

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.<sup>6</sup>

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

<sup>6</sup> The *Brunner* test includes two other steps not relevant to hardship claims in garnishment proceedings.