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DEPARTMENT OF EDUCATION

34 CFR Part 36

RIN 1801-AA12

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Department of Education (Department) issues these final regulations to adjust the Department's civil monetary penalties (CMPs) for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990.

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

FOR FURTHER INFORMATION CONTACT: Peter Wathen-Dunn, Office of the General Counsel, U.S. Department of Education, 400 Maryland Avenue, SW., room 6E207, Washington, DC 20202-2241. Telephone: (202) 401-8300.

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SUPPLEMENTARY INFORMATION:

Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. 2461 note) provides for the regular evaluation of civil monetary penalties (CMPs) to ensure that they continue to maintain their deterrent value. The Inflation Adjustment Act requires that each agency issue regulations to adjust its CMPs beginning in 1996 and at least every four years thereafter. The Department published its most recent cost adjustment to each CMP in the Federal Register on January 4, 2005 (70 FR 297), and those adjustments became effective on the date of publication. The Department previously adjusted its CMPs in 2002. It has been more than four years since the last adjustment. Accordingly, the Department is now making the necessary adjustments.

A CMP is defined in the statute as any penalty, fine, or other sanction that is (1) for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or

enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

The formula for the amount of a CMP inflation adjustment is prescribed by law and is not subject to the exercise of discretion by the Secretary of Education (Secretary). The adjustment reflects the percentage increase in the Consumer Price Index for all urban consumers (CPI-U) published by the Department of Labor from June of the calendar year in which the amount was last adjusted, to June of the calendar year preceding the adjustment. The Inflation Adjustment Act also requires agencies to round the inflation adjustment based on the amount of the penalty when last adjusted.

- For penalties greater than \$100 but less than or equal to \$1,000, the adjusted amount must be rounded to the nearest \$100.

- For penalties greater than \$1,000 but less than or equal to \$10,000, the adjusted amount must be rounded to the nearest \$1,000.

- For penalties greater than \$10,000 but less than or equal to \$100,000, the adjusted amount must be rounded to the nearest \$5,000.

- For penalties greater than \$100,000 but less than or equal to \$200,000, the adjusted amount must be rounded to the nearest \$10,000.

- For penalties greater than \$200,000, the adjusted amount must be rounded to the nearest \$25,000.

The Department's Civil Monetary Penalties

The following analysis calculates new civil monetary penalties for penalty statutes in the order in which they appear in 34 CFR 36.2. The Inflation Adjustment Act provides that adjustments to an agency's CMPs apply only to violations that occur after the effective date of the adjustments. These regulations become effective upon publication in the Federal Register. Therefore, the adjustments made by this amendment to the Department's CMPs apply only to violations that occur after the date these regulations are published in the Federal Register.

Statute: 20 U.S.C. 1015(c)(5).

Current Regulations: The CMP for 20 U.S.C. 1015(c)(5) [Section 131(c)(5) of the Higher Education Act of 1965, as amended (HEA)], as last adjusted in 2005, is a fine of up to \$27,500 for failure by an IHE to provide information on the cost of higher education to the Commissioner of Education Statistics.

New Regulations: The new penalty for this section is \$30,000.

Reason: This CMP was last adjusted in 2005. Therefore, the inflation adjustment is the percentage change in the CPI-U from June 2005 (194.5) through June 2011 (225.722), or 16%. The new penalty is calculated as follows: $\$27,500 \times 16\% = \$4,400$, which increases the penalty, when rounded to the nearest \$5,000, to \$30,000.

Statute: 20 U.S.C. 1027(f)(3) (now 20 U.S.C. 1022d(a)(3)).

Current Regulations: The CMP for 20 U.S.C. 1027(f)(3) [Section 207(f)(3) of the HEA], as last adjusted in 2005, provides for a fine of up to \$27,500 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs.

New Regulations: The new penalty for this section is \$30,000.

Reason: In 2008, Congress amended the HEA, redesignating this CMP as section 205(a)(3) of the HEA (20 U.S.C. 1022d(a)(3)) and setting the fine at \$27,500. Because Congress reauthorized this penalty in 2008, the inflation adjustment for 20 U.S.C. 1022d(a)(3) is the percentage change in the CPI-U from June 2008 (218.815) through June 2011 (225.722), or 3.2%. The new penalty is

calculated as follows: $\$27,500 \times 3.2\% = \880 , which increases the penalty, when rounded to the nearest \$5,000, to \$30,000.

Statute: 20 U.S.C. 1082(g).

Current Regulations: The CMP for 20 U.S.C. 1082(g) [Section 432(g) of the HEA], as last adjusted in 2002, provides for a fine of up to \$27,500 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program.

New Regulation: The new penalty for this section is \$35,000.

Reason: This CMP was last adjusted in 2002. Therefore, the inflation adjustment is the percentage change in the CPI-U from June 2002 (179.9) through June 2011 (225.722), or 25.5%. The new penalty is calculated as follows: $\$27,500 \times 25.5\% = \$7,012.5$, which increases the penalty, when rounded to the nearest \$5,000, to \$35,000.

Statute: 20 U.S.C. 1094(c)(3)(B).

Current Regulations: The CMP for 20 U.S.C. 1094(c)(3)(B) [Section 487(c)(3)(B) of the HEA], as last adjusted in 2002, provides for a fine of up to \$27,500 for an IHE's violation of Title IV of the HEA or its implementing regulations. Title IV authorizes various programs of student financial assistance.

New Regulations: The new penalty for this section is \$35,000.

Reason: This CMP was last adjusted in 2002. Therefore, the inflation adjustment is the percentage change in the CPI-U from June 2002 (179.9) through June 2011 (225.722), or 25.5%. The new penalty is calculated as follows: $\$27,500 \times 25.5\% = \$7,012.5$, which increases the penalty, when rounded to the nearest \$5,000, to \$35,000.

Statute: 20 U.S.C. 1228c(c)(2)(E).

Current Regulations: None.

New Regulations: The new penalty for this section is \$1,100.

Reason: The CMP for 20 U.S.C. 1228c(c)(2)(E) [Section 429 of the General Education Provisions Act] was established in 1994 and has not been adjusted. It provides a penalty of up to \$1,000 for an educational organization's failure to disclose certain information to minor students and their parents.

The Inflation Adjustment Act was passed in 1990 and required agencies to first adjust their CMPs in 1996. Although the percentage change in the CPI-U from June 1994 through June 2011 is greater than 10%, the 1996 statute that amended the Inflation Adjustment Act also limited the first adjustment of a CMP to no more than 10 percent of the

original penalty. Because the Department has never adjusted the CMP for 20 U.S.C. 1228c(c)(2)(E), the Department is limited to a maximum inflation adjustment of 10%, rounded to the nearest \$100. The new penalty is calculated as follows: $\$1,000 \times 10\%$, which increases the penalty, when rounded to the nearest \$100, to \$1,100.

Statute: 31 U.S.C. 1352(c)(1) and (c)(2)(A).

Current Regulations: The CMPs for 31 U.S.C. 1352(c)(1) and (c)(2)(A), as last adjusted in 2002, provide for a fine of \$11,000 to \$110,000 for recipients of Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.

New Regulations: The new penalties for these sections are \$15,000 to \$140,000.

Reason: These CMPs were last adjusted in 2002. Therefore, the inflation adjustment is the percentage change in the CPI-U from June 2002 (179.9) through June 2011 (225.722), or 25.5%. The new penalties are calculated as follows: For the minimum fine of \$11,000, $\$11,000 \times 25.5\% = \$2,805$, which increases the minimum penalty, when rounded to the nearest \$5,000, to \$15,000. For the maximum penalty of \$110,000, $\$110,000 \times 25.5\% = \$28,050$, which

increases the maximum penalty, when rounded to the nearest \$10,000, of \$140,000.

Statute: 31 U.S.C. 3802(a)(1) and (a)(2).

Current Regulations: The CMPs for 31 U.S.C. 3802(a)(1) and (a)(2), as last adjusted in 2002, provide for a fine of up to \$5,500 for false claims and statements made to the Government.

New Regulations: The new penalty for this section is \$7,000.

Reason: This CMP was last adjusted in 2002.

Therefore, the inflation adjustment is the percentage change in the CPI-U from June 2002 (179.9) through June 2011 (225.722), or 25.5%. The new penalty is calculated as follows: $\$5,500 \times 25.5\% = \$1,402$, which increases the penalty, when rounded to the nearest \$1,000, to \$7,000.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a significant regulatory action as an action likely to result in a rule that may-

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities in a material way (also referred to as "economically significant" regulations);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

Based on the number and amount of penalties imposed under the CMPs amended in this final regulation, we have determined that this final regulatory action will have none of the economic impacts described under the Executive order. These final regulations are required by statute, are not at the Secretary's discretion, and, accordingly, do not have any of the policy impacts described under the Executive order. Because this final regulatory action is

not a significant regulatory action, it is not subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or providing information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations as required by statute. The Secretary has no discretion to consider alternative approaches as delineated in the Executive order. Based on this analysis and the reasons stated in the preamble, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

Waiver of Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations.

However, the APA provides that an agency is not required to conduct notice- and-comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B)). There is good cause to waive rulemaking here as unnecessary.

Rulemaking is "unnecessary" when the agency is issuing a minor rule in which the public is not particularly interested. It applies in those situations in which "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947) and South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983).

These regulations merely implement the statutory mandate to adjust CMPs for inflation. The regulations reflect administrative computations performed by the Department as prescribed by the statute and do not establish or affect substantive policy. The Secretary has no discretion in determining the new penalties.

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). Again, because these final regulations merely implement non-discretionary administrative computations, there is good cause to make them effective on the day they are published.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The formula for the amount of the inflation adjustments is prescribed by statute and is not subject to the Secretary's discretion. These CMPs are infrequently imposed by the Secretary, and the regulations do not involve any special considerations that might affect the imposition of CMPs on small entities.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

Based on our own 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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limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number does not apply)

List of Subjects in 34 CFR Part 36

Claims, Fraud, Penalties.

Dated: September 27, 2012

Arne Duncan,
Secretary of
Education.

For the reasons discussed in the preamble, the Secretary amends part 36 in title 34 of the Code of Federal Regulations as follows:

PART 36--ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

1. The authority citation for part 36 is revised to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461 note, unless otherwise noted.

2. The authority citation for §36.1 is revised to read as follows:

§36.2 Purpose.

* * * * *

(Authority: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461 note, unless otherwise noted)

3. Section 36.2 is amended by revising Table I and the authority citation to read as follows:

§36.2 Penalty adjustment.

* * * * *

Table I, Section 36.2.--Civil Monetary Penalty Inflation Adjustments

| Statute | Description | New maximum (and |
|---------|-------------|---------------------|
|---------|-------------|---------------------|

| | | minimum, if applicable) penalty amount |
|--|--|--|
| 20 U.S.C. 1015(c) (5) (Section 131(c) (5) of the Higher Education Act of 1965 (HEA)) | Provides for a fine, as last adjusted, of up to \$27,500 for failure by an institute of higher education to provide information on the cost of higher education to the Commissioner of Education Statistics. | \$30,000 |
| 20 U.S.C. 1022d(a) (3) (Section 205(a) (3) of the HEA) | Provides for a fine, as set by Congress in 2008, of up to \$27,500 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs. | \$30,000 |
| 20 U.S.C. 1082(g) (Section 432(g) of the HEA) | Provides for a civil penalty, as last adjusted, of up to \$27,500 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program. | \$35,000 |
| 20 U.S.C. 1094(c) (3) (B) (Section 487(c) (3) (B) of the HEA) | Provides for a civil penalty, as last adjusted, of up to \$27,500 for an IHE's violation of Title IV of the HEA, which authorizes various programs of student financial assistance. | \$35,000 |
| 20 U.S.C. 1228c(c) (2) (E) (Section 429 of the General Education Provisions Act) | Provides for a civil penalty of up to \$1,000 for an educational organization's failure to disclose certain information to minor students and their parents. | \$1,100 |
| 31 U.S.C. 1352(c) (1) and | Provides for a civil penalty, as last adjusted, of \$11,000 to | \$15,000 to |

| | | |
|-----------------------------------|---|-----------|
| (c) (2) (A) | \$110,000 for recipients of Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts. | \$140,000 |
| 31 U.S.C. 3802(a) (1) and (a) (2) | Provides for a civil penalty, as last adjusted, of up to \$5,500 for false claims and statements made to the Government. | \$7,000 |

(Authority: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461
note, unless otherwise noted)

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