Secretary may address a problem involving the servicer's overextended resources. By limiting the responsibilities performed by the

servicer under a contract, the Secretary may restrict the servicer's administration to a particular Title IV, HEA program while prohibiting the servicer from administering another Title IV, HEA program for which the servicer's past performance has been inadequate. By imposing additional responsibilities under a third-party servicer's contract, the Secretary may require the servicer to use additional safeguards before awarding or disbursing Title IV, HEA program funds or delivering Federal Stafford or Federal SLS loan proceeds.

Section 668.94 Termination. The Secretary proposes to add references to third-party servicers in this section to conform to proposed changes governing termination proceedings in other sections of this subpart. The Secretary proposes to specify that a termination of a third-party servicer's eligibility to contract with an institution to administer a Title IV, HEA program ends the authority of the servicer to administer that program under any existing contract between an institution and the servicer. In addition, if a third-party servicer's eligibility is terminated, the servicer would be required to return to each institution (or otherwise dispose of according to the Secretary's instructions) any funds received by the servicer under that program for that institution or the institution's students. The servicer also would be required to return to the institution all records pertaining to the servicer's administration of the institution's participation in that program.

The Secretary believes that the termination of a third-party servicer's eligibility to contract with an institution should be treated like the termination of an institution's participation in a Title IV, HEA program. Not only should new contracts with an institution be prohibited, but the servicer's existing activities involving the administration of that program also should cease. Further, a third-party servicer may possess unexpended funds under that program for an institution's students at the time that termination takes effect. The servicer should be required to return those funds to the institution so that those students may receive their aid. The return of records to the institution is needed because of the recordkeeping requirements that the various Title IV, HEA program requirements that the various Title IV, HEA program regulations apply to institutions.

Section 668.95 Reimbursements, refunds, and offsets. This section would be amended to add references to third-party servicers to conform to the proposed changes in the scope of this subpart.

Section 668.96 Reinstatement after termination. The Secretary proposes to add references to third-party servicers to conform to proposed changes in the scope of this subpart. The Secretary also proposes to eliminate the provision that permits an institution to apply for reinstatement of its participation after three months if the institution's participation has been terminated for engaging in substantial misrepresentation. Like institutions whose participation is terminated for other violations, the institution would be able to apply for reinstatement only after 18 months from the date of the termination, unless the institution also was debarred or suspended under E.O. 12549 or the Federal Acquisition Regulations (FAR), 48 CFR subpart 9.4. The Secretary further proposes to extend these criteria to apply to a termination of a third-party servicer's eligibility to contract with an institution to administer any aspect of the institution's participation in the Title IV, HEA programs if the basis for that termination was engaging in substantial misrepresentation.

The Title IV, HEA programs are most effective only if students, other members of the public, and governmental and other bodies can rely on the honesty of the representations of an institution or the institution's agents. The harm that substantial misrepresentation does to the integrity of the Title IV, HEA programs, to those who rely on the programs to help meet educational costs, and to the taxpayers who pay for the programs should carry equal weight with the harm done by any other violation of a Title IV, HEA program requirement. If an institution's participation or third-party servicer's eligibility is terminated because the institution or servicer engaged in substantial misrepresentation, the consequence of that termination should be no less than the consequence of a termination for other reasons.

Section 668.97 Removal of limitation. The Secretary proposes to provide that an institution may not apply for removal of a limitation before the later of (1) 12 months from the effective date of the limitation, or (2) the expiration of a debarment or suspension under E.O. 12549 or the FAR, 48 CFR subpart 9.4. Parallel to the requirement for institutions, a third-party servicer would be able to apply for removal of a limitation only after 12 months from the date of the limitation, unless the servicer was also debarred or suspended.

These changes are necessary to conform to the proposed changes in the scope of this subpart. The Secretary would include the length of a debarment or suspension action as a criterion to apply for removal of a limitation to protect the Title IV, HEA programs, the beneficiaries of those programs, and the Federal Government from potential effects of doing business with irresponsible entities.

Sections 668.111 Scope and purpose, 668.112 Definitions, 668.113 Request for review, 668.114 Notification of hearing, and 668.116 Hearing. The Secretary proposes to add references to a third-party servicer to these sections to parallel institutional appeal procedures and thus establish procedures for a third-party servicer to appeal a final audit determination or final program review determination. The proposed procedures generally would be parallel to the procedures already established that govern appeals by an institution of a final audit determination or final program review determination. Under § 668.116(e), the Secretary proposes to expand the types of evidence that an institution or servicer requesting review of the final audit or final program review determination may submit to a hearing official to include Department of Education program review reports and work papers for program reviews and institutional or servicer records and other materials (including records and other materials of institutions with which the servicer has contracts) provided to the Department in response to a program review. The Secretary also proposes to notify all institutions with which a third-party servicer contracts of final audit report or final program review determinations. The Secretary believes that an institution that contracts with a third-party servicer should be kept informed of any activities between the servicer and the Department that might affect the administration of the institution's participation in a Title IV, HEA program.

Section 668.123 Collection. The Secretary proposes to modify this section to conform to the proposed changes to § 668.24.

Part 682—Federal Family Education Loan Programs

Section 682.200 Definitions. The Secretary proposes to amend the definition of *lender* to exclude from the definition of an "eligible lender" any lender that (1) is debarred or suspended under E.O. 12549 or the FAR, (2) has principals or affiliates so debarred or suspended, (3) is an affiliate of any

person so debarred or suspended, or (4) employs to administer or assist in the administration of FFEL program funds any person so debarred or suspended. The effect of these proposed changes would be automatically to exclude a debarred or suspended lender from participation in the FFEL programs for the duration of the debarment or suspension. A guaranty agency would thus be prohibited from guaranteeing a new loan made by the lender during this period.

Like the proposed changes governing the standard of conduct of participating educational institutions and third-party servicers under 34 CFR 668.82, these changes are needed to establish appropriate safeguards to protect the integrity of the FFEL programs and the Federal financial interest if serious questions are raised about the honesty and lawfulness of the conduct of a lender's owners, officers, directors, management, employees, or affiliates whose duties involve the administration of or influence over the use of those funds.

The Secretary proposes to amend this section to expand on the statutory definition of *third-party servicer* in the proposed regulations to clarify its applicability in the FFEL programs. Under that definition, a third-party servicer is an individual or organization that contracts with a lender or guaranty agency to administer any aspect of the lender's or guaranty agency's participation in the FFEL programs, including any applicable function described in the definition of third-party servicer in 34 CFR part 668. The Secretary believes that by including the statutory definition as well as a reference to the proposed definition of third-party servicer under 34 CFR part 668, that individuals or organizations that contract with a lender or guaranty agency to administer any aspect of the lender's or guaranty agency's participation in the FFEL programs will be able to determine the applicability of these regulations to themselves.

Section 682.401 Basic Program Agreement. The Secretary proposes to revise this section of the regulations to clarify a guaranty agency's responsibilities if it enters into a contract with a third-party servicer. As discussed previously under § 682.200, the Secretary proposes to prohibit a guaranty agency from entering into a contract with a third-party servicer that the Secretary has determined is not financially responsible or has been determined by the Secretary to have not complied with the statutes and regulations that govern the FFEL programs.

Under this proposed provision, a guaranty agency would be required to provide to the Secretary the names and addresses of any third-party servicer with which the agency contracts and, if requested by the Secretary, a copy of that contract. The Secretary is proposing to require submission by the agency of the name and address of any third-party servicer with which the agency contracts, and, upon request, the contract, to assist the Secretary in carrying out his responsibilities to monitor the performance of third-party servicers.

The Secretary believes that receipt of a copy of the contract is necessary because it states the services that a third-party servicer performs for a guaranty agency. With this information, the Secretary will be better able to monitor program compliance and integrity of the guaranty agency's portfolio that the servicer is administering. These changes would parallel the requirements concerning contracts between institutions and third-party servicers.

Note that section 552 of the Administrative Procedure Act does not require disclosure to the public, under the Freedom of Information Act (FOIA), of subject matter that is deemed to be a trade secret or is of commercial or financial interest or is of a privileged or confidential nature (note also that the entity submitting the information is responsible for identifying information that is not subject to the FOIA's disclosure requirements).

Section 682.413 Remedial actions. The Secretary proposes to revise this section of the regulations to clarify a lender's and its third-party servicer's responsibility to pay liabilities if the servicer has not complied with FFEL program statutes or regulations with respect to services it has contracted with a lender to perform. Under this section, a third-party servicer and lender under whose contract the servicer committed the violation would be considered jointly and severally liable for paying to the Secretary any interest benefits and special allowance or any compensation the servicer has received on any loan from the lender from the date that the servicer fails to comply with any of the requirements in § 682.406(a)(1)–(a)(6), (a)(9), and (a)(12), for any period when the loan has lost its eligibility for reinsurance coverage as a result of the third-party servicer's actions, and for any period after it erroneously bills the Secretary for interest benefits and special allowance. The Secretary would vigorously attempt to collect any of those liabilities first from the lender and, if the lender does not repay those liabilities within 30 days or does not make arrangements satisfactory to the Secretary to repay those liabilities, pursue the third-party servicer for the payment of those liabilities.

This proposed section would also clarify a guaranty agency's and its third-party servicer's responsibilities to pay liabilities to the Secretary if the servicer has not complied with FFEL program statutes or regulations with respect to services that it has contracted with a guaranty agency to perform. Under this proposed provision, the Secretary would require a guaranty agency to repay to the Secretary any reinsurance payments the guaranty agency received on a loan if the third-party servicer contracting with the guaranty agency causes a loan to lose its eligibility for reinsurance. In addition to the repayment of reinsurance, if a third-party servicer makes an incomplete or incorrect statement in connection with any agreement entered into under this part or any other Federal requirement, the guaranty agency with which it has entered into a contract may be subjected by the Secretary to return payments made by the Secretary to the agency, have its payments withheld by the Secretary, or have its participation in the FFEL programs limited, suspended, or terminated. In addition to these penalties, the guaranty agency and its third-party servicer may be fined, may be required to repay any payments the Secretary became obligated to make to others as a result of an incomplete or incorrect statement or violation of any Federal requirement, or be responsible for repaying any interest benefits, special allowance, or reinsurance paid on a Consolidation loan for a violation of 34 CFR 682.206(f)(1). The guaranty agency and its third-party servicer would be considered jointly and severally liable for any of those liabilities. The method by which the Secretary would collect any liability would parallel the proposed provisions governing the circumstances under which a lender and third-party servicer would be jointly and severally liable to the Secretary.

In the negotiated rulemaking sessions, the issue of third-party servicer liability generated controversy and dissension among the negotiators. With regard to liabilities assessed against a third-party servicer under the FFEL programs, many negotiators raised the same objections previously discussed in connection with liability for servicers under 34 CFR part 668. Negotiators raised an additional objection, suggesting that liabilities assessed against third-party servicers under the FFEL programs are unnecessary given

the ability of the Secretary to determine a loan to be uninsured and thus able to be collected directly from a lender or guaranty agency. In response to these objections, the Secretary offered the same modification of the concept of joint and several liability discussed previously in 34 CFR part 668. As noted, no consensus was reached. However, the Secretary agreed to incorporate language into these proposed regulations to specify that the Secretary would first attempt collection from a lender or guaranty agency in the event of liability on the part of a third-party servicer. The Secretary included this provision at the request of negotiators because the Secretary believes that this provision would not adversely impact the integrity of the FFEL programs. The Secretary specifically invites further public comment on the issue of joint and several liability for servicers contracting with lenders and guaranty agencies in order to obtain additional advice from the higher education community in the development of final regulations.

The Secretary specifically invites public comment on whether, and how, the Secretary should hold a third-party servicer that administers FFEL programs jointly and severally liable for any violation of an FFEL program requirement by that servicer and whether any alternative less than assumption of full liability is sufficient to protect the public interest. The Secretary notes that substantial losses have occurred in the FFEL programs due to third-party servicer violations.

Under these proposed regulations, the Secretary would follow the fine proceedings contained in 34 CFR part 668, subpart G, in imposing a fine against a third-party servicer.

Section 682.414 Records, reports, and inspection requirements for guaranty agency programs. The Secretary proposes to amend this section to make a third-party servicer's responsibilities under this part conform to currently existing regulations with respect to a guaranty agency's obligation to maintain current records. Under this provision, a third-party servicer acting as an agent for a guaranty agency would be required to maintain current, complete, and accurate records for all loans that it services for that agency. These records would have to be updated at least once every 10 business days. The Secretary is proposing this provision to ensure that a third-party servicer with which a guaranty agency contracts is responsible for maintaining accurate records.

Section 682.416 Requirements for third-party servicers and lenders contracting with third-party servicers. The Secretary proposes to add a new section to the FFEL program regulations that would set forth administrative and financial standards that a third-party servicer would be required to meet in order to be an eligible third-party servicer with which a lender or guaranty agency may contract for purposes of its responsibilities under the FFEL programs. Under these proposed regulations, a third-party servicer would be considered to be administratively responsible if it provides the services for which it has contracted to perform in accordance with the Federal laws and regulations that govern the FFEL programs, has business systems that are capable of meeting those requirements and has adequate personnel who are knowledgeable about the FFEL programs. The Secretary is proposing these standards because he believes that these are the minimum administrative standards that an agent or entity must meet to demonstrate satisfactorily to the Secretary that it is capable of performing FFEL program services in accordance with applicable statutes and regulations.

The Secretary proposes to apply the standards governing financial responsibility under 34 CFR 668.13(c), (d), (g), and (h), governing the financial responsibility of institutions and third-party servicers contracting with those institutions, to a third-party servicer that administers any aspect of the FFEL programs under a contract with a guaranty agency or lender, for purposes of this part.

During the negotiated rulemaking sessions, the proposed standards governing financial responsibility of third-party servicers and institutions generated disagreement among the negotiators. The Secretary intends that the financial responsibility standards in this section would parallel, as applicable, similar standards of financial responsibility for participating institutions that the Secretary intends to publish in proposed regulations to be published shortly after these. When published, this future NPRM will provide commenters with the opportunity to comment on financial responsibility standards governing both third-party servicers and institutions.

The Secretary proposes these standards to ensure that a third-party servicer would not be able to maintain a contract with a lender or guaranty agency to administer any aspect of the lender's or guaranty agency's FFEL program unless that servicer periodically demonstrates to the Secretary the ability to meet its financial obligations with that lender or guaranty agency. Further, these standards would ensure that the servicer can demonstrate that it is financially stable and will be able to meet these obligations in the future. The Secretary believes that these standards are necessary because the financial failure of a third-party servicer could have an enormous impact on the FFEL programs that could create substantial losses for the Federal taxpayer.

Under these proposed rules, the Secretary would, as determined necessary, conduct a special review of a third-party servicer to determine if it meets the administrative capability and financial responsibility standards proposed in this section. If the Secretary conducts that review, the servicer would be required to provide evidence to the Secretary that it meets these standards. Based on the review of the materials required by this section the Secretary could initiate a limitation, suspension, or termination action against the servicer. If the servicer is unable to demonstrate that it meets the established standards for administrative capability and financial responsibility, the servicer could provide evidence to the Secretary demonstrating that the limitation, suspension, or termination action is unwarranted. This latter provision was added at the request of negotiators to govern situations where a third-party servicer may not be able to meet the defined standards proposed in this section, but the servicer still considers itself to be administratively capable and financially responsible. This provision would allow a third-party servicer the opportunity to demonstrate to the Secretary that it is still administratively capable and financially responsible.

This section would provide that a third-party servicer is not financially responsible under this section if the servicer, or the servicer's owner, majority shareholder, or chief executive officer is determined to have a questionable past performance. The past performance criteria in this section would parallel proposed requirements under 34 CFR 668.12 (implementing statutory requirements governing the past performance of persons or organizations associated with institutions that participate in Title IV, HEA programs) and under 34 CFR 668.82 (governing the standard of conduct of institutions and third-party servicers for purposes of the Title IV, HEA programs). Furthermore, the Secretary proposes to apply this provision to any person employed by the servicer or any person, entity, or any officer or employee of an entity that the servicer contracts with whose past performance is also questionable. In

addition, in order to remain financially responsible, if a third-party servicer learns of such a conviction or determination, the servicer would have to take immediate action to safeguard the Title IV, HEA programs, as explained previously in the discussion concerning § 668.82.

However, for purposes of this part, the Secretary proposes to specify that with regard to the conduct of an officer or employee of a third-party servicer or a person, entity, or officer or employee of an entity with which the servicer contracts, that conduct would be a factor in determining the servicer's financial responsibility only if the individual or entity is used in a capacity that involves administering any aspect of the Title IV, HEA programs. For example, the Secretary would not hold the conduct of a custodian employed by a third-party servicer as an element in determining the servicer's financial responsibility, if that custodian had no responsibility for administering a Title IV, HEA program.

The Secretary also proposes to specify that a third-party servicer would not be considered to be financially responsible if the servicer, or any principal or affiliate of the servicer (as those terms are defined in 34 CFR part 85), is debarred or suspended under E.O. 12549 or the FAR, or is engaging in activity that is cause under 34 CFR 85.305 or 85.405 for debarment or suspension under E.O. 12549 or the FAR.

Like the proposed changes governing the past performance of individuals or organizations associated with institutions that participate in the Title IV, HEA programs and standard of conduct of participating institutions and third-party servicers, these changes are needed to establish appropriate safeguards to protect the integrity of the FFEL programs and the Federal financial interest if serious questions are raised about the honest and lawful conduct of a servicer's owners, officers, directors, employees, or affiliates whose duties involve the administration of or influence over the use of those funds.

Under this section, a third-party servicer would be required to have an annual independent audit of its administration of the FFEL programs that examines the servicer's compliance with the Act and applicable regulations and its financial management of FFEL program activities. These requirements and audit exceptions would parallel the proposed audit requirements and exceptions under 34 CFR 668.23 (governing audit requirements for third-party servicers contracting with institutions to administer any aspect of the institution's participation in the Title IV, HEA programs), except that the report of the audit would have to be submitted to the Secretary within six months of the end of the audit report period. A third-party servicer's initial audit would have to cover the same period required of audits performed for third-party servicers contracting with institutions to administer any aspect of the institution's participation in the Title IV, HEA programs (discussed previously in 34 CFR 668.23). The Secretary believes that initial audits will be more useful and effective if they encompass an entire fiscal year. The Secretary also believes that allowing servicers additional time to prepare for the implementation of these regulations would enable servicers to comply more fully with these regulations as well as defray the costs associated with an audit of a partial fiscal year and minimize the burden associated with implementing these regulations, as called for under E.O. 12866. Subsequent audits would, as required by statute, encompass the entire period since the servicer's previous audit.

In addition, the Secretary proposes that the audit report would be conducted in accordance with the audit guide developed by the Inspector General of the Department of Education unless the third-party servicer is a governmental entity or nonprofit organization. A third-party servicer that is a governmental entity would be required to have an audit conducted in accordance with 31 U.S.C. 7502 and 34 CFR part 80, appendix G (pursuant to the Single Audit Act). A third-party servicer that is a nonprofit organization would be required to have an audit conducted in accordance with Office of Management and Budget Circular A-133, "Audit of Institutions of Higher Education and Other Nonprofit Institutions," as incorporated in 34 CFR 74.61(h)(3).

These proposed rules would also limit a lender's ability to enter into a contract with a third-party servicer. As explained previously in the discussion for § 682.200, under this proposal, a lender may not enter into a contract with a third-party servicer that the Secretary has determined does not meet the administrative capability or financial responsibility standards under this section. Further, a lender that contracts with a third-party servicer would have to provide the Secretary with the name and address of the third-party servicer, and, upon request, a copy of that contract.

Sections 682.700 Purpose and scope, 682.701 Definitions of terms used in this subpart, 682.702 Effect on participation, 682.703 Informal compliance procedure, 682.704 Emergency action, 682.705 Suspension proceedings, 682.706 Limitation or termination proceedings, 682.707 Appeals in a limitation or termination proceeding, 682.708 Evidence of mailing and receipt dates, 682.709 Reimbursements, refunds, and offsets, 682.710 Removal of limitation, and 682.711 Reinstatement after termination. The Secretary proposes to amend subpart G to provide that the Secretary would have the authority to limit, suspend, or terminate a third-party servicer's ability to contract with an eligible lender if the Secretary determines the third-party servicer has violated any FFEL program requirement. Section 432(a)(1) of the Act authorizes the Secretary to take action against third-party servicers for any violation of any FFEL program requirement. Under these proposed regulations, the Secretary could also take emergency action against the servicer if the Secretary receives reliable information that the servicer is in violation of applicable requirements pertaining to the lender's portfolio of loans. The procedures under which the Secretary could take those actions and the procedures a third-party servicer could use to appeal those actions are consistent with the long-standing procedures the Secretary uses to take those actions against a lender, and the procedures a lender may use to appeal those actions.

Executive Order 12866

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the Title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble under the heading *Paperwork Reduction Act of 1980.*

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and

tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the Title IV, HEA programs.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small institutions of higher education; small organizations that contract with educational institutions to administer aspects of the institutions' participation in the Title IV, HEA programs; and small organizations that contract with lenders or guaranty agencies to administer aspects of the lenders' or agencies' participation in the FFEL programs. However, the regulations would not have a significant economic impact on these small entities because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1980

Sections 668.13, 668.23, 668.25, 668.90, 668.96, 668.113, 682.414, 682.416, and 682.711 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

Educational institutions that are public or nonprofit institutions or businesses or other for-profit institutions may participate in the Title IV, HEA programs. State entities, nonprofit institutions, businesses or other for-profit organizations, or individuals may contract with educational institutions to administer aspects of the institutions' participation in the programs and may contract with lenders and guaranty agencies to administer aspects of the lenders' and agencies' participation in the FFEL programs. Individuals may apply for student financial assistance under the programs. The Department of Education needs and uses the information to enable the Secretary to determine whether the States, institutions, organizations, businesses, and individuals comply with the requirements for eligibility and participation in the programs.

Annual public reporting and recordkeeping burden contained in the collection of information proposed in these regulations is estimated to be 2,786 hours, including the time for searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information, and submitting materials.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 4318, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.268 Federal Direct Student Loan Program; and 84.272 National Early Intervention Scholarship and Partnership Program. Catalog of Federal Domestic Assistance Number for the Presidential Access Scholarship Program has not been assigned.)

Dated: February 9, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend parts 668 and 682 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. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

2. Section 668.1 is amended by revising paragraph (a) to read as follows:

§ 668.1 Scope.

(a) This part establishes general rules that apply to an institution that participates in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA program). To the extent that an institution contracts with a third-party servicer to administer any aspect of the institution's participation in any Title IV, HEA program, the applicable rules in this part also apply to that servicer. An institution's use of a third-party servicer does not alter the institution's responsibility for compliance with the rules in this part.

* * * * *

3. Section 668.2 is amended by adding definitions of "Designated department official", "Initiating official", "Show-cause official", and "Third-party servicer" to paragraph (b) in alphabetical order to read as follows:

§ 668.2 General definitions.

* * * * *

(b) * * *

Designated department official: An official of the Department of Education to whom the Secretary has delegated responsibilities indicated in this part.

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Initiating official: The designated department official authorized to begin an emergency action under § 668.83.

* * * * *

Show-cause official: The designated department official authorized to

conduct a show-cause proceeding for an emergency action under § 668.83.

* * * * *

Third-party servicer: An individual or a State or private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. The Secretary considers administration of participation in a Title IV, HEA program to—

(1) Include performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation, such as, but not restricted to—

(i) Processing student financial aid applications;

(ii) Performing need analysis;

(iii) Determining student eligibility and related activities;

(iv) Certifying loan applications;

(v) Processing SARs or output documents for payment to students;

(vi) Receiving, disbursing, or delivering Title IV, HEA program funds, excluding lock-box processing of loan payments and normal bank electronic fund transfers;

(vii) Conducting activities required by the provisions governing student consumer information services in Subpart D of this part;

(viii) Preparing and certifying requests for advance or reimbursement funding;

(ix) Loan servicing and collection;

(x) Preparing and submitting notices and applications required under 34 CFR part 600 and subpart B of this part; and

(xi) Preparing a Fiscal Operations Report and Application to Participate (FISAP);

(2) Exclude the following functions:

(i) Publishing ability-to-benefit tests.

(ii) Performing functions as a Multiple Data Entry Processor (MDE).

(iii) Financial and compliance auditing.

(iv) Mailing of documents prepared by the institution.

(v) Warehousing of records; and

(3) Notwithstanding the exclusions referred to in paragraph (2) of this definition, include any activity comprised of any function described in paragraph (1) of this definition.

(Authority: 20 U.S.C. 1088)

* * * * *

4. Section 668.11 is revised to read as follows:

§ 668.11 Scope.

(a) This subpart establishes standards that an institution must meet in order to participate in any Title IV, HEA program.

(b) Noncompliance with these standards by an institution already participating in any Title IV, HEA program or with applicable standards in this subpart by a third-party servicer that contracts with the institution may subject the institution or servicer, or both, to proceedings under subpart G of this part. These proceedings may lead to any of the following actions:

(1) An emergency action.

(2) The imposition of a fine.

(3) The limitation, suspension, or termination of the participation of the institution in a Title IV, HEA program.

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

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

5. Section 668.12, as proposed to be amended in a Notice of Proposed Rulemaking published on July 10, 1992 (57 FR 30830), is further amended by removing the period at the end of proposed redesignated paragraph (b)(2)(iv)(B) and adding, in its place, a semi-colon and adding new paragraphs (b)(2)(v) and (b)(2)(vi) to read as follows:

§ 668.12 Institutional participation agreement.

* * * * *

(b) * * *

(2) * * *

(v) That it is liable for all—

(A) Improperly spent or unspent funds received under the Title IV, HEA programs, including any funds administered by a third-party servicer; and

(B) Refunds that the institution or its servicer may be required to make; and

(vi) That it will not knowingly—

(A) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those programs, an individual who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds;

(B) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(C) Contract with or employ any individual, agency, or organization that has been, or any of whose officers or employees have been—

(*1*) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State or local government funds; or

(*2*) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local funds.

* * * * *

6. Section 668.13 as amended by the regulations published in the **Federal Register** on June 8, 1993 (58 FR 32201) (effective date pending) is amended by removing paragraphs (c)(4) and (g); redesignating paragraph (c)(5) as (c)(4) and paragraphs (h) through (j) as paragraphs (g) through (i), respectively; adding the word "or" after the semi-colon in paragraph (c)(3); and revising redesignated paragraph (c)(4), paragraph (d)(3), and redesignated paragraphs (g) introductory text and (h) to read as follows:

§ 668.13 Factors of financial responsibility.

* * * * *

(c) * * *

(4) A person who exercises substantial control over the institution or any member or members of the person's family, alone or together—

(i)(A) Exercises or exercised substantial control over another institution or a third-party servicer that owes a liability for a violation of a Title IV, HEA program requirement; or

(B) Owes a liability for a violation of a Title IV, HEA program requirement; and

(ii) That person, family member, institution, or servicer is not making payments in accordance with an agreement to repay that liability.

(d) * * *

(3) The Secretary may determine an institution to be financially responsible even if the institution is not otherwise financially responsible under paragraph (c)(4) of this section if—

(i) The institution notifies the Secretary, in accordance with 34 CFR 600.30, that the person referenced in paragraph (c)(4) of this section exercises substantial control over the institution; and

(ii)(A) The person repaid to the Secretary a portion of the applicable

liability, and the portion repaid equals or exceeds the greater of—

(1) The total percentage of the ownership interest held in the institution or third-party servicer that owes the liability by that person or any member or members of that person's family, either alone or in combination with one another;

(2) The total percentage of the ownership interest held in the institution or servicer that owes the liability that the person or any member or members of that person's family, either alone or in combination with one another, represents or represented under a voting trust, power of attorney, proxy, or similar agreement; or

(3) Twenty-five percent, if that person or any member of that person's family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution or servicer that owes the liability, or of an entity holding at least a 25 percent ownership interest in the institution or servicer that owes the liability;

(B) The applicable liability described in paragraph (c)(4)(ii) of this section is currently being repaid in accordance with a written agreement with the Secretary; or

(C) The institution demonstrates why—

(1) The person who exercises substantial control over the institution should nevertheless be considered to lack that control; or

(2) The person who exercises substantial control over the institution and each member of that person's family nevertheless does not or did not exercise substantial control over the institution or servicer that owes the liability.

* * * * *

(g) An "ownership interest" is a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution, institution's parent corporation, a third-party servicer, or a third-party servicer's parent corporation.

* * * * *

(h) The Secretary generally considers a person to exercise substantial control over an institution or third-party servicer, if the person—

(1) Directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer;

(2) Holds, together with other members of his or her family, at least a 25 percent ownership interest in the institution or servicer;

(3) Represents, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement one or more persons who hold, either individually or in combination with the other persons represented or the person representing them, at least a 25 percent ownership in the institution or servicer; or

(4) Is a member of the board of directors, the chief executive officer, or other executive officer of—

(i) The institution or servicer; or

(ii) An entity that holds at least a 25 percent ownership interest in the institution or servicer.

* * * * *

7. Section 668.23 is amended by redesignating paragraph (c)(3) as paragraph (c)(3)(i), revising paragraphs (b) and (c)(1), adding paragraph (c)(3)(ii) through (vi) and paragraph (c)(4)(iii), revising paragraph (c)(5), adding a new paragraph (c)(6), and revising paragraph (e) and the authority citation to read as follows:

§ 668.23 Audits, records, and examinations.

* * * * *

(b)(1) An institution that participates in any Title IV, HEA program shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, and the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution participates, and the State postsecondary review entity designated under subpart 1 of part H of Title IV of the HEA, in the conduct of audits, investigations, and program reviews authorized by law.

(2) A third-party servicer shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, and the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution contracting with the servicer participates, and the State postsecondary review entity designated under subpart 1 of part H of Title IV of the HEA, in the conduct of audits, investigations, and program reviews authorized by law.

(3) The institution's or servicer's cooperation must include—

(i) Providing timely access, for examination and copying, to the records (including computerized records) required by the applicable regulations and to any other pertinent books, documents, papers, computer programs, and records;

(ii) Providing reasonable access to personnel associated with the institution's or servicer's administration of the Title IV, HEA programs for the purpose of obtaining relevant information. In providing reasonable access, the institution or servicer may not—

(A) Refuse to supply any relevant information;

(B) Refuse to permit interviews with those personnel that do not include the presence of representatives of the institution's or servicer's management; or

(C) Refuse to permit interviews with those personnel that are not tape recorded by the institution or servicer.

(c)(1)(i) An institution that participates in the FDSL, Federal Perkins Loan, FWS, FSEOG, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Pell Grant, or PAS programs shall have performed a compliance audit of that program.

(ii) A third-party servicer that administers funds or determines student eligibility shall have a compliance audit performed of every aspect of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer has a contract, unless—

(A) The servicer contracts with only one participating institution; and

(B) The audit of that institution's participation involves every aspect of the servicer's administration of that Title IV, HEA program.

(iii) To meet the requirements of paragraph (c)(1)(ii) of this section, a third-party servicer that contracts with more than one participating institution may submit a single compliance audit report that covers every aspect of the servicer's administration of the participation in the Title IV, HEA programs for each institution with which the servicer contracts.

(iv) The audit required under paragraph (c)(1) (i) or (ii) of this section must be conducted by an independent auditor in accordance with the general standards and the standards for audits in the U.S. General Accounting Office's (GAO's) Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.

* * * * *

(3) * * *

(ii) The servicer shall have an audit performed at least once every year.

(iii) Notwithstanding paragraph (c)(3)(ii) of this section, the servicer shall have an audit performed at least once every two years if—

(A) The servicer administers less than $1,000,000 under the Title IV, HEA programs for the period covered by the audit; or

(B) The servicer had no material exceptions identified in the servicer's most recently submitted audit report and that report was submitted in a timely fashion.

(iv) The servicer is not required to have an audit performed for any year in which the servicer administers less than $250,000 under the Title IV, HEA programs.

(v) The servicer's first audit must cover the servicer's activities for its first full fiscal year beginning after July 1, 1994, and include any period from that date to the beginning of the first full fiscal year. Each subsequent audit that the servicer has performed must cover the servicer's activities for the entire period of time since the servicer's preceding audit.

(vi) Notwithstanding paragraph (c)(3)(iii) of this section, the Secretary may, as the Secretary deems necessary, request any third-party servicer to have an audit performed on an annual basis.

(4) * * *

(iii) The servicer shall submit its audit to the Department of Education's Inspector General in accordance with the deadlines established in audit guides developed by the Department of Education's Office of Inspector General.

(5)(i) An institution or third-party servicer that has an audit conducted in accordance with this section shall—

(A) Give the Secretary and the Inspector General access to records or other documents necessary to review the audit; and

(B) Include in any arrangement with an individual or firm conducting an audit described in this section a requirement that the individual or firm shall give the Secretary and the Inspector General access to records or other documents necessary to review the audit.

(ii) A third-party servicer shall give the Secretary and the Inspector General access to records or other documents necessary to review an institution's audit.

(iii) An institution shall give the Secretary and the Inspector General access to records or other documents necessary to review a third-party servicer's audit.

(6) The Secretary may require the institution or servicer to provide, upon request, to cognizant guaranty agencies and eligible lenders under the FFEL programs, State agencies, nationally recognized accrediting agencies, and State postsecondary review entities designated under Subpart 1 of part H of Title IV of the HEA, the results of any audit conducted under this section.

* * * * *

(e) Upon written request, an institution or third-party servicer shall give the Secretary access to all Title IV, HEA program and fiscal records, including records reflecting transactions with any financial institution with which the institution or servicer deposits or has deposited any Title IV, HEA program funds.

* * * * *

(Authority: 20 U.S.C. 1088, 1094, 1099c, 1141 and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

8. Section 668.24 is revised to read as follows:

§ 668.24 Audit exceptions and repayments.

(a)(1) If, as a result of a Federal audit or an audit performed at the direction of an institution or third-party servicer, an expenditure made by the institution or servicer or the institution's or servicer's compliance with an applicable requirement (including the lack of proper documentation), is questioned, the Secretary notifies the institution or servicer of the questioned expenditure or compliance.

(2) If the institution or servicer believes that the questioned expenditure or compliance was proper, the institution or servicer shall notify the Secretary in writing of the institution's or servicer's position and the reasons for that position.

(3) The institution's or servicer's response must be certified as to accuracy and completeness by an independent auditor in accordance with the general standards and the standards for audits in the U.S. General Accounting Office's (GAO's) Standards for Audit of Governmental Organizations, Programs, Activities, and Functions and must be received by the Secretary within 45 days of the date of the Secretary's notification to the institution or servicer.

(b)(1) Based on the audit finding and the institution's or third-party servicer's response, the Secretary determines the amount of liability, if any, owed by the institution or servicer and instructs the institution or servicer as to the manner of repayment.

(2) If the Secretary determines that a third-party servicer owes a liability for its administration of an institution's Title IV, HEA programs, the servicer shall notify each institution under whose contract the servicer owes a liability of the determination. The servicer shall also notify every institution that contracts with the servicer for the same service that the Secretary determined that a liability was owed.

(c)(1) An institution or third-party servicer that must repay funds under the procedures in this section shall repay those funds at the direction of the Secretary within 45 days of the date of the Secretary's notification, unless—

(i) The institution or servicer files an appeal under the procedures established in subpart H of this part; or

(ii) The Secretary permits a longer repayment period.

(2) Notwithstanding paragraphs (b) and (c)(1) of this section—

(i) If an institution or third-party servicer has posted surety or has provided a third-party guarantee and the Secretary questions expenditures or compliance with applicable requirements and identifies liabilities, then the Secretary may determine that deferring recourse to the surety or guarantee is not appropriate because—

(A) The need to provide relief to students or borrowers affected by the act or omission giving rise to the liability outweighs the importance of deferring collection action until completion of available appeal proceedings; or

(B) The terms of the surety or guarantee do not provide complete assurance that recourse to that protection will be fully available through the completion of available appeal proceedings; or

(ii) The Secretary may determine that an administrative offset to collect the funds owed under the procedures of this section is appropriate under 34 CFR 30.28.

(3) If, under the proceedings in subpart H, liabilities asserted in the notification against the institution or third-party servicer are upheld, the institution or third-party servicer shall repay those funds at the direction of the Secretary within 30 days of the final determination under subpart H of this part unless—

(i) The Secretary permits a longer repayment period; or

(ii) The Secretary determines that earlier collection action is appropriate pursuant to paragraph (c)(2) of this section.

(d) An institution is held responsible for any liability owed by the institution's third-party servicer for a violation incurred in servicing any aspect of that institution's participation in the Title IV, HEA programs and remains responsible for that amount until that amount is repaid in full.

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

9. Section 668.25 is redesignated as § 668.26 and a new § 668.25 is added to read as follows:

§ 668.25 Contracts between an institution and a third-party servicer.

(a) An institution may enter into a written contract with a third-party servicer for the administration of any aspect of the institution's participation in any Title IV, HEA program only to the extent that the servicer's eligibility to contract with the institution has not been limited, suspended, or terminated under the proceedings of subpart G of this part.

(b) Subject to the provisions of paragraph (d) of this section, a third-party servicer is eligible to enter into a written contract with an institution for the administration of any aspect of the institution's participation in any Title IV, HEA program only to the extent that the servicer's eligibility to contract with the institution has not been limited, suspended, or terminated under the proceedings of subpart G of this part.

(c) In a contract with an institution, a third-party servicer shall agree to—

(1) Comply with all statutory provisions of or applicable to Title IV of the HEA, all regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, limitations, suspensions, and terminations, including the requirement to use any funds that the servicer administers under any Title IV, HEA program and any interest or other earnings thereon solely for the purposes specified in and in accordance with that program;

(2) Refer to the Office of Inspector General of the Department of Education for investigation of any information indicating there is reasonable cause to believe that the institution might have engaged in fraud or other criminal misconduct in connection with the institution's administration of any Title IV, HEA program or an applicant for Title IV, HEA program assistance might have engaged in fraud or other criminal misconduct in connection with his or her application. Examples of the type of information that must be referred are—

(i) False claims by the institution for Title IV, HEA program assistance;

(ii) False claims of independent student status;

(iii) False claims of citizenship;

(iv) Use of false identities;

(v) Forgery of signatures or certifications; and

(vi) False statements of income;

(3) Be jointly and severally liable with the institution to the Secretary for any violation by the servicer of any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, and any applicable special arrangements, agreements, and limitations;

(4) In the case of a third-party servicer that disburses funds (including funds received under the Title IV, HEA programs) or delivers Federal Stafford Loan or Federal SLS Program proceeds to a student—

(i) Confirm the eligibility of the student before making that disbursement or delivering those proceeds. This confirmation must include, but is not limited to, any applicable information contained in the records required under § 668.23(f); and

(ii) Calculate and pay refunds and repayments due a student, the Title IV, HEA program accounts, and the student's lender under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs in accordance with the institution's refund policy, the provisions of §§ 668.21 and 668.22, and applicable program regulations; and

(5) If the servicer or institution terminates the contract, or if the servicer stops providing services for the administration of a Title IV, HEA program, goes out of business, or files a petition under the Bankruptcy Code, return to the institution all—

(i) Records in the servicer's possession pertaining to the institution's participation in the program or programs for which services are no longer provided; and

(ii) Funds, including Title IV, HEA program funds, received from or on behalf of the institution or the institution's students, for the purposes of the program or programs for which services are no longer provided.

(d) A third-party servicer may not enter into a written contract with an institution for the administration of any aspect of the institution's participation in any Title IV, HEA program, if—

(1)(i) The servicer has been limited, suspended, or terminated by the Secretary within the preceding five years;

(ii) The servicer has had, during the servicer's two most recent audits of the servicer's administration of the Title IV, HEA programs, an audit finding that resulted in the servicer's being required to repay an amount greater than five percent of the funds that the servicer administered under the Title IV, HEA programs for any award year; or

(iii) The servicer has been cited during the preceding five years for failure to submit audit reports required under Title IV of the HEA in a timely fashion; and

(2)(i) In the case of a servicer that has been subjected to a termination action by the Secretary, either the servicer, or one or more persons or entities that the Secretary determines (under the provisions of § 668.13) exercise substantial control over the servicer, or both, have not submitted to the Secretary financial guarantees in an amount determined by the Secretary to be sufficient to satisfy the servicer's potential liabilities arising from the servicer's administration of the Title IV, HEA programs; or

(ii) One or more persons or entities that the Secretary determines (under the provisions of § 668.13) exercise substantial control over the servicer have not agreed to be jointly or severally liable for any liabilities arising from the servicer's administration of the Title IV, HEA programs and civil and criminal monetary penalties authorized under Title IV of the HEA.

(e)(1)(i) An institution that participates in a Title IV, HEA program shall notify the Secretary within 10 days of the date that—

(A) The institution enters into a new contract or significantly modifies an existing contract with a third-party servicer to administer any aspect of that program;

(B) The institution or a third-party servicer terminates a contract for the servicer to administer any aspect of that program; or

(C) A third-party servicer that administers any aspect of the institution's participation in that program stops providing services for the administration of that program, goes out of business, or files a petition under the Bankruptcy Code.

(ii) The institution's notification must include the name and address of the servicer.

(2) An institution that contracts with a third-party servicer to administer any aspect of the institution's participation in a Title IV, HEA program shall provide to the Secretary, upon request, a copy of the contract, including any modifications, and provide information pertaining to the contract or to the servicer's administration of the institution's participation in any Title IV, HEA program.

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

10. Section 668.81 is amended by removing paragraph (f); revising paragraphs (a)(1) introductory text, (b), (c) introductory text, and (c)(1); and adding a new paragraph (a)(1)(iv) to read as follows:

§ 668.81 Scope and special definitions.

(a)(1) This subpart establishes regulations for the following actions with respect to a participating institution or third-party servicer:

* * * * *

(iv) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

* * * * *

(b) This subpart applies to an institution or a third-party servicer that violates any statutory provision of or applicable to Title IV, of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation prescribed under authority of Title IV of the HEA.

(c) This subpart does not apply to a determination that—

(1) An institution or any of its locations or educational programs fails to qualify for initial designation as an eligible institution, location, or educational program because the institution, location, or educational program fails to satisfy the statutory and regulatory provisions that define an eligible institution or educational program with respect to the Title IV, HEA program for which a designation of eligibility is sought; or

* * * * *

11. Section 668.82 is revised to read as follows:

§ 668.82 Standard of conduct.

(a) A participating institution or a third-party servicer that contracts with that institution acts in the nature of a fiduciary in the administration of the Title IV, HEA programs. To participate in any Title IV, HEA program, the institution or servicer must at all times act with the competency and integrity necessary to qualify as a fiduciary.

(b) In the capacity of a fiduciary—

(1) A participating institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs; and

(2) A third-party servicer is subject to the highest standard of care and diligence in administering any aspect of the programs on behalf of the institutions with which the servicer contracts and in accounting to the Secretary and those institutions for any funds administered by the servicer under those programs.

(c) The failure of a participating institution or any of the institution's third-party servicers to administer a Title IV, HEA program, or to account for the funds that the institution or servicer receives under that program, in accordance with the highest standard of care and diligence required of a fiduciary, constitutes grounds for—

(1) An emergency action against the institution, a fine on the institution, or the limitation, suspension, or termination of the institution's participation in that program; or

(2) An emergency action against the servicer, a fine on the servicer, or the limitation, suspension, or termination of the servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in that program.

(d)(1) A participating institution or a third-party servicer with which the institution contracts violates its fiduciary duty if—

(i)(A) The servicer has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds;

(B) A person who exercises substantial control over the servicer, as determined according to § 668.13, has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds;

(C) The servicer employs a person in a capacity that involves the administration of Title IV, HEA programs or the receipt of Title IV, HEA program funds who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or who has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(D) The servicer uses or contracts with any other person, agency, or organization that has been or whose officers or employees have been—

(*1*) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(*2*) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; and

(ii) Upon learning of a conviction, plea, or administrative or judicial determination described in paragraph (d)(1)(i) (B) through (D) of this section, the institution or servicer, as applicable, does not promptly remove the person, agency, or organization from any involvement in the administration of the institution's participation in Title IV, HEA programs, or, as applicable, the removal or elimination of any substantial control, as determined according to § 668.13, over the servicer.

(2)(i) A participating institution or a third-party servicer with which the institution contracts violates its fiduciary responsibility if the servicer commits a violation of a statutory provision of or applicable to Title IV of the HEA, a regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation by, a principal or affiliate of the servicer (as those terms are defined in 34 CFR part 85); and

(ii) Upon learning of a conviction, plea, or administrative or judicial determination described in paragraph (d)(2)(i) of this section, the institution or servicer, as applicable, does not promptly remove the person, agency, or organization from any involvement in the administration of the institution's participation in Title IV, HEA programs, or, as applicable, the removal or elimination of any substantial control, as determined according to § 668.13, over the servicer.

(3) A violation for a reason contained in paragraphs (d) (1) and (2) of this section is grounds for terminating—

(i) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program; and

(ii) The participation in any Title IV, HEA program of any institution under whose contract the servicer committed the violation, if that institution had been aware of the violation and had failed to take the appropriate action described in paragraphs (d)(1)(ii) and (d)(2)(ii) of this section.

(e)(1) A participating institution or third-party servicer, as applicable, violates its fiduciary duty if—

(i)(A) The institution or servicer, as applicable, is debarred or suspended under Executive Order (E.O.) 12549 (3 CFR, 1987 Comp., p. 189) or the Federal Acquisition Regulations (FAR), 48 CFR part 9, subpart 9.4; or

(B) Cause exists under 34 CFR 85.305 or 85.405 for debarring or suspending the institution, servicer, or any principal or affiliate of the institution or servicer under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4; and

(ii) Upon learning of the debarment, suspension, or cause for debarment or suspension, the institution or servicer, as applicable, does not promptly—

(A) Discontinue the affiliation; or

(B) Remove the principal from responsibility for any aspect of the administration of an institution's or servicer's participation in the Title IV, HEA programs.

(2) A violation for a reason contained in paragraph (e)(1) of this section is grounds for terminating—

(i) The institution's participation in any Title IV, HEA program; and

(ii) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program. The violation is also grounds for terminating, under this subpart, the participation in any Title IV, HEA program of any institution under whose contract the servicer committed the violation, if that institution knew or should have known of the violation.

(f)(1) The debarment of a participating institution or third-party servicer, as applicable, under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4, by the Department of Education or another Federal agency from participation in Federal programs, under procedures that comply with 5 U.S.C. 554–557 (formal adjudication requirements under the Administrative Procedure Act), terminates, for the duration of the debarment—

(i) The institution's participation in any Title IV, HEA program; and

(ii) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program.

(2)(i) The suspension of a participating institution or third-party servicer, as applicable, under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4, by the Department of Education or another Federal agency from participation in Federal programs, under procedures that comply with 5 U.S.C. 554–557, suspends—

(A) The institution's participation in any Title IV, HEA program; and

(B) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program.

(ii) A suspension under this paragraph lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that the suspension may last longer if—

(A) The institution or servicer, as applicable, and the Secretary, agree to an extension of the suspension; or

(B) The Secretary begins a limitation or termination proceeding against the institution or servicer, as applicable, under this subpart before the 60th day of the suspension.

(Authority: E.O. 12549 (3 CFR, 1987 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1070, *et seq.*, 1082(a)(1) and (h)(1), 1094(c)(1) (D) and (H), and 3474)

12. Section 668.83 is revised to read as follows:

§ 668.83 Emergency action.

(a) Under an emergency action, the Secretary may—

(1) Withhold Title IV, HEA program funds from a participating institution or its students, or from a third-party servicer, as applicable;

(2)(i) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds; or

(ii) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds except in accordance with a particular procedure; and

(3)(i) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program; or

(ii) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program except in accordance with a particular procedure.

(b)(1) An initiating official begins an emergency action against an institution or third-party servicer by sending the institution or servicer a notice by registered mail, return receipt requested. In an emergency action against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The official also may transmit the notice by other, more expeditious means if practical.

(2) The emergency action takes effect on the date the initiating official mails the notice to the institution or servicer, as applicable.

(3) The notice states the grounds on which the emergency action is based, the consequences of the emergency action, and that the institution or servicer, as applicable, may request an opportunity to show cause why the emergency action is unwarranted.

(c)(1) An initiating official takes emergency action against an institution or third-party servicer only if that official—

(i) Receives information, determined by the official to be reliable, that the institution or servicer, as applicable, is violating any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation;

(ii) Determines that immediate action is necessary to prevent misuse of Title IV, HEA program funds; and

(iii) Determines that the likelihood of loss from that misuse outweighs the importance of awaiting completion of any proceeding that may be initiated to limit, suspend, or terminate, as applicable—

(A) The participation of the institution in one or more Title IV, HEA programs; or

(B) The eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(2) Examples of violations of a Title IV, HEA program requirement that cause misuse and the likely loss of Title IV, HEA program funds include—

(i) Causing the commitment, disbursement, or delivery by any party of Title IV, HEA program funds in an amount that exceeds—

(A) The amount for which students are eligible; or

(B) The amount of principal, interest, or special allowance payments that would have been payable to the holder of a Federal Stafford, Federal PLUS, or Federal SLS loan if a refund allocable to that loan had been made in the amount and at the time required;

(ii) Using, offering to make available, or causing the use or availability of Title IV, HEA program funds for educational services if—

(A) The institution, servicer, or agents of the institution or servicer have made a substantial misrepresentation as described in §§ 668.72, 668.73, or 668.74 related to those services;

(B) The institution lacks the administrative or financial ability to provide those services in full; or

(C) The institution, or servicer, as applicable, lacks the administrative or financial ability to compensate by appropriate refund for any portion of an educational program not completed by a student; and

(iii) Engaging in fraud involving the administration of a Title IV, HEA program. Examples of fraud include—

(A) Falsification of any document received from a student or pertaining to a student's eligibility for assistance under a Title IV, HEA program;

(B) Falsification, including false certifications, of any document submitted by the institution or servicer to the Department of Education;

(C) Falsification, including false certifications, of any document used for or pertaining to—

(1) The legal authority of an institution to provide postsecondary education in the State in which the institution is located; or

(2) The accreditation or preaccreditation of an institution or any of the institution's educational programs or locations;

(D) Falsification, including false certifications, of any document submitted to a guaranty agency under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs or an independent auditor;

(E) Falsification of any document submitted to a third-party servicer by an institution or to an institution by a third-party servicer pertaining to the institution's participation in a Title IV, HEA program; and

(F) Falsification, including false certifications, of any document pertaining to the performance of any loan collection activity, including activity that is not required by the HEA or applicable program regulations.

(3) If the Secretary begins an emergency action against a third-party servicer, the Secretary may also begin an emergency action against any institution under whose contract a third-party servicer commits the violation.

(d)(1) Except as provided in paragraph (d)(2) of this section, after an emergency action becomes effective, an institution or third-party servicer, as applicable, may not—

(i) Make or increase awards or make other commitments of aid to a student under the applicable Title IV, HEA program;

(ii) Disburse either program funds, institutional funds, or other funds as assistance to a student under that Title IV, HEA program;

(iii) In the case of an emergency action pertaining to participation in the Federal Stafford Loan, Federal PLUS, or Federal SLS Program—

(A) Certify an application for a loan under that program;

(B) Deliver loan proceeds to a student under that program; or

(C) Retain the proceeds of a loan made under that program that are received after the emergency action takes effect; or

(iv) In the case of an emergency action against a third-party servicer, administer any aspect of any institution's participation in any Title IV, HEA program.

(2) If the initiating official withdraws, by an emergency action, the authority of the institution or servicer to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds, or the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program, except in accordance with a particular procedure specified in the notice of emergency action, the institution or servicer, as applicable, may not take any action described in paragraph (d)(1) of this section except in accordance with the procedure specified in the notice.

(e)(1) Upon request by the institution or servicer, as applicable, the Secretary provides the institution or servicer, as soon as practicable, with an opportunity to show cause that the emergency action is unwarranted or should be modified.

(2) An opportunity to show cause consists of an opportunity to present evidence and argument to a show-cause official. The initiating official does not act as the show-cause official for any emergency action that the initiating official has begun. The show-cause official is authorized to grant relief from the emergency action. The institution or servicer may make its presentation in writing or, upon its request, at an informal meeting with the show-cause official.

(3) The show-cause official may limit the time and manner in which argument and evidence may be presented in order to avoid unnecessary delay or the presentation of immaterial, irrelevant, or repetitious matter.

(4) The institution or servicer, as applicable, has the burden of persuading the show-cause official that the emergency action imposed by the notice is unwarranted or should be modified because—

(i) The grounds stated in the notice did not, or no longer, exist;

(ii) The grounds stated in the notice will not cause loss or misuse of Title IV, HEA program funds; or

(iii) The institution or servicer, as applicable, will use procedures that will reliably eliminate the risk of loss from the misuse described in the notice.

(5) The show-cause official continues, modifies, or revokes the emergency action promptly after consideration of any argument and evidence presented by the institution or servicer, as applicable, and the initiating official.

(6) The show-cause official notifies the institution or servicer, as applicable, of that official's determination promptly after the completion of the show-cause meeting or, if no meeting is requested, after the official receives all the material submitted by the institution in opposition to the emergency action. In the case of a notice to a third-party servicer, the official also notifies each institution that contracts with the servicer of that determination. The show-cause official may explain that determination by adopting or modifying the statement of reasons provided in the notice of emergency action.

(f)(1) An emergency action does not extend more than 30 days after initiated unless the Secretary initiates a limitation, suspension, or termination proceeding under this part or under 34 CFR part 600 against the institution or servicer, as applicable, within that 30-day period, in which case the emergency action continues until a final decision is issued in that proceeding, as provided in § 668.90 (c) or (f), as applicable.

(2) Until a final decision is issued by the Secretary in a proceeding described in paragraph (f)(1) of this section, the continuation, modification, or revocation of the emergency action is at the sole discretion of the initiating official, or, if a show-cause proceeding is conducted, the show-cause official.

(3) If an emergency action extends beyond 180 days by virtue of paragraph (f)(1) of this section, the institution or servicer, as applicable, may then submit written material to the show-cause official to demonstrate that because of facts occurring after the later of the notice by the initiating official or the show-cause meeting, continuation of the emergency action is unwarranted and the emergency action should be modified or ended. The show-cause official considers any written material submitted and issues a determination that continues, modifies, or revokes the emergency action.

(g) The expiration, modification, or revocation of an emergency action against an institution or third-party servicer does not bar subsequent emergency action against that institution on grounds other than those specifically identified in the notice imposing the prior emergency action. Separate grounds may include violation by an institution or third-party servicer of an agreement or limitation imposed or resulting from the prior emergency action.

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

13. Section 668.84 is revised to read as follows:

§ 668.84 Fine proceedings.

(a) *Scope and consequences.* (1) The Secretary may impose a fine of up to $25,000 per violation on a participating institution or third-party servicer that—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a fine proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(b) *Procedures.* (1) A designated department official begins a fine proceeding by sending the institution or servicer, as applicable, a notice by certified mail, return receipt requested. In the case of a fine proceeding against a third-party servicer, the official also sends the notice to each institution that is affected by the alleged violations identified as the basis for the fine action, and, to the extent possible, to each institution that contracts with the servicer for the same service affected by the violation. This notice—

(i) Informs the institution or servicer of the Secretary's intent to fine the institution or servicer, as applicable, and the amount of the fine and identifies the alleged violations that constitute the basis for the action;

(ii) Specifies the proposed effective date of the fine, which is at least 20 days from mailing of the notice of intent;

(iii) Informs the institution or servicer that the fine will not be effective on the date specified in the notice if the designated department official receives from the institution or servicer, as applicable, by that date a written request for a hearing or written material indicating why the fine should not be imposed; and

(iv) In the case of a fine proceeding against a third-party servicer, informs each institution that is affected by the alleged violations of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution affected by the alleged violations that—

(i) The fine will not be imposed; or

(ii) The fine is imposed as of a specified date, and in a specified amount.

(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 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 § 668.88.

(c) *Expedited proceedings.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, any time schedule specified in this section may be shortened.

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

14. Section 668.85 is revised to read as follows:

§ 668.85 Suspension proceedings.

(a) *Scope and consequences.* (1) The Secretary may suspend an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a suspension proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The suspension may not exceed 60 days unless—

(i) The institution or servicer and the Secretary agree to an extension if the institution or servicer, as applicable, has not requested a hearing; or

(ii) The designated department official begins a limitation or termination proceeding under § 668.86.

(b) *Procedures.* (1) A designated department official begins a suspension proceeding by sending a notice to an institution or third-party servicer by certified mail, return receipt requested. In the case of a suspension proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. The notice—

(i) Informs the institution or servicer of the intent of the Secretary to suspend the institution's participation or the servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(ii) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the suspension will not be effective on the date specified in the notice, except as provided in § 668.90(b)(2), if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the suspension should not take place; and

(iv) In the case of a suspension proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing, but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that—

(i) The proposed suspension is dismissed; or

(ii) The suspension is effective as of a specified date.

(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 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 after the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.88.

(c) *Expedited proceedings.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time period specified in this section may be shortened.

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

15. Section 668.86 is revised to read as follows:

§ 668.86 Limitation or termination proceedings.

(a) *Scope and consequences.* (1) The Secretary may limit or terminate an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a limitation or termination proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The consequences of the limitation or termination of the institution's participation or the servicer's eligibility are described in §§ 668.93 and 668.94, respectively.

(b) *Procedures.* (1) A designated department official begins a limitation or termination proceeding by sending an institution or third-party servicer a notice by certified mail, return receipt requested. In the case of a limitation or termination proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. This notice—

(i) Informs the institution or servicer of the intent of the Secretary to limit or terminate the institution's participation or servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action, and, in the case of a limitation proceeding, states the limits to be imposed;

(ii) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the limitation or termination will not be effective on the date specified in the notice if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the limitation or termination should not take place; and

(iv) In the case of a limitation or termination proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that—

(i) The proposed action is dismissed;

(ii) Limitations are effective as of a specified date; or

(iii) The termination is effective as of a specified date.

(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 sets the date and the 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 § 668.88.

(c) *Expedited proceeding.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time schedule specified in this section may be shortened.

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

16. Section 668.87 is revised to read as follows:

§ 668.87 Prehearing conference.

(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.

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

17. Section 668.88 is amended by revising paragraph (b) introductory text and paragraph (d) to read as follows:

§ 668.88 Hearing.

* * * * *

(b) If the hearing official, the designated department official who brought a proceeding against an institution or third-party servicer under this subpart, and the institution or servicer, as applicable, agree, the hearing process may be expedited. Procedures to expedite the hearing process may include, but are not limited to, the following—

* * * * *

(d) The designated department official makes a transcribed record of the proceeding and makes the record available to the institution or servicer, as applicable, upon request and upon the institution's or servicer's payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

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

18. Section 668.89 is amended by revising paragraphs (a), (b)(2), and (c) introductory text, and adding a new paragraph (d) to read as follows:

§ 668.89 Authority and responsibilities of the hearing official.

(a) The hearing official regulates the course of a hearing and the conduct of the parties during the hearing. The hearing official takes all necessary steps to conduct a fair and impartial hearing.

(b) * * *

(2) If requested by the hearing official, the parties to a hearing shall provide available personnel who have knowledge about the matter under review for oral or written examination.

(c) The hearing official takes whatever measures are appropriate to expedite a hearing. These measures may include, but are not limited to, the following—

* * * * *

(d) The hearing official is bound by all applicable statutes and regulations. The hearing official may not—

(1) Waive applicable statutes and regulations; or

(2) Rule them invalid.

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

19. Section 668.90 is revised to read as follows:

§ 668.90 Initial and final decisions—Appeals.

(a)(1)(i) A hearing official issues a written initial decision in a hearing by certified mail, return receipt requested to—

(A) The designated department official who began a proceeding against an institution or third-party servicer;

(B) The institution or servicer, as applicable; and

(C) In the case of a proceeding against a third-party servicer, each institution that contracts with the servicer.

(ii) The hearing official may also transmit the notice by other, more expeditious means if practical.

(iii) The hearing official issues the decision within the latest of the following dates:

(A) The 30th day after the last submission is filed with the hearing official.

(B) The 60th day after the last submission is filed with the hearing official if the Secretary, upon request of the hearing official, determines that the unusual complexity of the case requires additional time for preparation of the decision.

(C) The 50th day after the last day of the hearing, if the hearing official does not request the parties to make any posthearing submission.

(2) The hearing official's initial decision states whether the imposition of the fine, limitation, suspension, or termination sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution or servicer, the hearing official may, if appropriate, issue an initial decision to fine the institution or servicer, as applicable, or, rather than terminating the institution's participation or servicer's eligibility, as applicable, impose one or more limitations on the institution's participation or servicer's eligibility.

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of § 668.12(b)(2)(vi), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of § 668.82(d) (1) and (2), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

(iii) If an action brought against an institution or third-party servicer involves its failure to provide surety in the amount specified by the Secretary under § 668.13, the hearing official must find that the amount of the surety established by the Secretary was appropriate unless the institution can demonstrate that the amount was unreasonable;

(iv) In a limitation, suspension, or termination proceeding commenced on the grounds described in § 668.15(b)(1), if the hearing official finds that an institution's Federal Stafford loan and Federal SLS cohort default rate, as defined in § 668.15(f), meets the conditions specified in § 668.15(b)(1) for initiation of limitation, suspension, or termination proceedings, the hearing official finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution demonstrates that it has acted diligently to implement the default reduction measures described in Appendix D to this part;

(v) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to comply with the requirements of § 668.23(c)(4), if the hearing official finds that the institution or servicer failed to meet those requirements, the hearing official finds that the termination is warranted;

(vi) In a termination action against an institution based on the grounds that the institution is not financially responsible under § 668.13(c)(4), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.13(d)(3) have been met; and

(vii) In a termination action against an institution or third-party servicer on the grounds that the institution or servicer, as applicable, engaged in fraud involving the administration of any Title IV, HEA program, the hearing official finds that the termination action is warranted if the hearing official finds that the institution or servicer, as applicable, engaged in that fraud. Examples of fraud include—

(A) Falsification of any document received from a student or pertaining to a student's eligibility for assistance under a Title IV, HEA program;

(B) Falsification, including false certifications, of any document submitted by the institution or servicer to the Department of Education;

(C) Falsification, including false certifications, of any document used for or pertaining to—

(1) The legal authority of an institution to provide postsecondary education in the State in which the institution is located; or

(2) The accreditation or preaccreditation of an institution or any of the institution's educational programs or locations;

(D) Falsification, including false certifications, of any document submitted to a guaranty agency under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs, an independent auditor, an eligible institution, or a third-party servicer;

(E) Falsification of any document submitted to a third-party servicer by an institution or to an institution by a third-party servicer pertaining to the institution's participation in a Title IV, HEA program; and

(F) Falsification, including false certifications, of any document pertaining to the performance of any loan collection activity, including activity that is not required by the HEA or applicable program regulations.

(4) The hearing official bases findings of fact only on evidence considered at the hearing and on matters given judicial notice. If a hearing is conducted solely through written submissions, the parties must agree to findings of fact.

(b)(1) In a suspension proceeding, the Secretary reviews the hearing official's initial decision and issues a final decision within 20 days after the initial decision. The Secretary adopts the initial decision unless it is clearly unsupported by the evidence presented at the hearing.

(2) The Secretary notifies the institution or servicer and, in the case of a suspension proceeding against a third-party servicer, each institution that contracts with the servicer of the final decision. If the Secretary suspends the institution's participation or servicer's eligibility, the suspension takes effect on the later of—

(i) The day that the institution or servicer receives the notice; or

(ii) The date specified in the designated department official's original notice of intent to suspend the institution's participation or servicer's eligibility.

(3) A suspension may not exceed 60 days unless a designated department official begins a limitation or termination proceeding under this subpart before the expiration of that period. In that case, the period may be extended until a final decision is issued in that proceeding according to paragraph (c) of this section.

(c)(1) In a fine, limitation, or termination proceeding, the hearing official's initial decision automatically

becomes the Secretary's final decision 30 days after the initial decision is issued and received by both parties unless, within that 30-day period, the institution or servicer, as applicable, or the designated department official appeals the initial decision to the Secretary.

(2)(i) A party may appeal the hearing official's initial decision by submitting to the Secretary, within 30 days after the party receives the initial decision, a brief or other written statement that explains why the party believes that the Secretary should reverse or modify the decision of the hearing official.

(ii) At the time the party files its appeal submission, the party shall provide a copy of that submission to the opposing party.

(iii) The opposing party shall submit its brief or other responsive statement to the Secretary, with a copy to the appellant, within 30 days after the opposing party receives the appellant's brief or written statement.

(iv) The appealing party may submit proposed findings of fact or conclusions of law. However, the proposed findings of fact must be supported by—

(A) The evidence introduced into the record at the hearing;

(B) Stipulations of the parties if the hearing consisted of written submissions; or

(C) Matters that may be judicially noticed.

(v) Neither party may introduce new evidence on appeal.

(vi) The initial decision of the hearing official imposing a fine or limiting or terminating the institution's participation or servicer's eligibility does not take effect pending the appeal.

(vii) The Secretary renders a final decision. The Secretary may delegate to a designated department official the functions described in paragraph (c)(2)(vii) through (ix) of this section.

(viii) In rendering a final decision, the Secretary considers only evidence introduced into the record at the hearing and facts agreed to by the parties if the hearing consisted only of written submissions and matters that may be judicially noticed.

(ix) If the hearing official finds that a termination is warranted pursuant to paragraph (a)(3) of this section, the Secretary affirms that decision. In any other case, 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. If the Secretary affirms the initial decision without issuing a statement of reasons, the Secretary adopts the opinion of the hearing official as the decision of the Secretary. If the Secretary modifies, remands, or reverses the initial decision, in whole or in part, the Secretary's decision states the reasons for the action taken.

(Authority: 20 U.S.C. 1082, 1094)

20. Section 668.91 is amended by revising the heading; and revising paragraphs (a)(1), (a)(2), (b) heading, (b)(1), (b)(2) introductory text, and (c) to read as follows:

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

(a) * * *

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

(2) Documents filed by facsimile transmission must be transmitted to the designated department official identified, either in the notice initiating the action, or, for an appeal, in instructions provided by the hearing official, as the individual responsible to receive them. A party filing a document by facsimile transmission must confirm that a complete and legible copy of the document was received by the Department of Education, and may be required by the designated department official to provide a hard copy of the document.

* * * * *

(b) *Confirmation of mailing and receipt dates.* (1) The mailing date of a notice from a designated department official initiating an action under this subpart is the date evidenced on the original receipt of mailing from the U.S. Postal Service.

(2) The date on which a request for a show-cause opportunity, a request for a hearing, other material submitted in response to a notice of action under this subpart, a decision by a hearing official, or a notice of appeal is received is, as applicable—

* * * * *

(c) *Refusals.* If an institution or third-party servicer refuses to accept a notice mailed under this subpart, the Secretary considers the notice as being received on the date that the institution or servicer refuses to accept the notice.

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

21. Section 668.92 is revised to read as follows:

§ 668.92 Fines.

(a) In determining the amount of a fine, the designated department official, hearing official, and Secretary take into account—

(1)(i) The gravity of an institution's or third-party servicer's violation or failure to carry out the relevant statutory provision, regulatory provision, special arrangement, agreement, or limitation; or

(ii) The gravity of the institution's or servicer's misrepresentation;

(2) The size of the institution;

(3) The size of the servicer's business, including the number of institutions and students served by the servicer;

(4) In the case of a violation by a third-party servicer, the extent to which the servicer can document that the institution contributed to that violation; and

(5)(i) For purposes of assessing a fine on a third-party servicer, the extent to which violations are caused by repeated mechanical systemic unintentional errors.

(ii) The Secretary counts the total of violations caused by repeated mechanical systemic unintentional errors as a single violation.

(b) In determining the gravity of the institution's or servicer's violation, failure, or misrepresentation under paragraph (a) of this section, the designated department official, hearing official, and Secretary take into account the amount of any liability owed by the institution and any third-party servicer that contracts with the institution, and the number of students affected as a result of that violation, failure, or misrepresentation on—

(1) Improperly expended or unspent Title IV, HEA program funds received by the institution or servicer, as applicable; or

(2) Required refunds.

(c) Upon the request of the institution or third-party servicer, the Secretary may compromise the fine.

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

22. Section 668.93 is revised to read as follows:

§ 668.93 Limitation.

A limitation may include, as appropriate to the Title IV, HEA program in question—

(a) A limit on the number or percentage of students enrolled in an institution who may receive Title IV, HEA program funds;

(b) A limit, for a stated period of time, on the percentage of an institution's total receipts from tuition and fees derived from Title IV, HEA program funds;

(c) A limit on the number or size of institutions with which a third-party servicer may contract;

(d) A limit on the number of borrower or loan accounts that a third-party servicer may service under a contract with an institution;

(e) A limit on the responsibilities that a third-party servicer may perform under a contract with an institution;

(f) A requirement for a third-party servicer to perform additional responsibilities under a contract with an institution;

(g) A requirement that an institution obtain surety, in a specified amount, to assure its ability to meet its financial obligations to students who receive Title IV, HEA program funds;

(h) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

(i) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

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

23. Section 668.94 is revised to read as follows:

§ 668.94 Termination.

(a) A termination—

(1) Ends an institution's participation in a Title IV, HEA program or ends a third-party servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program;

(2) Ends the authority of a third-party servicer to administer any aspect of any institution's participation in that program;

(3) Prohibits an institution or third-party servicer, as applicable, or the Secretary from making or increasing awards under that program;

(4) Prohibits an institution or third-party servicer, as applicable, from making any other new commitments of funds under that program; and

(5) If an institution's participation in the Federal Stafford Loan, Federal PLUS, or Federal SLS Program has been terminated, prohibits further guarantee commitments by the Secretary for loans under that program to students to attend that institution, and, if the institution is a lender under that program, prohibits further disbursements by the institution (whether or not guarantee commitments have been issued by the Secretary or a guaranty agency for those disbursements).

(b) After its participation in a Title IV, HEA program has been terminated, an institution may disburse or deliver funds under that Title IV, HEA program to students enrolled at the institution only in accordance with § 668.26 and with any additional requirements imposed under this part.

(c) If a third-party servicer's eligibility is terminated, the servicer must return to each institution that contracts with the servicer any funds received by the servicer under the applicable Title IV, HEA program on behalf of the institution or the institution's students or otherwise dispose of those funds under instructions from the Secretary. The servicer also must return to each institution that contracts with the servicer all records pertaining to the servicer's administration of that program on behalf of that institution.

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

24. Section 668.95 is revised to read as follows:

§ 668.95 Reimbursements, refunds, and offsets.

(a) The designated department official, hearing official, or Secretary may require an institution or third-party servicer to take reasonable and appropriate corrective action to remedy the institution's or servicer's violation, as applicable, of any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation.

(b) The corrective action may include payment of any funds to the Secretary, or to designated recipients, that the institution or servicer, as applicable, improperly received, withheld, disbursed, or caused to be disbursed. Corrective action may, for example, relate to—

(1) With respect to the Federal Stafford Loan, Federal PLUS, and Federal SLS programs—

(i) Ineligible interest benefits, special allowances, or other claims paid by the Secretary; and

(ii) Discounts, premiums, or excess interest paid in violation of 34 CFR part 682; and

(2) With respect to all Title IV, HEA programs—

(i) Refunds required under program regulations; and

(ii) Any grants, work-study assistance, or loans made in violation of program regulations.

(c) If any final decision requires an institution or third-party servicer to reimburse or make any other payment to the Secretary, the Secretary may offset these claims against any benefits or claims due to the institution or servicer.

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

25. Section 668.96 is revised to read as follows:

§ 668.96 Reinstatement after termination.

(a)(1) An institution whose participation in a Title IV, HEA program has been terminated may file a request for reinstatement of that participation.

(2) A third-party servicer whose eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program has been terminated may file a request for reinstatement of that eligibility.

(b) An institution whose participation has been terminated or a third-party servicer whose eligibility has been terminated may request reinstatement only after the later of the expiration of—

(1) Eighteen months from the effective date of the termination; or

(2) A debarment or suspension under Executive Order 12549 or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(c) To be reinstated, an institution or third-party servicer must submit its request for reinstatement in writing to the Secretary and must—

(1) Demonstrate to the Secretary's satisfaction that it has corrected the violation or violations on which its termination was based, including payment in full to the Secretary or to other recipients of funds that the institution or servicer, as applicable, has improperly received, withheld, disbursed, or caused to be disbursed;

(2) Meet all applicable requirements of this part; and

(3) In the case of an institution, enter into a new program participation agreement with the Secretary.

(d) The Secretary, within 60 days of receiving the reinstatement request—

(1) Grants the request;

(2) Denies the request; or

(3) Grants the request subject to a limitation or limitations.

(Authority: 20 U.S.C. 1094; E.O. 12549 (3 CFR, 1987 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

26. Section 668.97 is revised to read as follows:

§ 668.97 Removal of limitation.

(a) An institution whose participation in a Title IV, HEA program has been limited may not apply for removal of the limitation before the expiration of 12 months from the effective date of the limitation.

(b) A third-party servicer whose eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program has been limited may request removal of the limitation.

(c) The institution or servicer may not apply for removal of the limitation before the later of the expiration of—

(1) Twelve months from the effective date of the limitation; or

(2) A debarment or suspension under Executive Order 12549 or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(d) If the institution or servicer requests removal of the limitation, the request must be in writing and show that the institution or servicer, as applicable, has corrected the violation or violations on which the limitation was based.

(e) No later than 60 days after the Secretary receives the request, the Secretary responds to the institution or servicer—

(1) Granting its request;

(2) Denying its request; or

(3) Granting the request subject to other limitation or limitations.

(f) If the Secretary denies the request or establishes other limitations, the Secretary grants the institution or servicer, upon the institution's or servicer's request, an opportunity to show cause why the participation or eligibility, as applicable, should be fully reinstated.

(g) The institution's or servicer's request for an opportunity to show cause does not waive—

(1) The institution's right to participate in any or all Title IV, HEA programs if it complies with the continuing limitation or limitations pending the outcome of the opportunity to show cause; and

(2) The servicer's right to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the servicer complies with the continuing limitation pending the outcome of the opportunity to show cause.

(Authority: 20 U.S.C. 1094; E.O. 12549 (3 CFR, 1987 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

27. Section 668.111 is amended by revising paragraphs (a) and (b) to read as follows:

§ 668.111 Scope and purpose.

(a) This subpart establishes rules governing the appeal by an institution or third-party servicer from a final audit determination or a final program review determination arising from an audit or program review of the institution's participation in any Title IV, HEA program or of the servicer's administration of any aspect of an institution's participation in any Title IV, HEA program.

(b) This subpart applies to any participating institution or third-party servicer that appeals a final audit determination or final program review determination.

* * * * *

28. Section 668.112 is revised to read as follows:

§ 668.112 Definitions.

The following definitions apply to this subpart:

(a) *Final audit determination* means the written notice of a determination issued by a designated department official based on an audit of—

(1) An institution's participation in any or all of the Title IV, HEA programs; or

(2) A third-party servicer's administration of any aspect of an institution's participation in any or all of the Title IV, HEA programs.

(b) *Final program review determination* means the written notice of a determination issued by a designated department official and resulting from a program compliance review of—

(1) An institution's participation in any or all of the Title IV, HEA programs; or

(2) A third-party servicer's administration of any aspect of an institution's participation in any Title IV, HEA program.

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

29. Section 668.113 is revised to read as follows:

§ 668.113 Request for review.

(a) An institution or third-party servicer seeking the Secretary's review of a final audit determination or a final program review determination shall file a written request for review with the designated department official.

(b) The institution or servicer shall file its request for review and any records or materials admissible under the terms of § 668.116 (e) and (f), no later than 45 days from the date that the institution or servicer receives the final audit determination or final program review determination.

(c) The institution or servicer shall attach to the request for review a copy of the final audit determination or final program review determination, and shall—

(1) Identify the issues and facts in dispute; and

(2) State the institution's or servicer's position, as applicable, together with the pertinent facts and reasons supporting that position.

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

30. Section 668.114 is revised to read as follows:

§ 668.114 Notification of hearing.

(a) Upon receipt of an institution's or third-party servicer's request for review, the designated department official arranges for a hearing before a hearing official.

(b) Within 30 days of the designated department official's receipt of an institution's or third-party servicer's request for review, the hearing official notifies the designated department official and the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer of the schedule for the submission of briefs by both the designated department official and, as applicable, the institution or servicer.

(c) The hearing official schedules the submission of briefs and of accompanying evidence admissible under the terms of § 668.116 (e) and (f) to occur no later than 120 days from the date that the hearing official notifies the institution or servicer.

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

31. Section 668.116 is amended by revising paragraphs (b), (d), (e)(1), (f), and (g) to read as follows:

§ 668.116 Hearing.

* * * * *

(b) The hearing process consists of the submission of written briefs to the hearing official by the institution or third-party servicer, as applicable, and by the designated department official, unless the hearing official determines, under paragraph (g) of this section, that an oral hearing is also necessary.

* * * * *

(d) An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:

(1) That expenditures questioned or disallowed were proper.

(2) That the institution or servicer complied with program requirements.

(e)(1) A party may submit as evidence to the hearing official only materials within one or more of the following categories:

(i) Department of Education audit reports and audit work papers for audits performed by the department's Office of Inspector General.

(ii) In the case of an institution, institutional audit work papers, records, and other materials, if the institution provided those work papers, records, or materials to the department no later than the date by which the institution

was required to file its request for review in accordance with § 668.113.

(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, if the servicer provided those work papers, records, or materials to the Department of Education no later than the date that the servicer was required to file the request for review under § 668.113.

(iv) Department of Education program review reports and work papers for program reviews.

(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, if the records or materials were provided to the Department of Education by the institution or servicer no later than the date by which the institution or servicer was required to file its request for review in accordance with § 668.113.

(vi) Other Department of Education records and materials if the records and materials were provided to the hearing official no later than 3 days after the institution's or servicer's filing of its request for review.

* * * * *

(f) The hearing official accepts only evidence that is both admissible and timely under the terms of paragraph (e) of this section, and relevant and material to the appeal. Examples of evidence that shall be deemed irrelevant and immaterial except upon a clear showing of probative value respecting the matters described in paragraph (d) of this section include—

(1) Evidence relating to a period of time other than the period of time covered by the audit or program review;

(2) Evidence relating to an audit or program review of an institution or third-party servicer other than the institution or servicer bringing the appeal, or the resolution thereof; and

(3) Evidence relating to the current practice of the institution or servicer bringing the appeal in the program areas at issue in the appeal.

(g)(1) The hearing official may schedule an oral argument if he or she determines that an oral argument is necessary to clarify the issues and the positions of the parties as presented in the parties' written submissions.

(2) In the event that an oral argument is conducted, the designated department official makes a transcribed record of the proceedings and makes that record available to the institution or servicer and any institution that contracts with the servicer upon the institution's or servicer's request and upon its payment of a fee consistent with that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR Part 5).

* * * * *

32. Section 668.123 is revised to read as follows:

§ 668.123 Collection.

To the extent that the decision of the Secretary sustains the final audit determination or program review determination, subject to the provisions of § 668.24(c)(3), the Department of Education will take steps to collect the debt at issue or otherwise effect the determination that was subject to the request for review.

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

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAMS

33. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C 1071 to 1087–2, unless otherwise noted.

34. Section 682.200 is amended in paragraph (b) by revising paragraph (1) and adding a new paragraph (5) in the definition of "Lender" and adding a new definition of "Third- party servicer" in alphabetical order, and by revising the authority citation to read as follows:

§ 682.200 Definitions.

* * * * *

(b) * * *

Lender. (1) The term "eligible lender" is defined in section 435(d) of the Act, and in paragraphs (2) through (5) of this definition.

* * * * *

(5) The term eligible lender does not include any lender that—

(i) Is debarred or suspended, or any of whose principals or affiliates (as those terms are defined in 34 CFR part 85) is debarred or suspended under Executive Order (E.O.) 12549 (3 CFR, 1987 Comp., p. 189) or the Federal Acquisition Regulation (FAR), 48 CFR part 9, subpart 9.4;

(ii) Is an affiliate, as defined in 34 CFR part 85, of any person who is debarred or suspended under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4; or

(iii) Employs a person who is debarred or suspended under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4, in a capacity that involves the administration or receipt of FFEL Program funds.

* * * * *

Third-party servicer. Any State or private, profit or nonprofit organization or any individual that enters into a contract with a lender or guaranty agency to administer, through either manual or automated processing, any aspect of the lender's or guaranty agency's FFEL programs required by any statutory provision of or applicable to title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation that governs the FFEL programs, including, any applicable function described in the definition of third-party servicer in 34 CFR part 668; originating, guaranteeing, monitoring, processing, servicing, or collecting loans; claims submission; or billing for interest benefits and special allowance.

* * * * *

(Authority: 8 U.S.C 1101; 20 U.S.C. 1070 to 1087–2, 1088–1098, 1141; E.O. 12549 (3 CFR, 1987 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

35. Section 682.401 is amended by adding a new paragraph (b)(23) to read as follows:

§ 682.401 Basic program agreement.

* * * * *

(b) * * *

(23) *Third-party servicers.* The guaranty agency may not enter into a contract with a third-party servicer that the Secretary has determined does not meet the financial and compliance standards under § 682.416. The guaranty agency shall provide the Secretary with the name and address of any third-party servicer with which the agency enters into a contract and, upon request by the Secretary, a copy of that contract.

* * * * *

36. Section 682.413 is amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 682.413 Remedial actions.

(a)(1) The Secretary requires a lender and its third-party servicer administering any aspect of the FFEL programs under a contract with the lender to repay interest benefits and special allowance or other compensation received on a loan guaranteed by a guaranty agency, pursuant to paragraph (a)(2) of this section—

(i) For any period beginning on the date of a failure by the lender or servicer, with respect to the loan, to comply with any of the requirements set forth in § 682.406(a)(1)-(a)(6), (a)(9), and (a)(12);

(ii) For any period beginning on the date of a failure by the lender or servicer, with respect to the loan, to

meet a condition of guarantee coverage established by the guaranty agency, to the date, if any, on which the guaranty agency reinstated the guarantee coverage pursuant to policies and procedures established by the agency;

(iii) For any period in which the lender or servicer, with respect to the loan, violates the requirements of subpart C of this part; and

(iv) For any period beginning on the day after the Secretary's obligation to pay special allowance on the loan terminates under § 682.302(d).

(2) For purposes of this section, a lender and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits and special allowance paid as a result of a violation of applicable requirements by the servicer in administering the lender's FFEL programs.

(3) For purposes of paragraph (a)(2) of this section, the relevant third party servicer shall repay any outstanding liabilities under paragraph (a)(2) of this section only if—

(i) The lender has not repaid in full the amount of the liability within 30 days; or

(ii) The lender has not made other satisfactory arrangements to pay the amount of the liability.

(b) The Secretary requires a guaranty agency to repay reinsurance payments received on a loan if the lender, third-party servicer, if applicable, or the agency failed to meet the requirements of § 682.406(a).

(c)(1) In addition to requiring repayment of reinsurance payments pursuant to paragraph (b) of this section, the Secretary may take one or more of the following remedial actions against a guaranty agency or third-party servicer administering any aspect of the FFEL programs under a contract with the guaranty agency, that makes an incomplete or incorrect statement in connection with any agreement entered into under this part or violates any applicable Federal requirement:

(i) Require the agency to return payments made by the Secretary to the agency.

(ii) Withhold payments to the agency.

(iii) Limit the terms and conditions of the agency's continued participation in the FFEL programs.

(iv) Suspend or terminate agreements with the agency.

(v) Impose a fine on the agency or servicer. For purposes of assessing a fine, repeated mechanical systemic unintentional errors shall be counted as one violation.

(vi) Require repayment from the agency and servicer pursuant to paragraph (c)(2) of this section, of interest, special allowance, and reinsurance paid on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1).

(vii) Require repayment from the agency or servicer, pursuant to paragraph (c)(2) of this section, of any related payments that the Secretary became obligated to make to others as a result of an incomplete or incorrect statement or a violation of an applicable Federal requirement.

(2) For purposes of this section, a guaranty agency and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits, special allowance, reinsurance paid, or other compensation on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1) as a result of a violation by the servicer administering any aspect of the FFEL programs under a contract with that guaranty agency.

(3) For purposes of paragraph (c)(2) of this section, the relevant third-party servicer shall repay any outstanding liabilities under paragraph (c)(2) of this section only if—

(i) The Secretary has determined that the servicer is jointly and severally liable for the liabilities; and

(ii)(A) The guaranty agency has not repaid in full the amount of the liability within 30 days; or

(B) The guaranty agency has not made other satisfactory arrangements to pay the amount of the liability.

(d)(1) The Secretary follows the procedures described in 34 CFR part 668, subpart G, applicable to fine proceedings against schools, in imposing a fine against a lender, guaranty agency, or third-party servicer. References to "the institution" in those regulations shall be understood to mean the lender, guaranty agency, or third-party servicer, as applicable, for this purpose.

(2) The Secretary also follows the provisions of section 432(g) of the Act in imposing a fine against a guaranty agency or lender.

* * * * *

37. Section 682.414 is amended by revising paragraph (a)(1)(i) to read as follows:

§ 682.414 Records, reports, and inspection requirements for guaranty agency programs.

(a) *Records.* (1)(i) The guaranty agency shall maintain current, complete, and accurate records of each loan that it holds, including, but not limited to, the records described in paragraph (a)(1)(ii) of this section. The records must be maintained in a system that allows ready identification of each loan's current status, updated at least once every 10 business days. Any reference to a guaranty agency under this section includes a third-party servicer that administers any aspect of the FFEL programs under a contract with the guaranty agency, if applicable.

* * * * *

38. A new § 682.416 is added to subpart D to read as follows:

§ 682.416 Requirements for third-party servicers and lenders contracting with third-party servicers.

(a) *Standards for administrative capability.* A third-party servicer is considered administratively responsible if it—

(1) Provides the services and administrative resources necessary to fulfill its contract with a lender or guaranty agency, and conducts all of its contractual obligations that apply to the FFEL program in accordance with FFEL program regulations;

(2) Has business systems that are capable of meeting the requirements of part B of Title IV of the Act and with the FFEL program regulations; and

(3) Has adequate personnel who are knowledgeable about the FFEL programs.

(b) *Standards of financial responsibility.* The Secretary applies the provisions of 34 CFR 668.13(c), (d), (g), and (h) to determine that a third-party servicer is financially responsible under this part. References to "the institution" in those provisions shall be understood to mean the third-party servicer, for this purpose.

(c) *Special review of third-party servicer.* (1) The Secretary may review a third-party servicer to determine that it meets the administrative capability and financial responsibility standards in this section.

(2) In response to a request from the Secretary, the servicer shall provide evidence to demonstrate that it meets the administrative capability and financial responsibility standards in this section.

(3) The servicer may also provide evidence of why administrative action is unwarranted if it is unable to demonstrate that it meets the standards of this section.

(4) Based on the review of the materials provided by the servicer, the Secretary determines if the servicer meets the standards in this part. If the servicer does not, the Secretary may initiate an administrative proceeding under subpart G.

(d) *Past performance of third-party servicer or persons affiliated with*

servicer. Notwithstanding paragraph (b) of this section, a third-party servicer is not financially responsible if—

(1) (i) The servicer; its owner, majority shareholder, or chief executive officer; any person employed by the servicer in a capacity that involves the administration of a Title IV, HEA program or the receipt of Title IV, HEA program funds; any person, entity, or officer or employee of an entity with which the servicer contracts in a capacity that involves the administration of a Title IV, HEA program or the receipt of Title IV, HEA program funds has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving such funds, unless—

(A) The funds that were fraudulently obtained, or criminally acquired, used, or expended have been repaid to the United States, and any related financial penalty has been paid;

(B) The persons who were convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of the funds are no longer incarcerated for that crime; and

(C) At least five years have elapsed from the date of the conviction, *nolo contendere* plea, guilty plea, or administrative or judicial determination; or

(ii) The servicer, or any principal or affiliate of the servicer (as those terms are defined in 34 CFR part 85), is—

(A) Debarred or suspended under Executive Order (E.O.) 12549 or the Federal Acquisition Regulations (FAR), 48 CFR part 9, subpart 9.4; or

(B) Engaging in any activity that is a cause under 34 CFR 85.305 or 85.405 for debarment or suspension under E.O. 12549 or the FAR, 48 CFR part 9, subpart 9.4; and

(2) Upon learning of a conviction, plea, or administrative or judicial determination described in paragraph (d)(1) of this section, the servicer does not promptly remove the person, agency, or organization from any involvement in the administration of the servicer's participation in Title IV, HEA programs, including, as applicable, the removal or elimination of any substantial control, as determined under 34 CFR 668.13, over the servicer.

(e) *Independent audits.* (1) A third-party servicer shall arrange for an independent audit of its administration of the FFEL program loan portfolio unless—

(i) The servicer contracts with only one lender or guaranty agency; and

(ii) The audit of that lender's or guaranty agency's FFEL programs involves every aspect of the servicer's administration of those FFEL programs.

(2) The audit must—

(i) Examine the servicer's compliance with the Act and applicable regulations;

(ii) Examine the servicer's financial management of its FFEL program activities;

(iii) Be conducted in accordance with the standards for audits issued by the United States General Accounting Office's (GAO's) Standards for Audit of Governmental Organizations, Programs, Activities, and Functions. Procedures for audits are contained in an audit guide developed by and available from the Office of Inspector General of the Department of Education; and

(iv) Except for the initial audit, be conducted at least annually and be submitted to the Secretary within six months of the end of the audit period. The initial audit must be an annual audit of the servicer's first full fiscal year beginning after July 1, 1994, and include any period from the beginning of the first full fiscal year. The audit report must be submitted to the Secretary within six months of the end of the audit period. Each subsequent audit must cover the servicer's activities for the one-year period beginning no later than the end of the period covered by the preceding audit.

(3) Notwithstanding paragraph (e)(2)(iv) of this section the servicer shall have an audit performed at least once every two years if—

(i) The servicer administers less than $1,000,000 under the Title IV, HEA programs for the period covered by the audit; or

(ii) The servicer had no material exceptions identified in its most recently submitted audit report and that report was submitted in a timely fashion.

(4) The servicer is not required to have an audit performed for any year in which the servicer administers less than $250,000 of the principal value of the loans under the Title IV, HEA programs.

(5) Notwithstanding paragraphs (e)(3) and (4) of this section, the Secretary may, as the Secretary deems necessary, request any third-party servicer to have an audit performed on an annual basis.

(6) With regard to a third-party servicer that is a governmental entity, the audit required by this paragraph must be conducted in accordance with 31 U.S.C. 7502 and 34 CFR part 80, appendix G.

(7) With regard to a third-party servicer that is a nonprofit organization, the audit required by this paragraph must be conducted in accordance with Office of Management and Budget (OMB) Circular A–133, "Audit of Institutions of Higher Education and Other Nonprofit Institutions," as incorporated in 34 CFR 74.61(h)(3).

(f) *Contract responsibilities.* A lender that participates in the FFEL programs may not enter into a contract with a third-party servicer that the Secretary has determined does not meet the requirements of this section. The lender must provide the Secretary with the name and address of any third-party servicer with which the lender enters into a contract and, upon request by the Secretary, a copy of that contract. A third-party servicer that is under contract with a lender to perform any activity for which the records in § 682.414(a)(3)(ii) are relevant to perform the services for which the servicer has contracted shall maintain current, complete, and accurate records pertaining to each loan that the servicer is under contract to administer on behalf of the lender. The records must be maintained in a system that allows ready identification of each loan's current status.

(Authority: 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1082; E.O. 12549 (3 CFR, 1987 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

39. The title of subpart G is revised to read as follows: Subpart G—Limitation, Suspension, or Termination of Lender or Third-party Servicer Eligibility and Disqualification of Lenders and Schools

40. Section 682.700 is amended by revising paragraphs (a) and (b)(1) to read as follows:

§ 682.700 Purpose and scope.

(a) This subpart governs the limitation, suspension, or termination by the Secretary of the eligibility of an otherwise eligible lender to participate in the FFEL programs or the eligibility of a third-party servicer to enter into a contract with an eligible lender to administer any aspect of the lender's FFEL programs. The regulations in this subpart apply to a lender or third-party servicer that violates any statutory provision governing the FFEL programs or any regulations, special arrangements, agreements, or limitations prescribed under those programs. These regulations apply to lenders that participate only in a guaranty agency program, lenders that participate in the FFEL programs, and third-party servicers that administer aspects of a lender's FFEL program portfolio. These regulations also govern the Secretary's disqualification of a lender or school

from participation in the FFEL programs under section 432 (h)(2) and (h)(3) of the Act.

(b) * * *

(1) (i) To a determination that an organization fails to meet the definition of "eligible lender" in section 435(d)(1) of the Act or the definition of "lender" in § 682.200, for any reason other than a violation of the prohibitions in section 435(d)(5) of the Act; or

(ii) To a determination that an organization fails to meet the standards in § 682.416;

* * * * *

41. Section 682.701 is amended by revising the definitions of "Limitation", "Suspension", and "Termination" to read as follows:

§ 682.701 Definitions of terms used in this subpart.

* * * * *

Limitation: The continuation of a lender's or third-party servicer's eligibility subject to compliance with special conditions established by agreement with the Secretary or a guaranty agency, as applicable, or imposed as the result of a limitation or termination proceeding.

Suspension: The removal of a lender's eligibility, or a third-party servicer's eligibility to contract with a lender or guaranty agency, for a specified period of time or until the lender or servicer fulfills certain requirements.

Termination: (1) The removal of a lender's eligibility for an indefinite period of time—

(i) By a guaranty agency; or

(ii) By the Secretary, based on an action taken by the Secretary, or a designated Departmental official under § 682.706; or

(2) The removal of a third-party servicer's eligibility to contract with a lender or guaranty agency for an indefinite period of time by the Secretary based on an action taken by the Secretary, or a designated Departmental official under § 682.706.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

42. Section 682.702 is amended by redesignating paragraph (c) as paragraph (d); adding a new paragraph (c); and removing "(c)" in paragraph (a) and adding, in its place "(d)" to read as follows:

§ 682.702 Effect on participation.

* * * * *

(c) A limitation imposes on a third-party servicer—

(1) A limit on the number of loans or accounts or total amount of loans that the servicer may service;

(2) A limit on the number of loans or accounts or total amount of loans that the servicer is administering under its contract with a lender or guaranty agency; or

(3) Other reasonable requirements or conditions, including those described in § 682.709.

* * * * *

43. Section 682.703 is amended by revising paragraph (a) and paragraph (b) introductory text to read as follows:

§ 682.703 Informal compliance procedure.

(a) The Secretary may use the informal compliance procedure in paragraph (b) of this section if the Secretary receives a complaint or other reliable information indicating that a lender or third-party servicer may be in violation of applicable laws, regulations, special arrangements, agreements, or limitations.

(b) Under the informal compliance procedure, the Secretary gives the lender or servicer a reasonable opportunity to—

* * * * *

44. Section 682.704 is amended by revising paragraphs (a)(1), (b), (c), and (d)(2)(ii) to read as follows:

§ 682.704 Emergency action.

(a) * * *

(1) Receives reliable information that the lender or a third-party servicer with which the lender contracts is in violation of applicable laws, regulations, special arrangements, agreements, or limitations pertaining to the lender's portfolio of loans;

* * * * *

(b) The Secretary begins an emergency action by notifying the lender or third-party servicer, by certified mail, return receipt requested, of the action and the basis for the action.

(c) The action becomes effective on the date the notice is mailed to the lender or third-party servicer.

(d) * * *

(2) * * *

(ii) Upon the written request of the lender or third-party servicer, the Secretary may provide the lender or servicer with an opportunity to demonstrate that the emergency action is unwarranted.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

45. Section 682.705 is revised to read as follows:

§ 682.705 Suspension proceedings.

(a) *Scope.* (1) A suspension by the Secretary removes a lender's eligibility under the FFEL programs or a third-party servicer's ability to enter into contracts with eligible lenders, and the Secretary does not guarantee or reinsure a new loan made by the lender or new loan serviced by the servicer during a period not to exceed 60 days from the date the suspension becomes effective, unless—

(i) The lender or servicer and the Secretary agree to an extension of the suspension period, if the lender or third-party servicer has not requested a hearing; or

(ii) The Secretary begins a limitation or a termination proceeding.

(2) If the Secretary begins a limitation or a termination proceeding before the suspension period ends, the Secretary may extend the suspension period until the completion of that proceeding, including any appeal to the Secretary.

(b) *Notice.* (1) The Secretary, or a designated Departmental official, begins a suspension proceeding by sending the lender or servicer a notice by certified mail with return receipt requested.

(2) The notice—

(i) Informs the lender or servicer of the Secretary's intent to suspend the lender's or servicer's eligibility for a period not to exceed 60 days;

(ii) Describes the consequences of a suspension;

(iii) Identifies the alleged violations on which the proposed suspension is based;

(iv) States the proposed date the suspension becomes effective, which is at least 20 days after the date of mailing of the notice;

(v) Informs the lender or servicer that the suspension will not take effect on the proposed date, except as provided in paragraph (c)(8) of this section, if the Secretary receives at least five days prior to that date a request for an oral hearing or written material showing why the suspension should not take effect; and

(vi) Asks the lender or servicer to correct voluntarily any alleged violations.

(c) *Hearing.* (1) If the lender or servicer does not request an oral hearing but submits written material, the Secretary, or a designated Departmental official, considers the material and—

(i) Dismisses the proposed suspension; or

(ii) Determines that the proposed suspension should be implemented and notifies the lender or servicer of the effective date of the suspension.

(2) If the lender or servicer requests an oral hearing within the time specified in paragraph (b)(2)(v) of this section, the Secretary schedules the date and place of the hearing. The date is at least 15 days after receipt of the request from the lender or servicer. No proposed suspension takes effect until a hearing is held.

(3) The oral hearing is conducted by a presiding officer who—

(i) Ensures that a written record of the hearing is made;

(ii) Considers relevant written material presented before the hearing and other relevant evidence presented during the hearing; and

(iii) Issues a decision based on findings of fact and conclusions of law that may suspend the lender's or servicer's eligibility only if the presiding officer is persuaded that the suspension is warranted by the evidence.

(4) The formal rules of evidence do not apply, and no discovery, as provided in the Federal Rules of Civil Procedure (28 U.S.C. Appendix), is required.

(5) The presiding officer shall base findings of fact only on evidence considered at or before the hearing and matters given official notice.

(6) The initial decision of the presiding officer is mailed to the lender or servicer.

(7) The Secretary automatically reviews the initial decision of the presiding officer. The Secretary notifies the lender or servicer of the Secretary's decision by mail.

(8) A suspension takes effect on either a date that is at least 20 days after the date the notice of a decision imposing the suspension is mailed to the lender or servicer, or on the proposed effective date stated in the notice sent under paragraph (b) of this section, whichever is later.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

46. Section 682.706 is revised to read as follows:

§ 682.706 Limitation or termination proceedings.

(a) *Notice.* (1) The Secretary, or a designated Departmental official, begins a limitation or termination proceeding, whether a suspension proceeding has begun, by sending the lender or third-party servicer a notice by certified mail with return receipt requested.

(2) The notice—

(i) Informs the lender or servicer of the Secretary's intent to limit or terminate the lender's or servicer's eligibility;

(ii) Describes the consequences of a limitation or termination;

(iii) Identifies the alleged violations on which the proposed limitation or termination is based;

(iv) States the limits which may be imposed, in the case of a limitation proceeding;

(v) States the proposed date the limitation or termination becomes effective, which is at least 20 days after the date of mailing of the notice;

(vi) Informs the lender or servicer that the limitation or termination will not take effect on the proposed date if the Secretary receives, at least five days prior to that date, a request for an oral hearing or written material showing why the limitation or termination should not take effect;

(vii) Asks the lender or servicer to correct voluntarily any alleged violations; and

(viii) Notifies the lender or servicer that the Secretary may collect any amount owed by means of offset against amounts owed to the lender by the Department and other Federal agencies.

(b) *Hearing.* (1) If the lender or servicer does not request an oral hearing but submits written material, the Secretary, or a designated Departmental official, considers the material and—

(i) Dismisses the proposed limitation or termination; or

(ii) Notifies the lender or servicer of the date the limitation or termination becomes effective.

(2) If the lender or servicer requests a hearing within the time specified in paragraph (a)(2)(vi) of this section, the Secretary schedules the date and place of the hearing. The date is at least 15 days after receipt of the request from the lender or servicer. No proposed limitation or termination takes effect until a hearing is held.

(3) The hearing is conducted by a presiding officer who—

(i) Ensures that a written record of the hearing is made;

(ii) Considers relevant written material presented before the hearing and other relevant evidence presented during the hearing; and

(iii) Issues an initial decision, based on findings of fact and conclusions of law, that may limit or terminate the lender's or servicer's eligibility if the presiding officer is persuaded that the limitation or termination is warranted by the evidence.

(4) The formal rules of evidence do not apply, and no discovery, as provided in the Federal Rules of Civil Procedure, is required.

(5) The presiding officer shall base findings of fact only on evidence presented at or before the hearing and matters given official notice.

(6) If a termination action is brought against a lender or third-party servicer and the presiding officer concludes that a limitation is more appropriate, the presiding officer may issue a decision imposing one or more limitations on a lender or third-party servicer rather than terminating the lender's or servicer's eligibility.

(7) The initial decision of the presiding officer is mailed to the lender or servicer.

(8) Any time schedule specified in this section may be shortened with the approval of the presiding officer and the consent of the lender or servicer and the Secretary or designated Departmental official.

(9) The presiding officer's initial decision automatically becomes the Secretary's final decision 20 days after it is issued and received by both parties unless the lender, servicer, or designated Departmental official appeals the decision to the Secretary within this period.

(c) Notwithstanding the other provisions of this section, if a lender or a lender's owner or officer or third-party servicer or servicer's owner or officer, respectively, is convicted of or pled *nolo contendere* or guilty to a crime involving the unlawful acquisition, use, or expenditure of FFEL program funds, that conviction or guilty plea is grounds for terminating the lender's or servicer's eligibility, respectively, to participate in the FFEL programs.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

47. Section 682.707 is amended by revising paragraphs (a) introductory text and (d) to read as follows:

§ 682.707 Appeals in a limitation or termination proceeding.

(a) If the lender, third-party servicer, or designated Departmental official appeals the initial decision of the presiding officer in accordance with § 682.706(b)(9)—

* * * * *

(d) If the presiding officer's initial decision would limit or terminate the lender's or servicer's eligibility, it does not take effect pending the appeal unless the Secretary determines that a stay of the date it becomes effective would seriously and adversely affect the FFEL programs or student or parent borrowers.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

48. Section 682.708 is amended by revising paragraph (b) to read as follows:

§ 682.708 Evidence of mailing and receipt dates.

* * * * *

(b) If a lender or third-party servicer refuses to accept a notice mailed under this subpart, the Secretary considers the notice as being received on the date that the lender or servicer refuses to accept the notice.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

49. Section 682.709 is revised to read as follows:

§ 682.709 Reimbursements, refunds, and offsets.

(a) As part of a limitation or termination proceeding, the Secretary, or a designated Departmental official, may require a lender or third-party servicer to take reasonable corrective action to remedy a violation of applicable laws, regulations, special arrangements, agreements, or limitations.

(b) The corrective action may include payment to the Secretary or recipients designated by the Secretary of any funds, and any interest thereon, that the lender, or, in the case of a third-party servicer, the servicer or the lender that has a contract with a third-party servicer, improperly received, withheld, disbursed, or caused to be disbursed. A third-party servicer may be held liable up to the amounts specified in § 682.413(a)(2).

(c) If a final decision requires a lender, a lender that has a contract with a third-party servicer, or a third-party servicer to reimburse or make any payment to the Secretary, the Secretary may, without further notice or opportunity for a hearing, proceed to offset or arrange for another Federal agency to offset the amount due against any interest benefits, special allowance, or other payments due to the lender, the lender that has a contract with the third-party servicer, or the third-party servicer. A third-party servicer may be held liable up to the amounts specified in § 682.413(a)(2).

(Authority: 20 U.S.C. 1080, 1082, 1094)

50. Section 682.710 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 682.710 Removal of limitation.

(a) A lender or third-party servicer may request removal of a limitation imposed by the Secretary in accordance with the regulations in this subpart at any time more than 12 months after the date the limitation becomes effective.

(b) The request must be in writing and must show that the lender or servicer has corrected any violations on which the limitation was based.

* * * * *

(d)(1) If the Secretary denies the request or establishes other limitations, the lender or servicer, upon request, is given an opportunity to show why all limitations should be removed.

(2) A lender or third-party servicer may continue to participate in the FFEL programs, subject to any limitation imposed by the Secretary under paragraph (c)(3) of this section, pending a decision by the Secretary on a request under paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

51. Section 682.711 is amended by revising paragraphs (a), (b)(1), (b)(2), (e), and the authority citation following the section to read as follows:

§ 682.711 Reinstatement after termination.

(a) A lender or third-party servicer whose eligibility has been terminated by the Secretary in accordance with the regulations in this subpart may request reinstatement of its eligibility at any time more than 18 months after the date the termination becomes effective.

(b) * * *

(1) The lender or servicer has corrected any violations on which the termination was based; and

(2) The lender or servicer meets all requirements for eligibility.

* * * * *

(e)(1) If the Secretary denies the lender's or servicer's request or allows reinstatement subject to limitations, the lender or servicer, upon request, is given an opportunity to show why its eligibility should be reinstated and all limitations removed.

(2) A lender or third-party servicer whose eligibility to participate in the FFEL programs is reinstated subject to limitations imposed by the Secretary pursuant to paragraph (d)(3) of this section, may participate in those programs, subject to those limitations, pending a decision by the Secretary on a request under paragraph (e)(1) of this section.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

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