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DEPARTMENT OF EDUCATION

34 CFR Part 690

[Docket ID ED-2012-OPE-0006]

RIN 1840-AD11

Federal Pell Grant Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary adopts as final, without change, the interim final rule published on May 2, 2012, that amended regulations for the Federal Pell Grant program, to prohibit a student from receiving two consecutive Federal Pell Grants in a single award year. The final amendments implement provisions of the Higher Education Act of 1965 (HEA), as amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jacquelyn C. Butler, U.S. Department of Education, Office of Postsecondary Education, 1990 K Street, NW., room 8053, Washington, DC 20006-8542. Telephone: (202) 502-7890.

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Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under FOR FURTHER INFORMATION CONTACT. SUPPLEMENTARY INFORMATION: On May 2, 2012, the Secretary published an interim final rule in the Federal Register (77 FR 25893), corrected on July 11, 2012 (77 FR 40805), implementing provisions of the Higher Education Act of 1965 (HEA), as amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10, §1860(a)(2), 125 Stat. 169-70 (2011).

In the interim final rule, the Secretary--

- Delineated the conditions for calculating a Federal Pell Grant for a payment period (77 FR 25894);
- Removed the provision for awarding Federal Pell Grant payments from two Scheduled Awards (77 FR 25894);
- Specified when an institution may assign a crossover payment period that occurs over two award years (77 FR 25894);
- Specified when an institution may pay a transfer student attending more than one institution during an award year (77 FR 25894); and
- Removed regulations that established procedures for awarding a student his or her second Scheduled Award in an

award year (77 FR 25895).

The interim final rule was effective on the date of publication, May 2, 2012, and the Secretary requested public comment on whether changes to the regulations were warranted. Additionally, the interim final rule was corrected on July 11, 2012 (77 FR 40805). After considering all comments, the Secretary adopts the interim final rule without change. This document contains a discussion of the comments we received.

Analysis of Comments and Changes

In response to the Secretary's invitation, 10 parties submitted comments on the interim final rule.

An analysis of the comments received since publication of the interim final rule follows. We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. Generally, we do not address technical and other minor changes--and suggested changes the law does not authorize the Secretary to make.

General comments.

Comments: Several commenters expressed support for the regulatory changes in the interim final rule. One commenter objected to the Secretary's decision to waive rulemaking. The commenter noted that the public should have the opportunity to comment on proposed regulations through a notice of proposed rulemaking.

Discussion: The Secretary appreciates the commenters' support. We disagree with the comment that these regulations should have been submitted to the public as proposed regulations for notice and comment. As we discussed in the interim final rule, under the Waiver of Rulemaking and Delayed Effective Date section, the Department generally offers interested parties the opportunity to comment on proposed regulations in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 553). 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 procedure thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B)). The Secretary determined that there was good cause to waive rulemaking under the APA because the statutory change to prohibit a student from receiving two Federal Pell Grants in a single award year would have resulted in some students losing their Federal Pell Grant eligibility if we delayed making the regulatory change to amend §690.64 (77 FR 25897). Notice and comment to amend §§690.63, 690.65, and 690.67 was unnecessary because we merely updated these sections to reflect statutory changes in Public Law 112-10 that prohibit a student from receiving two Federal Pell Grants in a single award year.

Changes: None.

Payment Period in Two Award Years (§690.64)

Comments: One commenter asked if, for a crossover payment period, more than six months of a payment period occurs in an award year, must the Federal Pell Grant award be made from that award year. Another commenter thanked the Department for the regulatory change under §690.64(a) and (b), noting that the change would allow an institution to comply with the regulations governing the standards of administrative capability under 34 CFR 668.16 when awarding a Federal Pell Grant.

Discussion: In August 2008, the Higher Education Opportunity Act (HEOA), Public Law 110-315, added section 401(b)(5) to the HEA, and allowed an eligible student to receive two Federal Pell Grant Scheduled Awards during a single award year. Before then, institutions were required to assign a payment period that crossed over two award years to the award year where more than six months were scheduled to occur. With the removal of the two Pell provision from the statute, we did not revert back to the pre-HEOA regulations. Instead, the interim final rule amended §690.64(a)(2) to provide that an institution must determine for each Federal Pell Grant recipient the award year in which the payment period will be placed, giving institutions the ability to assign a crossover payment period in a way

that best meets the needs of its students.

The Secretary agrees with the commenter about the effect of §690.64(a) and (b).

Changes: None.

Transfer Student: Attendance at More Than One Institution During an Award Year (§690.65(c) and (f))

Comments: One commenter requested confirmation on whether the regulations apply to the annual Scheduled Award amount or the amount of the Pell Grant Lifetime Eligibility Used. This commenter also questioned whether a transfer student is required to repay the Federal Pell Grant funds that exceeded his or her Scheduled Federal Pell Grant for the award year. Two commenters were concerned that the change to these regulations would negatively affect transfer students. One commenter noted that students who transfer mid-year to a different school would be harmed by these regulations.

Discussion: The term used throughout the Federal Pell Grant program regulations is "Scheduled Federal Pell Grant" which is the amount of a Federal Pell Grant that is paid to a full-time student for a full academic year. In other publications, e.g., the Federal Student Aid Handbook, we use the term "Scheduled Award" which has the same meaning as "Scheduled Federal Pell Grant." The term "Pell Grant Lifetime Eligibility Used" is the total of each award year's percentage of the student's Scheduled Award that was

disbursed for the student. The Pell Grant Lifetime Eligibility Used is required to comply with the Consolidated Appropriations Act of 2012 (Public Law 112-74). The law included a provision that limits a student's eligibility for Federal Pell Grant funds to a maximum of 12 semesters (or its equivalent).

Because the maximum amount of a Scheduled Federal Pell Grant award a student can receive each year is equal to 100 percent, a student's Pell Grant Lifetime Eligibility Used must not exceed six years or a total of six Scheduled Federal Pell Grants (600 percent).

Section 690.79 provides that a student is liable for any Federal Pell Grant overpayment made to him or her, except if the overpayment occurred because the institution failed to follow the procedures in the Federal Pell Grant program regulations or the Student Assistance General Provisions regulations under 34 CFR part 668, in which case, the institution would be liable. A student is not liable for, and the institution is not required to attempt recovery of or refer to the Secretary, a Federal Pell Grant overpayment if the amount of the overpayment is less than \$25 and is not a remaining balance.

A student who receives a Federal Pell Grant at one institution and then subsequently transfers to a second institution in the same award year may receive a Federal

Pell Grant at the second institution for that portion of the award year in which the student is enrolled and has remaining Federal Pell Grant eligibility at that institution that does not exceed the student's Scheduled Award.

Although the commenter is correct that a transfer student may be negatively affected, e.g., the student will receive only the remaining portion of his or her Scheduled Federal Pell Grant award rather than a full Scheduled Federal Pell Grant award at the second institution, the change in the law prohibits a student from receiving more than one Scheduled Federal Pell Grant award during a single award year.

Changes: None.

Receiving Up to Two Scheduled Awards During a Single Award Year (§690.67)

Comments: Four commenters opposed the removal of the provision that allows an otherwise eligible student to receive a second Federal Pell Grant Scheduled Award in an award year. One commenter noted that with the reduction in Federal Pell Grant funds, students will be limited by the number of classes they may register for, and this may discourage accelerated program completion. Other commenters opined that without the additional Federal Pell Grant funds, students will be forced to incur more loan debt in order to complete their postsecondary education.

Discussion: Section 1860(a)(2) of division B of the

Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Public Law 112-10), repealed section 401(b)(5) of the HEA under which an otherwise eligible student could receive more than one Federal Pell Grant in an award year. While we understand the commenters' concerns, the Secretary does not have the authority to change statutory requirements.

Changes: None.

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 an "economically significant" rule);

(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.

The statutory elimination of the two Pell Grant option as reflected in this regulatory action is economically significant and subject to review by OMB under section 3(f)(1) 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 on 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 provide 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 adopting this interim rule as final without change only after a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis presented in the interim

final rule, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. We discussed the potential costs and benefits of these regulations in the interim final rule. (77 FR 25895).

Waiver of Delayed Effective Dates

The Administrative Procedure Act (APA) 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)). In addition, these final regulations are a major rule for purposes of the Congressional Review Act (CRA) (5 U.S.C. 801, et seq.). Generally, under the CRA, a major rule takes effect 60 days after the date on which the rule is published in the Federal Register. Section 808(2) of the CRA, however, provides that any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take

effect at such time as the Federal agency promulgating the rule determines.

As stated in detail in the interim final rule, 77 FR 25897 (May 2, 2012), because these final regulations merely reflect statutory changes and remove obsolete regulatory provisions and, in the case of §690.64, protect students from receiving reduced amounts of Pell Grant funds, there is good cause to waive the delayed effective dates under the APA and the CRA and make these final regulations effective on the day they are published.

Regulatory Flexibility Act

Final Regulatory Flexibility Analysis

These final regulations affect institutions that participate in title IV, HEA programs, and individual Pell Grant recipients. The effect of the elimination of two Pell Grants in one year will depend on the extent students replace the funds from other sources or change their academic plans, the distribution of recipients of a second Pell Grant, and the alternative use of the funds. This Final Regulatory Flexibility Analysis presents an estimate of the effect on small institutions of the statutory changes implemented through these final regulations. In the interim final rule, the Department welcomed comments about the estimates of the costs and benefits of the changes implemented in these final regulations. While some

commenters questioned the benefits of Pell Grants or the effect of the changes on transfer students, no comments were received about the specific estimates of the effect on small entities presented in the Initial Regulatory Flexibility Analysis (77 FR 25895-25897).

Succinct statement of the objectives of, and legal basis for, these final regulations

These final regulations remove regulatory provisions related to the availability of two Pell Grants in one year to comply with section 1860(a)(2) of division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Public Law 112-10), which repealed section 401(b)(5) of the HEA under which an otherwise eligible student could receive more than one Federal Pell Grant in an award year.

Description of and, where feasible, an estimate of the number of small entities to which these final regulations will apply

These final regulations affect institutions that participate in title IV, HEA programs and loan borrowers. The definition of "small entity" in the Regulatory Flexibility Act encompasses "small businesses," "small organizations," and "small governmental jurisdictions." The definition of "small business" comes from the definition of "small business concern" under section 3 of the Small

Business Act as well as regulations issued by the U.S. Small Business Administration (SBA). The SBA defines a "small business concern" as one that is "organized for profit; has a place of business in the U.S.; operates primarily within the U.S. or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor..." "Small organizations" are further defined as any "not-for-profit enterprise that is independently owned and operated and not dominant in its field." The definition of "small entity" also includes "small governmental jurisdictions," which includes "school districts with a population less than 50,000."

Data from the Integrated Postsecondary Education Data System (IPEDS) indicate that roughly 3,448 institutions representing approximately 63 percent of those institutions participating in the Federal student assistance programs meet the definition of "small entities" when all private nonprofit institutions are classified as small because none is dominant in the field. If the \$7 million in revenue requirement were applied to private nonprofit institutions, the number of small entities would be reduced to 2,386 or 43.6 percent of institutions. Table 2 summarizes small institutions and their percent of AY 2008-2009 Pell Grant recipients and amounts by sector.

Table 2: AY 2008-2009 Pell Grant Recipients and Amounts by

Sector	Small Institutions #	% of Sector	% of Pell Grant Recipients	\$
Public 4-year	4	0.7%	0.0%	0.0%
Private nonprofit 4-year*	444	30.0%	5.6%	5.9%
Private for-profit 4-year	52	24.6%	1.0%	1.0%
Public 2-year	88	8.5%	0.8%	0.7%
Private nonprofit 2-year*	147	86.5%	54.6%	53.3%
Private for-profit 2-year	405	69.6%	21.1%	21.5%
Public <2-year	202	87.4%	62.6%	61.6%
Private nonprofit <2-year*	61	93.8%	51.4%	51.1%
Private for-profit <2-year	983	89.4%	44.5%	44.4%

Source: IPEDS 2008-2009

*Applies \$7 million revenue standard to private nonprofit institutions for informational purposes. If not applied, the number of institutions in the private nonprofit sectors would be 1,479 four-year, 170 two-year, and 65 less-than-two-year institutions. All Pell Grant recipients and Pell Grant disbursements in the private nonprofit sectors would be small entities.

Using the distribution of Pell Grant recipients and amounts at small institutions from Table 2 and the Department's estimated two Pell Grant recipients and

amounts, the estimated maximum cost to small institutions across all sectors for the period from 2011-2012 to 2015-2016 is approximately \$1.67 billion. The estimated recipients and amounts by type of institution are summarized in Table 3. The amount of grant aid lost for any individual institution will depend on the extent the second Pell Grant option was utilized at that school. If distributed evenly across all small entities, with nonprofit institutions subject to the \$7 million revenue requirement for a more uniform profile of institutions, an annual average of \$150,000 would not be available from second Pell Grants in one award year. As discussed in the Summary of Potential Cost and Benefits section of the interim final rule, much of this revenue will be available from other sources including the preservation of the maximum grant level in the Pell Grant Program, student earnings or savings, and increased student debt.

Table 3: Estimated Pell Grant Recipients and Amounts at Small Institutions

	Estimated Pell Grant Recipients at Small Institutions				
	AY 2011-12	AY 2012-13	AY 2013-14	AY 2014-15	AY 2015-16
Public 2 yr	4,060	4,963	4,997	5,123	5,256
Public 4 yr	143	175	176	181	185
Private					

	18,152	22,190	22,342	22,904	23,501
Proprietary	78,907	96,459	97,120	99,562	102,157
Total	101,263	123,787	124,636	127,770	131,100

Estimated Pell Grant Amounts in Millions at Small Institutions					
	AY 2011-12	AY 2012-13	AY 2013-14	AY 2014-15	AY 2015-16
Public 2 yr	10.6	13.0	13.3	13.8	14.5
Public 4 yr	0.4	0.5	0.5	0.5	0.5
Private	43.9	53.8	55.1	57.3	59.9
Proprietary	215.7	264.4	270.8	282.0	294.6
Total	270.5	331.6	339.6	353.7	369.4

Source: IPEDS 2008-2009 and Department of Education estimates

Description of the projected reporting, recordkeeping and other compliance requirements of these final regulations, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record

These final regulations do not impose any new reporting, record keeping, or other compliance requirements on institutions.

Identification, to the extent practicable, of all relevant Federal regulations that may duplicate, overlap, or conflict with these final regulations

These final regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

No alternatives were considered for the amendments to §§690.63(g)(1), 690.63(h), 690.65(c), 690.65(f), and 690.67 because these changes implement changes to the HEA enacted by Congress and the Department did not exercise discretion in developing these amendments. With respect to §690.64, the Department could have left the current regulations in place. However, such an action would have led to potentially serious adverse effects on students, as described in the Waiver of Rulemaking and Delayed Effective Date section of the preamble in the interim final rule.

Paperwork Reduction Act of 1995

These final regulations do not create any information collection requirements. With the removal of §§690.63(h) and 690.67 and the revision of §690.64, due to the statutory changes, the paperwork burden associated with those sections are also removed. This change results in the discontinuation of information collection 1845-0098 and, therefore, the elimination of 109,605 burden hours associated with that collection.

Intergovernmental Review

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

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(Catalog of Federal Domestic Assistance Number: 84.063
Federal Pell Grants)

List of Subjects in 34 CFR Part 690

Colleges and universities, Elementary and secondary education, Grant programs-education, Student aid.

Dated: June 26, 2013

Arne Duncan,
Secretary of Education.

For the reasons discussed in the preamble, the interim final rule that amended 34 CFR part 690, published at 77 FR 25893 on May 2, 2012, is adopted as final without change.

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