Federal Register

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Part IV

Department of Education

34 CFR Part 34

Administrative Wage Garnishment; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 34

Administrative Wage Garnishment

AGENCY: Office of the Chief Financial Officer, Department of Education.

ACTION: Final regulations.

SUMMARY: These regulations implement for the Department of Education the provisions for administrative wage garnishment in the Debt Collection Improvement Act of 1996 (DCIA). The DCIA authorizes Federal agencies to garnish administratively, that is, without court order, the disposable pay of an individual who is not a Federal employee to collect a delinquent nontax debt owed to the United States. These regulations implement this authority for a debt owed to the United States under a program administered by the Department of Education.

DATES: These regulations are effective March 21, 2003.

FOR FURTHER INFORMATION CONTACT: Marian E. Currie, U.S. Department of Education, Union Center Plaza Room 41B4, 830 First Street NE, Washington DC 20202, Telephone: (202) 377–3212 or via Internet: *marian.currie@ed.gov.*

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SUPPLEMENTARY INFORMATION: On April 12, 2002, the Secretary published in the **Federal Register** a notice of proposed rulemaking (NPRM) (67 FR 18072) for implementation of the wage garnishment authority in the DCIA. This document contains the final regulations for the rules that were proposed in that NPRM. These final regulations contain a few changes from the NPRM.

Analysis of Comments and Changes

In response to the NPRM, we received comments from two parties. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

Although a substantial number of small entities will be subject to these regulations and to the certification requirement in these regulations, as explained in the NPRM, the requirements will not have a significant economic impact on these entities.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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

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(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 34

Administrative practice and procedure, Claims, Debts, Garnishment of wages, Hearing and appeal procedures, Salaries, Wages.

Dated: February 12, 2003.

Rod Paige,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by adding a new part 34 to read as follows:

PART 34— ADMINISTRATIVE WAGE GARNISHMENT

Sec.

Authority: 31 U.S.C. 3720D, unless otherwise noted.

§ 34.1 Purpose of this part.

This part establishes procedures the Department of Education uses to collect money from a debtor's disposable pay by means of administrative wage garnishment to satisfy delinquent debt owed to the United States.

(Authority: 31 U.S.C. 3720D)

§ 34.2 Scope of this part.

(a) This part applies to collection of any financial obligation owed to the United States that arises under a program we administer.

(b) This part applies notwithstanding any provision of State law.

(c) We may compromise or suspend collection by garnishment of a debt in accordance with applicable law.

(d) We may use other debt collection remedies separately or in conjunction with administrative wage garnishment to collect a debt.

(e) To collect by offset from the salary of a Federal employee, we use the procedures in 34 CFR part 31, not those in this part.

(Authority: 31 U.S.C. 3720D)

§ 34.3 Definitions.

As used in this part, the following definitions apply:

Administrative debt means a debt that does not arise from an individual's obligation to repay a loan or an overpayment of a grant received under a student financial assistance program authorized under Title IV of the Higher Education Act.

Business day means a day Monday through Friday, unless that day is a Federal holiday.

Certificate of service means a certificate signed by an authorized official of the U.S. Department of Education (the Department) that indicates the nature of the document to which it pertains, the date we mail the document, and to whom we are sending the document.

Day means calendar day. For purposes of computation, the last day of a period will be included unless that day is a Saturday, a Sunday, or a Federal legal holiday; in that case, the last day of the period is the next business day after the end of the period.

Debt or *claim* means any amount of money, funds, or property that an appropriate official of the Department has determined an individual owes to the United States under a program we administer.

Debtor means an individual who owes a delinquent nontax debt to the United States under a program we administer.

Disposable pay. This term—

(a)(1) Means that part of a debtor's compensation for personal services, whether or not denominated as wages, from an employer that remains after the deduction of health insurance premiums and any amounts required by law to be withheld.

(2) For purposes of this part, ''amounts required by law to be withheld'' include amounts for deductions such as social security taxes and withholding taxes, but do not include any amount withheld under a court order; and

(b) Includes, but is not limited to, salary, bonuses, commissions, or vacation pay.

Employer. This term—

(a) Means a person or entity that employs the services of another and that pays the latter's wages or salary;

(b) Includes, but is not limited to, State and local governments; and

(c) Does not include an agency of the Federal Government.

Financial hardship means an inability to meet basic living expenses for goods and services necessary for the survival of the debtor and his or her spouse and dependents.

Garnishment means the process of withholding amounts from an employee's disposable pay and paying those amounts to a creditor in satisfaction of a withholding order.

We means the United States Department of Education.

Withholding order. (a) This term means any order for withholding or garnishment of pay issued by this Department, another Federal agency, a State or private non-profit guaranty agency, or a judicial or administrative body.

(b) For purposes of this part, the terms ''wage garnishment order'' and ''garnishment order'' have the same meaning as ''withholding order.''

You means the debtor.

(Authority: 31 U.S.C. 3720D)

§ 34.4 Notice of proposed garnishment.

(a) We may start proceedings to garnish your wages whenever we determine that you are delinquent in paying a debt owed to the United States under a program we administer.

(b) We start garnishment proceedings by sending you a written notice of the proposed garnishment.

(c) At least 30 days before we start garnishment proceedings, we mail the notice by first class mail to your last known address.

(d)(1) We keep a copy of a certificate of service indicating the date of mailing of the notice.

(2) We may retain this certificate of service in electronic form.

(Authority: 31 U.S.C. 3720D)

§ 34.5 Contents of a notice of proposed garnishment.

In a notice of proposed garnishment, we inform you of—

(a) The nature and amount of the debt;

(b) Our intention to collect the debt through deductions from pay until the debt and all accumulated interest, penalties, and collection costs are paid in full; and

(c) An explanation of your rights, including those in § 34.6, and the time frame within which you may exercise your rights.

(Authority: 31 U.S.C. 3720D)

§ 34.6 Rights in connection with garnishment.

Before starting garnishment, we provide you the opportunity—

(a) To inspect and copy our records related to the debt;

(b) To enter into a written repayment agreement with us to repay the debt under terms we consider acceptable;

(c) For a hearing in accordance with § 34.8 concerning—

(1) The existence, amount, or current enforceability of the debt;

(2) The rate at which the garnishment order will require your employer to withhold pay; and

(3) Whether you have been continuously employed less than 12 months after you were involuntarily separated from employment.

(Authority: 31 U.S.C. 3720D)

§ 34.7 Consideration of objection to the rate or amount of withholding.

(a) We consider objections to the rate or amount of withholding only if the objection rests on a claim that withholding at the proposed rate or amount would cause financial hardship to you and your dependents.

(b) We do not provide a hearing on an objection to the rate or amount of withholding if the rate or amount we propose to be withheld does not exceed the rate or amount agreed to under a repayment agreement reached within the preceding six months after a previous notice of proposed garnishment.

(c) We do not consider an objection to the rate or amount of withholding based on a claim that by virtue of 15 U.S.C. 1673, no amount of wages are available for withholding by the employer.

(Authority: 31 U.S.C. 3720D)

§ 34.8 Providing a hearing.

(a) We provide a hearing if you submit a written request for a hearing concerning the existence, amount, or enforceability of the debt or the rate of wage withholding.

(b) At our option the hearing may be an oral hearing under § 34.9 or a paper hearing under § 34.10.

(Authority: 31 U.S.C. 3720D)

§ 34.9 Conditions for an oral hearing.

(a) We provide an oral hearing if you—

(1) Request an oral hearing; and

(2) Show in the request a good reason to believe that we cannot resolve the issues in dispute by review of the documentary evidence, by demonstrating that the validity of the claim turns on the credibility or veracity of witness testimony.

(b) If we determine that an oral hearing is appropriate, we notify you how to receive the oral hearing.

(c)(1) At your option, an oral hearing may be conducted either in-person or by telephone conference.

(2) We provide an in-person oral hearing with regard to administrative debts only in Washington D.C.

(3) We provide an in-person oral hearing with regard to debts based on student loan or grant obligations only at our regional service centers in Atlanta, Chicago, or San Francisco.

(4) You must bear all travel expenses you incur in connection with an in-person hearing.

(5) We bear the cost of any telephone calls we place in order to conduct an oral hearing by telephone.

(d)(1) To arrange the time and location of the oral hearing, we ordinarily attempt to contact you first by telephone call to the number you provided to us.

(2) If we are unable to contact you by telephone, we leave a message directing you to contact us within 5 business days to arrange the time and place of the hearing.

(3) If we can neither contact you directly nor leave a message with you by telephone—

(i) We notify you in writing to contact us to arrange the time and place of the hearing; or

(ii) We select a time and place for the hearing, and notify you in writing of the time and place set for the hearing.

(e) We consider you to have withdrawn the request for an oral hearing if—

(1) Within 15 days of the date of a written notice to contact us, we receive no response to that notice; or

(2) Within five business days of the date of a telephone message to contact us, we receive no response to that message.

(Authority: 31 U.S.C. 3720D)

§ 34.10 Conditions for a paper hearing.

We provide a paper hearing—

(a) If you request a paper hearing;

(b) If you requested an oral hearing, but we determine under § 34.9(e) that you have withdrawn that request;

(c) If you fail to appear for a scheduled oral hearing, as provided in § 34.15; or

(d) If we deny a request for an oral hearing because we conclude that, by a review of the written record, we can resolve the issues raised by your objections.

(Authority: 31 U.S.C. 3720D)

§ 34.11 Timely request for a hearing.

(a) A hearing request is timely if—

(1) You mail the request to the office designated in the garnishment notice and the request is postmarked not later than the 30th day following the date of the notice; or

(2) The designated office receives the request not later than the 30th day following the date of the garnishment notice.

(b) If we receive a timely written request from you for a hearing, we will not issue a garnishment order before we—

(1) Provide the requested hearing; and

(2) Issue a written decision on the objections you raised.

(c) If your written request for a hearing is not timely—

(1) We provide you a hearing; and

(2) We do not delay issuance of a garnishment order unless—

(i) We determine from credible representations in the request that the delay in filing the request for hearing was caused by factors over which you had no control; or

(ii) We have other good reason to delay issuing a garnishment order.

(d) If we do not complete a hearing within 60 days of an untimely request, we suspend any garnishment order until we have issued a decision.

(Authority: 31 U.S.C. 3720D)

§ 34.12 Request for reconsideration.

(a) If you have received a decision on an objection to garnishment you may file a request for reconsideration of that decision.

(b) We do not suspend garnishment merely because you have filed a request for reconsideration.

(c) We consider your request for reconsideration if we determine that—

(1) You base your request on grounds of financial hardship, and your financial circumstances, as shown by evidence submitted with the request, have materially changed since we issued the decision so that we should reduce the amount to be garnished under the order; or

(2)(i) You submitted with the request evidence that you did not previously submit; and

(ii) This evidence demonstrates that we should reconsider your objection to the existence, amount, or enforceability of the debt.

(d)(1) If we agree to reconsider the decision, we notify you.

(2)(i) We may reconsider based on the request and supporting evidence you have presented with the request; or

(ii) We may offer you an opportunity for a hearing to present evidence.

(Authority: 31 U.S.C. 3720D)

§ 34.13 Conduct of a hearing.

(a)(1) A hearing official conducts any hearing under this part.

(2) The hearing official may be any qualified employee of the Department whom the Department designates to conduct the hearing.

(b)(1) The hearing official conducts any hearing as an informal proceeding.

(2) A witness in an oral hearing must testify under oath or affirmation.

(3) The hearing official maintains a summary record of any hearing.

(c) Before the hearing official considers evidence we obtain that was not included in the debt records available for inspection when we sent notice of proposed garnishment, we notify you that additional evidence has become available, may be considered by the hearing official, and is available for inspection or copying.

(d) The hearing official considers any objection you raise and evidence you submit—

(1) In or with the request for a hearing;

(2) During an oral hearing;

(3) By the date that we consider, under § 34.9(e), that a request for an oral hearing has been withdrawn; or

(4) Within a period we set, ordinarily not to exceed seven business days, after—

(i) We provide you access to our records regarding the debt, if you requested access to records within 20 days after the date of the notice under § 34.4;

(ii) We notify you that we have obtained and intend to consider additional evidence;

(iii) You request an extension of time in order to submit specific relevant evidence that you identify to us in the request; or

(iv) We notify you that we deny your request for an oral hearing.

(Authority: 31 U.S.C. 3720D)

§ 34.14 Burden of proof.

(a)(1) We have the burden of proving the existence and amount of a debt.

(2) We meet this burden by including in the record and making available to the debtor on request records that show that—

(i) The debt exists in the amount stated in the garnishment notice; and

(ii) The debt is currently delinquent.

(b) If you dispute the existence or amount of the debt, you must prove by a preponderance of the credible evidence that—

(1) No debt exists;

(2) The amount we claim to be owed on the debt is incorrect, or

(3) You are not delinquent with respect to the debt.

(c)(1) If you object that the proposed garnishment rate would cause financial hardship, you bear the burden of proving by a preponderance of the credible evidence that withholding the

amount of wages proposed in the notice would leave you unable to meet the basic living expenses of you and your dependents.

(2) The standards for proving financial hardship are those in § 34.24.

(d)(1) If you object on the ground that applicable law bars us from collecting the debt by garnishment at this time, you bear the burden of proving the facts that would establish that claim.

(2) Examples of applicable law that may prevent collection by garnishment include the automatic stay in bankruptcy (11 U.S.C. 362(a)), and the preclusion of garnishment action against a debtor who was involuntarily separated from employment and has been reemployed for less than a continuous period of 12 months (31 U.S.C. 3720D(b)(6)).

(e) The fact that applicable law may limit the amount that an employer may withhold from your pay to less than the amount or rate we state in the garnishment order does not bar us from issuing the order.

(Authority: 31 U.S.C. 3720D)

§ 34.15 Consequences of failure to appear for an oral hearing.

(a) If you do not appear for an in-person hearing you requested, or you do not answer a telephone call convening a telephone hearing, at the time set for the hearing, we consider you to have withdrawn your request for an oral hearing.

(b) If you do not appear for an oral hearing but you demonstrate that there was good cause for not appearing, we may reschedule the oral hearing.

(c) If you do not appear for an oral hearing you requested and we do not reschedule the hearing, we provide a paper hearing to review your objections, based on the evidence in your file and any evidence you have already provided.

(Authority: 31 U.S.C. 3720D)

§ 34.16 Issuance of the hearing decision.

(a) *Date of decision.* The hearing official issues a written opinion stating his or her decision, as soon as practicable, but not later than 60 days after the date on which we received the request for hearing.

(b) If we do not provide you with a hearing and render a decision within 60 days after we receive your request for a hearing—

(1) We do not issue a garnishment order until the hearing is held and a decision rendered; or

(2) If we have already issued a garnishment order to your employer, we suspend the garnishment order beginning on the 61st day after we receive the hearing request until we provide a hearing and issue a decision.

(Authority: 31 U.S.C. 3720D)

§ 34.17 Content of decision.

(a) The written decision is based on the evidence contained in the hearing record. The decision includes—

(1) A description of the evidence considered by the hearing official;

(2) The hearing official's findings, analysis, and conclusions regarding objections raised to the existence or amount of the debt;

(3) The rate of wage withholding under the order, if you objected that withholding the amount proposed in the garnishment notice would cause an extreme financial hardship; and

(4) An explanation of your rights under this part for reconsideration of the decision.

(b) The hearing official's decision is the final action of the Secretary for the purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*).

(Authority: 31 U.S.C. 3720D)

§ 34.18 Issuance of the wage garnishment order.

(a)(1) If you fail to make a timely request for a hearing, we issue a garnishment order to your employer within 30 days after the deadline for timely requesting a hearing.

(2) If you make a timely request for a hearing, we issue a withholding order within 30 days after the hearing official issues a decision to proceed with garnishment.

(b)(1) The garnishment order we issue to your employer is signed by an official of the Department designated by the Secretary.

(2) The designated official's signature may be a computer-generated facsimile.

(c)(1) The garnishment order contains only the information we consider necessary for your employer to comply with the order and for us to ensure proper credit for payments received from your employer.

(2) The order includes your name, address, and social security number, as well as instructions for withholding and information as to where your employer must send the payments.

(d)(1) We keep a copy of a certificate of service indicating the date of mailing of the order.

(2) We may create and maintain the certificate of service as an electronic record.

(Authority: 31 U.S.C. 3720D)

§ 34.19 Amounts to be withheld under a garnishment order.

(a)(1) After an employer receives a garnishment order we issue, the employer must deduct from all disposable pay of the debtor during each pay period the amount directed in the garnishment order unless this section or § 34.20 requires a smaller amount to be withheld.

(2) The amount specified in the garnishment order does not apply if other law, including this section, requires the employer to withhold a smaller amount.

(b) The employer must comply with our garnishment order by withholding the lesser of—

(1) The amount directed in the garnishment order; or—

(2) The amount specified in 15 U.S.C. 1673(a)(2) (Restriction on Garnishment); that is, the amount by which a debtor's disposable pay exceeds an amount equal to 30 times the minimum wage. (See 29 CFR 870.10.)

(Authority: 31 U.S.C. 3720D)

§ 34.20 Amount to be withheld under multiple garnishment orders.

If a debtor's pay is subject to several garnishment orders, the employer must comply with our garnishment order as follows:

(a) Unless other Federal law requires a different priority, the employer must pay us the amount calculated under § 34.19(b) before the employer complies with any later garnishment orders, except a family support withholding order.

(b) If an employer is withholding from a debtor's pay based on a garnishment order served on the employer before our order, or if a withholding order for family support is served on an employer at any time, the employer must comply with our garnishment order by withholding an amount that is the smaller of—

(1) The amount calculated under § 34.19(b); or

(2) An amount equal to 25 percent of the debtor's disposable pay less the amount or amounts withheld under the garnishment order or orders with priority over our order.

(c)(1) If a debtor owes more than one debt arising from a program we administer, we may issue multiple garnishment orders.

(2) The total amount withheld from the debtor's pay for orders we issue under paragraph (c)(1) of this section does not exceed the amounts specified in the orders, the amount specified in § 34.19(b)(2), or 15 percent of the debtor's disposable pay, whichever is smallest.

(d) An employer may withhold and pay an amount greater than that amount in paragraphs (b) and (c) of this section if the debtor gives the employer written consent.

(Authority: 31 U.S.C. 3720D)

§ 34.21 Employer certification.

(a) Along with a garnishment order, we send to an employer a certification in a form prescribed by the Secretary of the Treasury.

(b) The employer must complete and return the certification to us within the time stated in the instructions for the form.

(c) The employer must include in the certification information about the debtor's employment status, payment frequency, and disposable pay available for withholding.

(Authority: 31 U.S.C. 3720D)

§ 34.22 Employer responsibilities.

(a)(1) Our garnishment order indicates a reasonable period of time within which an employer must start withholding under the order.

(2) The employer must promptly pay to the Department all amounts the employer withholds according to the order.

(b) The employer may follow its normal pay and disbursement cycles in complying with the garnishment order.

(c) The employer must withhold the appropriate amount from the debtor's wages for each pay period until the employer receives our notification to discontinue wage garnishment.

(d) The employer must disregard any assignment or allotment by an employee that would interfere with or prohibit the employer from complying with our garnishment order, unless that assignment or allotment was made for a family support judgment or order.

(Authority: 31 U.S.C. 3720D)

§ 34.23 Exclusions from garnishment.

(a) We do not garnish your wages if we have credible evidence that you—

(1) Were involuntarily separated from employment; and

(2) Have not yet been reemployed continuously for at least 12 months.

(b) You have the burden of informing us of the circumstances surrounding an involuntary separation from employment.

(Authority: 31 U.S.C. 3720D)

§ 34.24 Claim of financial hardship by debtor subject to garnishment.

(a) You may object to a proposed garnishment on the ground that withholding the amount or at the rate stated in the notice of garnishment would cause financial hardship to you and your dependents. (See § 34.7)

(b) You may, at any time, object that the amount or the rate of withholding which our order specifies your employer must withhold causes financial hardship.

(c)(1) We consider an objection to an outstanding garnishment order and provide you an opportunity for a hearing on your objection only after the order has been outstanding for at least six months.

(2) We may provide a hearing in extraordinary circumstances earlier than six months if you show in your request for review that your financial circumstances have substantially changed after the notice of proposed garnishment because of an event such as injury, divorce, or catastrophic illness.

(d)(1) You bear the burden of proving a claim of financial hardship by a preponderance of the credible evidence.

(2) You must prove by credible documentation—

(i) The amount of the costs incurred by you, your spouse, and any dependents, for basic living expenses; and

(ii) The income available from any source to meet those expenses.

(e)(1) We consider your claim of financial hardship by comparing—

(i) The amounts that you prove are being incurred for basic living expenses; against

(ii) The amounts spent for basic living expenses by families of the same size and similar income to yours.

(2) We regard the standards published by the Internal Revenue Service under 26 U.S.C. 7122(c)(2) (the ''National Standards'') as establishing the average amounts spent for basic living expenses for families of the same size as, and with family incomes comparable to, your family.

(3) We accept as reasonable the amount that you prove you incur for a type of basic living expense to the extent that the amount does not exceed the amount spent for that expense by families of the same size and similar income according to the National Standards.

(4) If you claim for any basic living expense an amount that exceeds the amount in the National Standards, you must prove that the amount you claim is reasonable and necessary.

(Authority: 31 U.S.C. 3720D)

§ 34.25 Determination of financial hardship.

(a)(1) If we conclude that garnishment at the amount or rate proposed in a notice would cause you financial hardship, we reduce the amount of the proposed garnishment to an amount that we determine will allow you to meet proven basic living expenses.

(2) If a garnishment order is already in effect, we notify your employer of any change in the amount the employer must withhold or the rate of withholding under the order.

(b) If we determine that financial hardship would result from garnishment based on a finding by a hearing official or under a repayment agreement we reached with you, this determination is effective for a period not longer than six months after the date of the finding or agreement.

(c)(1) After the effective period referred to in paragraph (b) of this section, we may require you to submit current information regarding your family income and living expenses.

(2) If we conclude from a review of that evidence that we should increase the rate of withholding or payment, we—

(i) Notify you; and

(ii) Provide you with an opportunity to contest the determination and obtain a hearing on the objection under the procedures in § 34.24.

(Authority: 31 U.S.C. 3720D)

§ 34.26 Ending garnishment.

(a)(1) A garnishment order we issue is effective until we rescind the order.

(2) If an employer is unable to honor a garnishment order because the amount available for garnishment is insufficient to pay any portion of the amount stated in the order, the employer must—

(i) Notify us; and

(ii) Comply with the order when sufficient disposable pay is available.

(b) After we have fully recovered the amounts owed by the debtor, including interest, penalties, and collection costs, we send the debtor's employer notification to stop wage withholding.

(Authority: 31 U.S.C. 3720D)

§ 34.27 Actions by employer prohibited by law.

An employer may not discharge, refuse to employ, or take disciplinary action against a debtor due to the issuance of a garnishment order under this part.

(Authority: 31 U.S.C. 3720D)

§ 34.28 Refunds of amounts collected in error.

(a) If a hearing official determines under §§ 34.16 and 34.17 that a person does not owe the debt described in our notice or that an administrative wage garnishment under this part was barred by law at the time of the collection

action, we promptly refund any amount collected by means of this garnishment.

(b) Unless required by Federal law or contract, we do not pay interest on a refund.

(Authority: 31 U.S.C. 3720D)

§ 34.29 Enforcement action against employer for noncompliance with garnishment order.

(a) If an employer fails to comply with § 34.22 to withhold an appropriate amount from wages owed and payable to an employee, we may sue the employer for that amount.

(b)(1) We do not file suit under paragraph (a) of this section before we terminate action to enforce the debt as a personal liability of the debtor.

(2) However, the provision of paragraph (b)(1) of this section may not apply if earlier filing of a suit is necessary to avoid expiration of any applicable statute of limitations.

(c)(1) For purposes of this section, termination of an action to enforce a debt occurs when we terminate collection action in accordance with the FCCS, other applicable standards, or paragraph (c)(2) of this section.

(2) We regard termination of the collection action to have occurred if we have not received for one year any payments to satisfy the debt, in whole or in part, from the particular debtor whose wages were subject to garnishment.

(Authority: 31 U.S.C. 3720D)

§ 34.30 Application of payments and accrual of interest.

We apply payments received through a garnishment in the following order—

(a) To costs incurred to collect the debt;

(b) To interest accrued on the debt at the rate established by—

(1) The terms of the obligation under which it arises; or

(2) Applicable law; and

(c) To outstanding principal of the debt.

(Authority: 31 U.S.C. 3720D)

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

Analysis of Comments and Changes

An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We discuss issues according to subject, under the sections of the regulations to which they pertain.

Scope of Garnishment Authority; Collection of Student Loans (§§ 34.1 and 34.2)

Comment: One commenter contended that the Department lacks legal authority to use the garnishment power in the DCIA to collect student loans, because the commenter views section 488A of the Higher Education Act, 20 U.S.C. 1095a, as restricting the Department's garnishment authority to ten percent of disposable pay.

Discussion: The commenter bases this contention not on the terms of the DCIA, but on a rule of statutory construction that where two statutes authorize an action, the more specific of the two sets the limits to that authority. Section 488A of the HEA authorizes the Secretary of Education and guaranty agencies to garnish up to ten percent of debtor pay to collect student loans, while the DCIA authorizes Federal agencies to garnish up to fifteen percent of debtor pay. The commenter views the HEA as the more specific of the two statutes, and contends that the HEA limits the Department's garnishment power to the ten percent rate it authorizes. We disagree that the HEA is the more specific of the two statutes; both statutes apply to a distinctive category of entities. The HEA extended garnishment authority to the Department and to some 36 separate State and non-profit entities operating as guaranty agencies, and empowers the latter group to collect both on their own behalf and on behalf of the Federal government.[1] The DCIA applies only to Federal agencies, and applies exclusively to collection of debts owed to the Federal Government.

Even if the HEA were the more specific of the two authorities, the rule that the more specific of two potentially applicable statutes controls is merely one of several tools used to discern the intent of Congress. Another way to determine the intent of Congress when two potentially-applicable statutes adopt inconsistent terms is to view the more recent of the two as embodying the current intent of Congress. The 1996 DCIA is the more recent of the two statutes. Thus, Congress' intent to allow garnishment at 15 percent supersedes the HEA's more limited authority.

Looking to the more recent of two statutes to discern Congress' intent is particularly apt because the DCIA garnishment provision is both more recently enacted and part of a comprehensive scheme inconsistent with the limits of the earlier HEA authority. The DCIA supersedes the more limited authority in HEA section 488A because the DCIA garnishment authority is an addition to a comprehensive statutory scheme (31 U.S.C. 3701–3720E) for enforcement of Federal debts, including student loan debts. That scheme includes, for example, authority under 31 U.S.C. 3720A to collect Federal debt by tax refund offset, and, under 31 U.S.C. 3711(g), to report delinquent Federal debt to credit bureau. Thus, because Congress intended this statutory scheme as in effect before the 1996 DCIA amendments to apply to student loans, there is no reason to infer that Congress did not intend the garnishment provision added by the DCIA to this scheme in 1996 to apply to student loans as well.

Changes to the roles of specific Federal agencies made by the DCIA show that Congress intended that the tools available under this statutory scheme, including garnishment, be used to collect student loans. For the first time, the DCIA required Federal agencies to transfer collection responsibility for their delinquent debt to Treasury, or to other Federal agencies which were designated ''debt collection centers.'' The DCIA authorizes Treasury, as well as these designated ''debt collection centers,'' to use all the collection tools provided in the DCIA, including its garnishment provision, to collect debts which they ''cross-service.'' Education has been designated a debt collection center for student loans, thus, it is illogical to infer any congressional intent to bar Education from using the same DCIA garnishment authority to collect Federal student loan debts that Treasury and other agencies are meant to use to collect Federal debts.

Moreover, if Education had not been designated a debt collection center, the DCIA would have required Education to transfer its student loan debts to Treasury (or another agency designated as a collection center) for cross-servicing. Treasury plainly has full authority to use DCIA garnishment to collect any debts transferred to it for servicing, including student loans from Education. Thus, because Treasury or other Federal agencies would have power to collect those very student loans at the 15 percent rate, it is illogical to infer any congressional intent to restrict garnishment to the lesser HEA level when those same loans are serviced by Education itself.

The text of the DCIA itself shows that the absence of any language excluding student loans from garnishment under 31 U.S.C. 3720D was no oversight. The DCIA expanded the scope of Federal offsets by amending 31 U.S.C. 3716 to authorize offset by Treasury against such Federal payments as Social Security benefits, 31 U.S.C. 3716(b)(3), but expressly excluded title IV HEA student assistance payments from offset. 31 U.S.C. 3716(b)(1)(C). That express exclusion of student aid from the DCIA offset provision, contrasted against the absence of any reference to student loans in the DCIA garnishment provision—a provision copied almost verbatim from HEA section 488A—shows that Congress spoke clearly when it meant to exclude student aid from the reach of the DCIA tools, and intended no exclusion of student loans from the DCIA garnishment provision.

In addition to the language of the statute itself, the legislative context of the garnishment provision shows that Congress intended the Department to use this DCIA authority to collect student loans. The subcommittee in which the provision originated understood from testimony before it that the provision would increase Education's authority to 15 percent to garnish

[1] Guarantors are authorized to collect ''the amount owed'' by the defaulter, 20 U.S.C. 1095a(a), which includes that portion of the loan debt not covered by Federal reinsurance, as well as that portion of the recovery that the guarantor is authorized to retain. 20 U.S.C. 1078(c)(1), 1078(c)(6).

debtor wages to collect student loans.[2] Subsequent oversight action by that subcommittee[3] and by the General Accounting Office[4] at the request of the subcommittee demonstrate the subcommittee's expectation, and Education's intention, that Education would implement the DCIA 15 percent wage garnishment authority to collect student loans.

For these reasons, the Department considers unfounded the view that the HEA garnishment authority precludes use of the DCIA garnishment authority to collect student loans.

Changes: None.

Comment: One commenter objected that the explanation for the Department's implementation of DCIA garnishment authority in these regulations left confusion about whether current FFELP regulations, which address garnishment under HEA section 488A by student loan guarantors, will continue to apply to those guarantors, and invited speculation about whether student loan guarantors would continue to garnish to collect debts they held, and if so, whether the HEA, rather than the DCIA, authorized them to do so.

Discussion: The statements made by the Department regarding its intention to use DCIA garnishment authority make no suggestion that the role and authority of student loan guarantors has changed. The HEA expressly authorizes student loan guarantors to collect by garnishment, and nothing in the DCIA expressly or implicitly addresses the authority of guarantors to garnish. Regulations adopted under the Federal Family Education Loan Program (FFELP) at 34 CFR 682.410(b)(9) to implement that authority for guarantors expressly apply to action by FFELP loan guarantors to conduct garnishment under HEA section 488A. Those regulations do not state or imply that they apply to the Department, either when the Department conducted garnishment under HEA section 488A or under any other authority. Because the FFELP regulations in most instances closely track the language of HEA section 488A, the Department, by following the provisions of the statute itself, generally conformed to those regulations. Because the DCIA garnishment provision mirrors HEA section 488A, the Department's reasons for interpreting and implementing several DCIA provisions apply with equal force to identical terms of HEA section 488A, which the Department has authority to interpret. That reasoning therefore helps clarify the intent of identical language found in both statutes. Discussion of the HEA in the explanation for this rule did not suggest that the Department considered student loan guarantors to be authorized to collect under the DCIA authority.

Changes: None.

Computation of Time and System Changes (§ 34.3)

Comment: A commenter objects that adopting definitions of ''day'' and ''business day'' may require modification of current systems for mailings. As an example, the commenter stated that the garnishment order cannot be issued until 30 days after the date of the notice, and the proposed rule provides that if the last day of a period is a Saturday, Sunday, or Federal holiday, the period runs to the next business day. Thus, the rule would be violated if a contractor were to mail a garnishment order exactly 30 days after the date of the notice, if that 30th day fell on a Saturday or Sunday.

Discussion: These rules adopt verbatim the definitions and approach adopted by Treasury in its rule, which mirror rules almost invariably applied in litigation. The only act we take under this rule within a specified number of days after an event or deadline is the issuance of the garnishment order; § 34.4 states that we provide notice of the proposed garnishment ''at least'' 30 days before we begin garnishment, and § 34.18(a)(1) provides that we issue a garnishment order ''within 30 days after the deadline for timely requesting a hearing'' or ''within 30 days after a decision.'' The Department is responsible for ensuring that its garnishment activities, and the actions of contractors as needed to support those activities, conform to this rule. We therefore see no basis for the complaint that the rule would require modification of systems used to create and mail the notices and orders Education now uses in its garnishment process.

Changes: None.

Rights in Connection With Garnishment (§ 34.6)

Comment: A commenter objected that the regulations do not articulate specific defenses that may be available to the debtor as grounds for objection to the proposed garnishment, and urged that the rule should mandate use of a form request for hearing of the kind now used by the Department for garnishment action to collect student loans.

Discussion: The Department has used, and will continue to use for collection of student loan debts, a form Request for Hearing that lists potentially available grounds for objection. Because this regulation applies to garnishment to collect any debts held by the Department, the Department did not consider it necessary to adopt any specific provisions applicable only to some debts. The Department has no intention to change this procedure for student loans. However, neither the statute, Treasury regulations, nor due process requires use of a notice that lists potentially available defenses. There is no need to include in these regulations provisions that would imply that such a duty exists.

Changes: None.

Comment: A commenter urged that the regulations should specifically require the Department to give notice that a debtor may object to garnishment on the ground that the debtor was recently reemployed after involuntary separation.

Discussion: The Department agrees that debtors may not be aware that they may object on the grounds that the debtor has been recently been reemployed after involuntary separation from employment. The notice and the request for hearing now used by the Department for HEA garnishment explain this option. Because this objection applies regardless of the nature of the debt to be collected, the Department agrees that the regulations should commit to providing express notice of this option.

Changes: The regulations are modified in § 34.6 to provide that the pre-garnishment notice includes an explanation of the availability of objection on the grounds of recent reemployment after involuntary separation.

Comment: A commenter urged that the regulations should specifically require notice to the debtor that limits on withholding imposed by 15 U.S.C. 1671 *et seq.* may preclude actual withholding of pay.

Discussion: Neither the Department, nor any other garnishing creditor, can reliably determine whether, and for what period, 15 U.S.C. 1673 may bar an employer from honoring a particular garnishment order. That statute imposes the duty on the employer to honor its limits, because only the employer actually knows both the amount of the debtor's disposable pay and the number, amount, relative priority, and duration of all withholding orders that may affect the debtor. The court or administrative body that issues a garnishment order meets its duty under 15 U.S.C. 1673(c) by stating in the garnishment order that the employer must pay no more than the amount permitted by that statute. Standard Form 329B, the garnishment order prescribed for Federal agencies by Treasury, thus directs the employer to pay the lesser of the amount permitted under 15 U.S.C. 1673 or the amount determined by the agency (either 15 percent of disposable pay or a lesser amount).

Therefore, these regulations, consistent with Treasury regulations, do not recognize as a valid defense to a garnishment action a contention by the debtor that the proposed withholding order, if honored by the employer, would result in withholding amounts greater than those permitted by 15 U.S.C. 1673. Because this statute provides no defense to the debtor in a proceeding under this part, it does not affect the debtor's ability to respond in a meaningful manner in the proposed garnishment. We note that neither 15 U.S.C. 1671 *et seq.*, the garnishment statutes themselves (HEA section 488A or 31

[2] Hearing on H.R. 2234, the Debt Collection Improvement Act of 1995, before the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, 104th Cong., 1st Sess. on H.R. 2234, Sept. 8, 1995 at 70, 159, 253. Moreover, the Congressional Budget Office estimated substantial increased recoveries on defaulted loans from these DCIA proposals. See 142 Cong. Rec. S1825 (Memorandum from John Righter, CBO, to Patrick Windham, Sen. Committee on Commerce, Science, and Transportation, regarding Preliminary scoring of the ''Debt Collection Improvement Act of 1996,'' Chapter 2 of a proposed amendment to H.R. 3019). As explained by cognizant staff, CBO based its estimates on the understanding that Education would use fully these DCIA tools, including garnishment, to collect defaulted student loans.

[3] Hearing on Federal Debt Collection Practices before the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, 105th Cong., 1st Sess., Nov. 12, 1997, at 90, 91.

[4] General Accounting Office: Debt Collection Improvement Act of 1996: Status of Selected Agencies' Implementation of Administrative Wage Garnishment (GAO–02–313).

U.S.C. 3720D), nor Treasury regulations require the creditor who intends to garnish to include in the notice or complaint initiating collection action an explanation of the effect of 15 U.S.C. 1673. There appears to be little value in including an explanation of this statute in the notice, which is intended to explain the debtor's rights in the garnishment proceeding.

Changes: None.

Comment: A commenter stated that the regulations lacked language to mirror the assurance in the preamble that the Department provides hearings even if the request for a hearing is not made timely, and that the regulations should include this assurance.

Discussion: Section 34.8 requires the debtor to make any request for a hearing in writing, regardless of the type of hearing sought. Section 34.11(c)(1) expressly states that we provide a hearing even if that written request for a hearing is untimely. That provision contains the assurance that the commenter describes, and no additional language is needed to ensure that right.

Changes: None.

Comment: A commenter stated that regulations should require that the Department make available for inspection by the debtor prior to the hearing any evidence on which the Department intends to rely to establish the existence and amount of the debt.

Discussion: The proposed rule, in §§ 34.5 and 34.6(a), stated that the Department would explain in the pre-garnishment notice that the debtor may inspect and copy records regarding the debt, and in § 34.14(a)(2) further provided that the Department would, on request, make available to the debtor, as part of the hearing process, the evidence which we believe establishes the existence and amount of the debt. These provisions ensure that the debtor has an opportunity to examine the evidence on which the Department's claim rests, in a timely manner, that permits the debtor effectively to respond with evidence and argument before a decision is issued. No change is needed.

Changes: None.

Conditions for an Oral Hearing (§ 34.9)

Comment: A commenter objected to the requirement that the objecting debtor who seeks an oral hearing must state reasons why the objection cannot be satisfactorily reviewed based on the records, including any material provided by the debtor. The commenter objected that this requirement places an unfair burden on borrowers, many of whom may be low-income or unsophisticated.

Discussion: By requiring the debtor to show that an oral hearing is actually needed to resolve the disputed facts, the regulations adopt the same approach used in judicial proceedings, the paradigm of due process. Courts routinely dispose of defenses—including those raised by pro se or unsophisticated defendants—through summary judgment rulings, and that disposition meets constitutional due process standards. The Department has limited resources available to conduct oral hearings; published statistics show that the Department received approximately 9000 requests for hearings in its HEA garnishment actions in FY 2000. General Accounting Office: Debt Collection Improvement Act of 1996: Status of Selected Agencies' Implementation of Administrative Wage Garnishment (GAO–02–313) p. 16. Limitations on resources do not warrant curtailing the rights of debtors, but do militate in favor of the Department, like Federal courts exercising summary judgment authority, avoiding unnecessary hearings.

Consistent with Treasury regulations applicable to offset proceedings, 31 CFR 901.3(e), and to DCIA garnishment actions, 31 CFR 285.11(e), the Department in these regulations simply requires the debtor who seeks an oral hearing to show a good reason why we cannot resolve the disputed issues by reviewing the debt records. This is a common-sense standard that we have generously applied for years in Federal offset proceedings. The Department sees no readily articulated and sensible lesser standard, and no reason to commit in these regulations to provide an oral hearing on request regardless of the nature of the objection or the kind of evidence available.

Proposed § 34.10(a) stated that a paper hearing would be held upon request, but inadvertently omitted the word ''or'' before stating that paper hearings would be provided if we conclude that we can resolve the issues raised by an objection without an oral hearing.

Changes: Section 34.10(a) of the proposed rule is revised to state that we provide a paper hearing upon request by the debtor or if an oral hearing was requested but we determine that we can resolve the issues raised by the objection through a review of the written record regarding the debt.

Comment: A commenter urged that, for in-person or telephone hearings, the regulations be revised to state that the Department must send a copy of the hearing file to the debtor prior to the hearing.

Discussion: The Department has used, and will continue to use, a pre-garnishment notice that encourages the debtor to request copies of the records that pertain to the debt to be collected by garnishment, and to do so before the hearing, and indeed before the submission of the actual objection to the proposed garnishment. The proposed rule in § 34.5(c)(1) provides that the Department makes these records available on request. If the debtor does not choose to request and review these records, we see no need to incur the expense of sending the records to the debtor.

Changes: None.

Conduct of Hearings (§ 34.13)

Comment: One commenter disagreed with the statement in the preamble that contractors cannot rule on debtor objections. The commenter considered the statement that this activity was an inherently governmental function to imply that student loan guarantors could not use independent hearing officials, including administrative law judges and other parties, whom they retain by contract.

Discussion: The Department intended no inference that student loan guarantors could not use contracts to retain independent hearing officials. HEA section 488A requires student loan guarantors to appoint administrative law judges or to retain independent hearing officials, not under the supervision or control of the guarantor, to adjudicate debtor objections to the proposed garnishment; that retainer agreement will obviously be embodied in a contract with the hearing official. As Treasury stated in promulgating controlling regulations, Federal agencies ''may not contract out 'inherently governmental functions,' . . . [but] contractors can[ ] assist agencies'' by mailing notices, orders authorized by the agency, receiving documents from debtors and employers, and arranging repayment agreements approved by the agency. 63 FR 25137. Unlike these supporting functions, adjudication of debtor disputes to the compulsory taking of a portion of their wages by garnishment is an inherently governmental function. The Department therefore cannot use contractors to decide debtor objections. The Department recognizes that the HEA requires guarantors to use individuals, including administrative law judges, who are independent of the guarantor to perform this adjudication function. We fully agree that guarantors can arrange for these services by contracts.

Changes: None.

Comment: One commenter agreed with the statement that only qualified employees of the Department may conduct hearings, but objected to the statement that the Department may use contracted services to analyze debtor objections and propose appropriate findings to those objections. The commenter requested that the Department clarify that any findings proposed by contractors are not final, and that Department hearing officials must exercise independent judgment and provide independent rationales for decisions. The commenter further urged that the regulations bar use of employees of collection agencies or other agencies collecting debts on behalf of the Department to analyze objections. The commenter urged that contractors receive specific training on borrower defenses and other critical hearing procedures.

Discussion: The Department agrees with the commenter that Department contractors cannot conduct hearings or rule on objections to garnishment, because those are inherently governmental functions. As discussed earlier, HEA section 488A expressly requires guarantors to use independent hearing officials not under the control of the guarantor to judge debtor objections to garnishment. In contrast, both HEA section 488A and 31 U.S.C. 3720D direct the Department itself to provide a hearing and decide debtor objections. The Department cannot, therefore, delegate this duty to a contractor. This does not, however, preclude use of contractors to analyze debtor objections and propose resolutions on those objections.

Department officials must therefore consider the objections raised by each debtor, and must issue a decision on those objections. Unless and until a Department official makes findings and issues a decision, there is no ruling on a debtor's objections.

The Department agrees that contractors used to prepare recommendations should be trained to properly analyze debtor objections. However, because contractor analyses of those objections are clearly no more than recommendations to Department staff and have no binding effect whatever on the debtor, we see no need to include language in the regulations to characterize contractor analyses.

Debtors have the right, under these regulations, to avoid garnishment by entering a voluntary repayment agreement. The Department uses its collection contractors to negotiate repayment terms with those debtors sent notice of garnishment who wish to repay voluntarily. Collection contractors have a financial interest in recovery, whether by garnishment or by voluntary payment, and the Department does not use them to prepare recommended analysis for a hearing on any objection, including hardship objections. These regulations ensure a hearing by a designated Department official for any debtor who does not agree to repay voluntarily and has requested a hearing.

Changes: None.

Comment: A commenter opined that the regulations should adopt guidelines and training procedures for any Department staff designated to conduct hearings of debtor objections. The commenter urged that the regulations should require the Department to provide debtors a list of hearing officials available for review of their objections so that they may object to those they consider unqualified or biased.

Discussion: Any decision issued by the Department on debtor objections to garnishment is subject to judicial review under Administrative Procedure Act (APA). The Department has a strong interest in seeing that Department staff who conduct hearings do so in conformance with applicable substantive and procedural law. Therefore, the Department sees little value in adding generalized language to this part that would purport to govern its own internal training procedures.

The commenter points to no administrative or judicial tribunal that allows debtors to select the individual to hear their cases, and shows no good reason to adopt that course in this part. The commenter urged that this would permit a debtor to reject a particular individual who the debtor considers biased against the debtor. A debtor who objects to a hearing official as biased, can object as part of the hearing process to that individual serving as hearing official.[5] Hearings under this part are not subject to 5 U.S.C. 556, which requires the agency to consider and include in the administrative record its ruling on any objection to a proposed hearing official. However, the Department must meet that test, because it must consider and rule on any objection raised by the debtor, including an objection that the hearing official is biased. That determination, and any claim that a decision was the result of bias by the hearing official, may be tested on judicial review.

No Department hearing official benefits financially from the outcome of a hearing, and Federal ethics rules prohibit a hearing official from participating in a matter in which the individual has a financial interest. 5 CFR 2635.402(a). The Department therefore sees no need to add provisions to these regulations offering debtors a choice of hearing officials as a remedy for speculation that some Department official may harbor bias against a particular debtor.

Changes: None.

Content of Decision; Basis of Decision on Evidence Considered at Hearing (§ 34.17)

Comment: A commenter stated that regulations should require that hearing decisions be based only on evidence presented at the hearing and should clearly state the grounds for denial of an objection.

Discussion. Section 34.17 of the proposed rule provided that the decision would include the hearing official's conclusions and reasoning for each objection presented. We agree that the decision must rest on evidence presented in the hearing, but that hearing process is informal and may extend beyond the actual oral hearing. The regulations do not bar debtors from presenting in oral hearings objections not raised in the request for hearing, and do not require debtors who seek oral hearings to disclose all the evidence on which they will rely to support an objection. Because new objections and evidence first presented by the debtor during an oral hearing may require the Department to obtain further evidence in order to evaluate, the hearing official may leave the record open both for the Department and for the debtor. We may need to obtain additional evidence to respond to objections and evidence submitted by a debtor in either an oral or paper hearing.

To ensure that evidence we may obtain after the notice is sent is fairly considered in the hearing process, the debtor must have an opportunity to examine and respond to that evidence before the hearing official makes his or her decision. Therefore, if we intend to consider evidence that was not included in our records of the debt that were available for inspection prior to the hearing, the hearing official will consider that evidence only after we notify the debtor, make that evidence available to the debtor, and provide a reasonable period for rebuttal evidence and argument by the debtor.

The proposed regulations did not address the situation in which the debtor learns after filing the request for hearing that specific relevant evidence is available, and wishes to submit that evidence and have it considered in the proceeding. We believe that the debtor should have the opportunity to do so, if that evidence can be promptly acquired and produced. To ensure that this opportunity does not unduly delay completion of the hearing and issuance of the decision, it is reasonable to expect the debtor to make a specific request that the record be held open for consideration of such evidence, and to describe in that request what the evidence is, and why it is relevant.

The proposed regulations did not address situations in which a debtor requests access to records, and then seeks to submit evidence and objection based on a review of our records of the debt, or seeks—but is denied—an oral hearing at which he or she would offer evidence and objections. Department regulations for the Treasury Offset Program assure a debtor who seeks access to Department debt records with reasonable diligence—within 20 days of the date of the notice of proposed offset—an extended deadline for presenting evidence and argument opposing the offset. 34 CFR 30.33(d). A similar assurance is appropriate in these proceedings. Finally, the regulations can clarify that a debtor who intended to present evidence and objection at an oral hearing should have an opportunity to submit both in written form if that request for an oral hearing is denied.

The time provided for submission of evidence and objections not included in the request for hearing may vary depending on the situation. We believe that this period should ordinarily be at least seven business days, but could in particular circumstances be shorter, or, as resources may permit, longer. In any event, the particular deadline applicable in each situation should be communicated to the debtor.

Changes: Section 34.17 is modified to provide that the decision rests on evidence in the hearing record, and includes a description of the evidence considered in making that decision. Section 34.13 is modified to add a new paragraph (d) to state the instances in which the hearing official will accept evidence and argument not included in the request for hearing or presented during an oral hearing. Section 34.13(d)(4)(i) provides that if the debtor requests access to records within 20 days of the date of the notice, the debtor may submit evidence and objection for a limited time after we provide the requested records. Section 34.13(d)(4)(ii) and (c) provide that if we obtain and intend to have considered in the hearing process evidence that was not included in the records that were available for inspection by the debtor when notice was sent, we first notify the debtor regarding the new evidence, make this evidence available to the debtor, and provide a reasonable period for rebuttal evidence and argument. Section 34.13(d)(4)(iii) provides for a brief extension of time, upon request, for a debtor to submit specifically-identified evidence not previously presented, and to raise an objection based on that evidence. Section 34.13(d)(4)(iv) provides an opportunity to submit evidence and argument after a request for an oral hearing is denied.

Comment: A commenter urged that the regulations require that information about reconsideration and appeal rights be included in the decision, and that this information be displayed in the decision in large bold letters.

Discussion: The regulations now state that the garnishment hearing decision is final agency action for purposes of the judicial review under the APA. We have no administrative appeal procedures for garnishment decisions, and therefore no administrative appeal rights to explain in the

[5] Grounds for disqualification in proceedings under this part would include those applicable to Federal court proceedings; as pertinent here, Federal law requires disqualification of a judge in a Federal court proceeding who has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts. 28 U.S.C. 455(b)(1).

decision. We currently state in a garnishment decision that the debtor may contest the ruling by filing suit in Federal district court and we expect to continue to do so. These regulations do create reconsideration rights, and we agree that the decision offers a useful vehicle for presenting those rights to the debtor.

Changes: Section 34.17(a) is modified to provide that the decision includes an explanation of reconsideration rights available to the debtor.

Comment: A commenter believed that we should state that the position taken in the proposed rule regarding the effect of a failure to issue a decision within 60 days of an untimely request for a hearing applies as well to garnishment action by guarantors under the HEA.

Discussion: We stated in the preamble that the statutory requirement that a hearing decision be issued within 60 days of the debtor's request does no more than require the garnishing party to suspend any outstanding garnishment order if a hearing decision is not issued within 60 days of the debtor's request, but does not bar resumption of garnishment, or, if an order has not been issued, issuance of the order, after an adverse hearing decision is issued. As explained there, this conclusion follows from well-established case law addressing the effect of statutory deadlines on agency action. *United States* v. *James Daniel Good Real Property,* 510 U.S. 43, 63 (1993); *United States* v. *Montalvo-Murillo,* 495 U.S. 711 (1990); *Brock* v. *Pierce County,* 476 U.S. 253 (1986). Pursuant to the principle articulated in these rulings, failure by a guarantor to meet the HEA 60-day decision requirement, like a failure to meet the same duty under the DCIA addressed in these rules, does no more than suspend the garnishor's right to issue or continue in effect an existing garnishment order.

Changes: None

Financial Hardship; Reconsideration (§§ 34.24, 34.25)

Comment: A commenter stated that provisions regarding the right to claim financial hardship were inconsistent and should be clarified to allow the debtor to raise hardship at any time.

Discussion: The regulations provide that the debtor may object to garnishment on financial hardship grounds at any time, but that the Department in general commits to provide a hearing on a hardship objection no earlier than six months after we issue a garnishment order. The Department recognizes that in some instances, financial circumstances may change substantially within a relatively short time, so that a debtor not faced with hardship at the time of the notice or hearing may suffer financial setbacks before six months of garnishment have been completed. The regulations therefore provide that the Department will consider a hardship objection raised within that six-month period if in the judgment of the Department, the debtor shows in the request for review that his or her financial circumstances have substantially worsened after the notice of proposed garnishment on account of an event such as disability, divorce, or catastrophic illness.

Section 34.7 of the proposed regulations stated that we provided no hearing regarding objection to the rate or amount of withholding on a new garnishment action if, within the past 12 months, we had begun garnishment proceedings and determined in those proceedings an appropriate withholding amount, either by decision or by terms of voluntary agreement. This section applies to those circumstances in which we start garnishment to collect a different debt than that which we have already issued a garnishment order, or we start garnishment action to enforce a debt after the debtor breached an agreement to repay that debt after we had given notice of intent to collect that debt by garnishment. In both voluntary repayment agreements and hardship determinations, the Department typically states that the determination is effective for a period of six months, after which the debtor must demonstrate that he or she cannot pay more than the installment amount agreed to or the withholding rate determined to be appropriate. The 12-month period in proposed § 34.7(b) would have been inconsistent with this practice and with the general commitment in proposed § 34.24(c)(1) to consider a hardship objection within six months after the garnishment took effect.

Changes. Section 34.7(b) is revised first to state that a hearing is available to contest the amount or rate of a proposed garnishment only if the rate or amount there proposed exceeds the rate or amount we had agreed to within the preceding six months in an agreement resolving a prior garnishment proposal. Second, the same provision is revised to remove the restriction of hardship objection where a hearing decision within the preceding 12 months had set the withholding rate or amount.

Comment: A commenter objected that the grounds for hardship should not be compared to the grounds for undue hardship discharge of student loans in bankruptcy. The commenter disagrees that the case law interpreting the undue hardship requirement provides useful guidance, because a hardship determination under this rule is binding for six months, while a bankruptcy hardship determination in bankruptcy is permanent and takes into account the expected long-term financial difficulties of the debtor.

Discussion: The commenter suggests that the degree of financial hardship that merits a financial hardship under this rule differs from, and is less than, the kind of financial hardship needed to support a claim of undue hardship in bankruptcy. The observation is accurate, because these regulations measure hardship using the national standards, which compare the debtor's expenses to the average amounts incurred by families of similar size and income, while bankruptcy hardship analysis compares the debtor's expenses to those needed to maintain what case law refers to as a ''minimal standard of living.'' *Brunner* v. *N.Y. Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2nd Cir. 1987). The amounts spent for living expenses by peers of the debtor will in many instances significantly exceed those justifiable for a minimal standard of living.[6]

Under these regulations, the debtor bears the burden of proving the necessity of any amounts claimed in excess of the average amounts spent by his or her peers. The debtor may contend that above-average expenses are needed for housing costs, retirement savings, tuition for private schools, charitable contributions, vehicles, utilities, and telephone charges which the debtor now incurs. Bankruptcy courts routinely address these claims in evaluating undue hardship claims; that case law can provide guidance in considering whether a debtor carries his or her burden under these regulations of proving that above-average expenses are necessary.

Changes: None.

Comment: A commenter urged that the Department include with the notice of proposed garnishment a separate form for debtors to use to claim financial hardship, which would explain the grounds for a hardship claim and how to obtain a hearing on the objection.

Discussion: The notice currently used by the Department, and that which the Department intends to use for garnishment under these regulations, explains the debtor's right to contest the proposed garnishment on both substantive and hardship grounds. The Department may modify the format of the notice as experience demonstrates that particular changes are useful.

The Department currently sends financial statement forms to those debtors who state on their request for hearing that they intend to object on hardship grounds. The overwhelming majority of objections to proposed garnishments that the Department now receives are based on financial hardship. The Department agrees that a self-explanatory form has proven very useful to encourage debtors to present their financial circumstances in a way that makes analysis of the objection by the Department easier, but sees no reason to commit at this point in regulations to a particular form, or to a particular method of providing that form to debtors.

Changes: None.

Comment: A commenter asked that we state that positions taken in the proposed rule regarding the burden of proof of hardship and the need to present that claim by completing a financial statement disclosing the income and assets available to meet the needs of the debtor and his or her family, apply to garnishment proceedings by guaranty agencies under HEA section 488A.

Discussion. Because the debtor alone has evidence needed to prove financial hardship, we believe that financial hardship is like an affirmative defense to a claim, such as repayment. As a matter of common sense and common law, the person who claims an affirmative defense bears the burden of proving that defense by a preponderance of the credible evidence. We provide a financial statement form for debtors who claim hardship to complete, and we intend to

[6] The *Brunner* test includes two other steps not relevant to hardship claims in garnishment proceedings.

continue to do so. The rule itself does not bar consideration of evidence presented in other forms.

Fair consideration of hardship claims depends on full and accurate disclosure of the income and assets available to meet the needs of the debtor and his or her family. Hearing officials should reject as unsupported those hardship claims by debtors who fail to disclose completely and—for written records hearings—in a form that bears some indicia of trustworthiness, such as a statement or affirmation that the disclosure is made under penalty of perjury.

Independent hearing officials conducting hearings under HEA section 488A must rule in accordance with applicable law, including Department program regulations.

FFELP regulations do not contain any provision that expressly allocates the burden of proof of financial hardship. Section 34.21(d) does not bind either debtors whose loans are collected by guarantors, or hearing officials used by the guarantors, but rests on principles that courts generally apply to allocating the burden of proof between litigants. Those principles, as well as common sense, should persuade FFELP hearing officials to place on the debtor the burden of proof and persuasion of a hardship claim.

As noted above, § 34.21 does not require the debtor to use a particular financial statement form to prove hardship in garnishment proceedings under these regulations; a guarantor may adopt a rule that requires debtors to use a particular form to prove hardship in its garnishment proceedings.

Changes: None.

Comment: A commenter urged that we state that the National Standards adopted by the Internal Revenue Service (IRS) also apply to evaluation of hardship claims raised in garnishment proceedings under the HEA.

Discussion: As discussed in response to other comments, these rules apply only to debtors subject to Department garnishment action under the DCIA, and these regulations do not bind debtors in garnishment actions under the HEA by either the Department or guarantors. However, we strongly believe that the Standards provide unique and well-founded, empirically-based benchmarks of amounts needed for basic living expenses. These regulations stipulate that amounts spent up to these benchmarks are reasonable and necessary, and create an explicit rebuttable presumption that amounts claimed in excess of these benchmarks are not necessary.

Under both the HEA and the DCIA, as discussed in response to other comments, the debtor bears the burden of proof and burden of persuasion that particular expense amounts are necessary. In absence of a FFELP regulation that expressly adopts the Standards, a hearing official could conceivably accept an expense claim as necessary based on the official's own judgment, even though the claimed amount exceeded the Standards and the debtor presented no evidence to support the need for that amount. We strongly believe that such a judgment would not be well-founded. The Department believes that hearing officials in HEA garnishment proceedings should accept the Standards as persuasive evidence of the amounts reasonable and necessary, and should require any debtor who claims larger amounts are needed to support that contention by persuasive evidence. If debtors in HEA garnishment proceedings are properly held to their burden of proof, there should be little practical difference between the presumption created in these regulations and the use of the Standards as reliable empiric evidence of reasonableness.

Changes: None.

Amount Withheld Under Garnishment Order (§ 34.19)

Comment: A commenter objected to the proposal that the Department might issue multiple garnishment orders under this rule regarding a debtor who owes several debts to the Department. The commenter believes that neither the DCIA nor the HEA allows multiple garnishment orders, and believes that Congress intended to limit garnishment to 10 percent of disposable pay.

Discussion: Treasury rules interpret the DCIA to allow a Federal agency that holds several claims against a debtor to issue more than one garnishment order to recover those claims. 31 CFR 285.11(i)(3)(iii). However, the comment is well taken that the total amount that may be withheld pursuant to orders issued by a single agency cannot exceed 15 percent of the debtor's disposable pay. 31 CFR 285.11(i)(2), (3)(iii).

Changes: The regulations are modified in § 34.20(b) to state that the aggregate amount that may be withheld by an employer pursuant to one or more orders we issue may not exceed 15 percent of the debtor's disposable pay.

Comment: A commenter urged that § 34.19 be changed to state that the amount required to be withheld by the employer be 15 percent of disposable pay, rather than the amount directed in the garnishment order. The commenter believed this change to be needed to make the employer and debtor both aware of their potential liability if they do not enter into voluntary repayment of the debt. The commenter also believed that the change to the proposed language would help the employer validate that the amount demanded in the order is accurate.

Discussion: Section 34.19 describes the amount that the employer must withhold pursuant to the garnishment order. That order is sent to the employer, not the debtor, and therefore has no effect on the debtor's ability to repay voluntarily. The notice, on the other hand, is sent to the debtor and warns of the potential garnishment of 15 percent of disposable pay; the notice is intended to motivate the debtor to repay voluntarily. If we determine that withholding at that rate would cause hardship, but that withholding a smaller amount would not do so, we must order the employer to withhold that lesser amount. HEA section 488A similarly requires guarantors, and the Department when garnishing under that HEA authority, to order withholding of a lesser amount if the debtor proves that withholding ten percent would cause hardship. In any case, the order must always state clearly the amount to be withheld, whether as a percentage of disposable pay or as a specific amount. The employer has no standing to scrutinize or object to a garnishment order, and has no need to be assured that the amount claimed is accurate. That duty lies with the government or the guarantor; the employer is entitled to rely on the garnishing creditor's representation that the debt is owed, and no change is needed to facilitate a review that the employer need not conduct.

Changes: None.

Comment: A commenter urged that we state that the position taken in § 34.24(c)(1) of the proposed rule, that we will consider or reconsider an objection on hardship grounds only after an order has been outstanding for six months, applies to garnishment action by student loan guarantors under the HEA.

Discussion: These regulations allow the debtor to raise or renew a hardship claim after an order has been outstanding for six months, but also allow consideration of a hardship claim earlier if the debtor demonstrates substantially worsened financial circumstances. 34 CFR 34.24(c)(2). This standard provides a reasonable balance between the debtor's interest in having potentially changed circumstances promptly evaluated and the government's need for finality for its determinations. This regulation is a procedural rule binding only in garnishment proceedings under this part. In the absence of a comparable FFELP regulation, however, whether and when a guarantor provides for reconsideration of a hardship claim remains a case-by-case determination.

Changes: None.

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