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DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 682, and 685

RIN 1840-AD19

[Docket ID ED-2015-OPE-0103]

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College And Higher Education Grant Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final rule; notification of partial delay of effective dates.

SUMMARY: On November 1, 2016, the Department of Education published final regulations entitled Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program (the final regulations) in the Federal Register. On May 24, 2017, the California Association of Private Postsecondary Schools (CAPPS) filed a Complaint and Prayer for Declaratory and Injunctive Relief in the United States District Court for the District of Columbia (Court). In light of the existence and potential consequences of the

pending litigation, the Department has concluded that justice requires it to postpone certain provisions of the final regulations pursuant to the Administrative Procedure Act (APA), pending judicial review. The provisions to be postponed are listed in detail in the SUPPLEMENTARY INFORMATION section of this document.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date for the amendments to or additions of: §§ 668.14; 668.41; 668.71; 668.90; 668.93; 668.171; 668.175 (c) and (d) and (f) and (h); Appendix C to Subpart L of Part 668; 674.33; 682.202; 682.211; 682.402(d)(3), (d)(6)(ii)(B)(1) and (2), (d)(6)(ii)(F) introductory text, (d)(6)(ii)(F)(5), (d)(6)(ii)(G), (d)(6)(ii)(H) through (K), (d)(7)(ii) and (iii), (d)(8), and (e)(6)(iii); 682.405(b)(4)(ii); 682.410; 685.200; 685.205; 685.206; 685,212(k); 685.214; 685.215; 685.222; Appendix A to Subpart B of Part 685; and 685.308, published November 1, 2016, at 81 FR 75926, is delayed until further notice .

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SUPPLEMENTARY INFORMATION: On November 1, 2016, the Department published the final regulations in the *Federal Register* (81 FR 75296), and the final regulations are scheduled to take effect on July 1, 2017. The final regulations made several changes to the Department's student financial assistance regulations. Those changes include a new Federal standard and process for determining whether a borrower has a defense to repayment on a loan based on an act or omission of a school. The final regulations also prohibit schools from using certain contractual provisions regarding dispute resolution processes in their agreements with students, including predispute arbitration provisions and class action waivers. The final regulations further impose new financial responsibility standards and require proprietary schools to make certain disclosures regarding the student loan repayment rates of their graduates.

On May 24, 2017, CAPPS filed its complaint with the Court challenging the final regulations (*California Association of Private Postsecondary Schools v. DeVos*, No. 1:17-cv-00999 (D.D.C. May 24, 2017)), in particular those provisions of the regulations pertaining to the standard and process for the Department to adjudicate borrower defense claims, requirements

pertaining to financial responsibility standards, provisions requiring proprietary institutions to provide warnings about their students' loan repayment rates, and prohibitions against institutions including arbitration or class action waivers in their agreements with students. CAPPS has also filed a motion for preliminary injunction asking the Court to restrain the Department from implementing or enforcing the arbitration and class action waiver prohibitions.

Under section 705 of the APA, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. 705. In light of the pending litigation, and for the following reasons, the Department has concluded that justice requires it to postpone the effectiveness of certain provisions of the final regulations until the judicial challenges to the final regulations are resolved.

First, the postponement will preserve the regulatory status quo while the litigation is pending and the Court decides whether to uphold the final regulations. The plaintiffs have raised serious questions concerning the validity of certain provisions of the final regulations and have identified substantial injuries that could result if the final regulations go into effect before those questions are resolved. Given the

legal uncertainty, maintaining the status quo is critical. For instance, if the final regulations are not postponed, institutions participating in the programs under title IV of the Higher Education Act of 1965, as amended (HEA), would be required, as of July 1, 2017, to modify their contracts in accordance with the arbitration and class action waiver regulations, which may be contrary to their interests. Postponing the final regulations will avoid the cost that institutions would incur in making these changes while the regulation is subject to judicial review. Additionally, if the final regulations are not postponed, institutions would be subject to financial responsibility trigger provisions that could impose substantial costs. Meanwhile, the postponement of the final regulations will not prevent student borrowers from obtaining relief because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement.

Second, the United States will suffer no significant harm from postponing the effectiveness of the final regulations while the litigation is pending. As the Department stated in the Net Budget Impacts section of the Regulatory Impact Analysis of the final regulations, the provisions with the greatest impact on the net budget impact of the final regulations are those related to the discharge of borrowers' loans, especially the changes to

borrower defense and closed school discharges. The final regulations were estimated to have a net budget impact in costs over the 2016-2026 loan cohorts of \$16.6 billion in the primary estimate scenario, including a cost of \$381 million for cohorts 2014-2016 attributable to the regulations providing for a three-year automatic closed school discharge. Postponing the effectiveness of the final regulations will help to avoid these significant costs to the Federal government and ultimately the Federal taxpayer.

Separately, the Department is announcing its plan to review and revise the regulations through the negotiated rulemaking process required under section 492 of the HEA. The postponement will allow the Department to consider and conduct a rulemaking process to review and revise the final regulations and ensures regulated parties will not incur costs that could be eliminated under any future regulations the Department promulgates on these matters.

Based upon the foregoing, the Department has determined that it is necessary to postpone the effectiveness of the revisions to or additions of the following provisions of the final regulations:

- §668.14(b) (30), (31), and (32) Program participation agreement.
- §668.41(h) and (i) Reporting and disclosure of information.

- §668.71(c) Scope and special definitions.
- §668.90(a)(3) Initial and final decisions.
- §668.93(h), (i), and (j) Limitation.
- §668.171 General.
- §668.175(c), (d), (f), and (h) Alternative standards and requirements.
- Part 668 subpart L, Appendix C.
- §674.33(g)(3) and (g)(8) Repayment.
- §682.202(b)(1) Permissible charges by lenders to borrowers.
- §682.211(i)(7) Forbearance.
- §682.402(d)(3), (d)(6)(ii)(B)(1) and (2), (d)(6)(ii)(F) introductory text, (d)(6)(ii)(F)(5), (d)(6)(ii)(G), (d)(6)(ii)(H) through (K), (d)(7)(ii) and (iii), (d)(8), and (e)(6)(iii) Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.
- §682.405(b)(4)(ii) Loan rehabilitation agreement.
- §682.410(b)(4) and (b)(6)(viii) Fiscal, administrative, and enforcement requirements.
- §685.200(f)(3)(v) and (f)(4)(iii) Borrower eligibility.
- §685.205(b)(6) Forbearance.
- §685.206(c) Borrower responsibilities and defenses.
- §685.212(k) Discharge of a loan obligation.
- §685.214(c)(2), (f)(4) through (7) Closed school discharge.

- §685.215(a)(1), (c)(1) through (c)(8), and (d) Discharge for false certification of student eligibility or unauthorized payment.
- §685.222 Borrower defenses.
- Part 685 subpart B, Appendix A Examples of borrower relief.
- §685.300(b)(11), (b)(12), and (d) through (i) Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.
- §685.308(a) Remedial actions.

We do not intend to postpone the effectiveness of the regulatory provisions published in 81 FR 75926 which: (1) expand the types of documentation that may be used for the granting of a discharge based on the death of the borrower; (2) amend the regulations governing the consolidation of Nursing Student Loans and Nurse Faculty Loans so that they align with the statutory requirements of section 428C(a)(4)(E) of the HEA; (3) address severability; and (4) make technical corrections. As established in 81 FR 75926, §§682.211(i)(7) and 682.410(b)(6)(viii) remain designated for early implementation, at the discretion of each lender or guaranty agency.

In sum, in light of the existence and potential consequences of the pending litigation, and given the potentially significant harm that could result if the status quo is altered by the implementation of the final regulations on



July 1, 2017, the Department has determined that the public interest and justice require postponing the effectiveness of the sections of the final regulations specified herein until the matters raised in the litigation are resolved.

In order to accomplish a postponement of certain sections of the final regulations under section 705 of the APA, the Department is delaying the effective date of the sections specified in the DATES and SUPPLEMENTARY INFORMATION sections of this document pursuant to the Federal Register Act and its implementing regulations.

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List of Subjects

34 CFR Part 668

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

34 CFR Part 674

Loan programs—education; Reporting and recordkeeping; Student aid.

34 CFR Parts 682 and 685

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

Dated: June 13, 2017

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Betsy DeVos,  
Secretary of Education.

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