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OFFICE OF MANAGEMENT AND BUDGET
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THE DIRECTOR

February 24, 2016

M-16-06

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:

Shaun Donovan
Director

SUBJECT:

Implementation of the Federal Civil Penalties Inflation Adjustment Act
Improvements Act of 2015

Overview

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) (Sec. 701 of Public Law 114-74), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) (Public Law 101-410), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

The 2015 Act requires agencies to: (1) adjust the level of civil monetary penalties with an initial “catch-up” adjustment through an interim final rulemaking (IFR); and (2) make subsequent annual adjustments for inflation. Catch-up adjustments will be based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year of the previous adjustment, and the October 2015 CPI-U. Annual inflation adjustments will be based on the percent change between the October CPI-U preceding the date of the adjustment, and the prior year’s October CPI-U. OMB Circular A-136, Financial Reporting Requirements, directs agencies to identify in the Agency Financial Report (AFR) the affected penalties, the applicable statutes and regulations, and the corresponding dates and amounts of adjustments.

Agencies are required to publish interim final rules with the initial penalty adjustment amounts by July 1, 2016, and the new penalty levels must take effect no later than August 1, 2016. These adjustments will apply to all civil monetary penalties covered by the Inflation Adjustment Act. In accordance with the 2015 Act, penalties under the Occupational Safety and Health Act and the Social Security Act, which were previously excluded by a 1996 amendment to the Inflation Adjustment Act, are now subject to the 2016 catch-up and annual inflation increases thereafter. Penalties under the Internal Revenue Code and the Tariff Act remain exempt from the inflation calculation of the 2015 Act.

Guidance

This memorandum provides guidance to agencies to implement the civil monetary penalty adjustment requirements of the 2015 Act. In particular, this memorandum explains agency responsibilities for:

- identifying applicable civil monetary penalties;
- completing the catch-up adjustment in 2016;
- making future annual adjustments for inflation beginning in 2017; and
- performing agency oversight of inflation adjustments.

Identifying applicable penalties

Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce. The Inflation Adjustment Act defines “civil monetary penalty” as “any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.”¹

Agencies are to adjust “the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.”²

Therefore, a civil monetary penalty is any monetary assessment levied for a violation of a Federal civil statute or regulation, assessed or enforceable through a civil action in Federal court or an administrative proceeding. This does not include a penalty levied for violation of a criminal statute, or fees for services, licenses, permits, or other regulatory reviews.

Furthermore, the adjustment will apply only to penalties with a dollar amount, and will not apply to penalties written as functions of violations. For example, a penalty written, “the penalty shall be the full cost of restoration and repair of archaeological resources damaged” will not be subject to adjustment. In the case of a penalty with only some dollar amounts, *e.g.*, “the penalty shall be the maximum of either twice the value of the transaction or \$250,000,” only the dollar figure, in this case \$250,000, will be subject to adjustment.

Notably, the civil monetary penalties under the Occupational Safety and Health Act, the Social Security Act, and the regulations promulgated under those statutes, are now subject to the inflation adjustment requirements of the 2015 Act.

Agencies with questions on the applicability of the inflation adjustment requirement to an individual penalty, should first consult with the Office of General Counsel of the agency for the applicable statute, and then seek clarifying guidance from OMB if necessary.

¹ Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 3(2), 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. § 2461 note) (emphasis added).

² *Id.* § 5(a).

Agencies should maintain and report updates to civil monetary penalties on an annual basis through the AFR, as directed by OMB Circular A-136.

Completing the catch-up adjustment

a. In order to complete the catch-up adjustment, agencies should identify, for each penalty, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (*i.e.*, as originally enacted by Congress), or last adjusted (*i.e.*, by Congress in statute, or by the agency through regulation), whichever is later, other than pursuant to the Inflation Adjustment Act. This will exclude prior inflationary adjustments under the Inflation Adjustment Act, which were capped at 10 percent and contributed to a decline in the real value of penalty levels. The 2015 Act's amendments to the Inflation Adjustment Act should remedy this issue and other implementation challenges.

b. To calculate the catch-up adjustment, agencies shall modify the penalty level or range identified in part a. above based on the Consumer Price Index (CPI-U) for the month of October 2015, not seasonally adjusted. Below, Table A provides multipliers to adjust the penalty level or range of penalty levels based on the year the penalty was established or last adjusted by statute or regulation. (The appendix provides additional instructions and examples on using Table A for the 2016 catch-up adjustment.) After applying the multiplier, agencies shall round all penalty levels to the nearest dollar. In accordance with the 2015 Act, however, agencies shall not increase penalty levels by more than 150 percent of the corresponding levels in effect on November 2, 2015. Note: The 150 percent limitation is on the amount of the increase; therefore, the adjusted penalty level(s) will be up to 250 percent of the level(s) in effect on November 2, 2015.

c. Agencies may request from OMB concurrence for a reduced catch-up adjustment determination, if they demonstrate the otherwise required increase of the penalty or penalty range would have a negative economic impact, or that the social costs would outweigh the benefits. Consistent with the 2015 Act, agencies should consult with OMB before proposing a reduced catch-up adjustment determination. Further, in accordance with the 2015 Act, the agency must have OMB concurrence before adjusting penalties pursuant to a reduced catch-up adjustment determination. Further, in making such a determination, the agency must use the standard rulemaking process, which includes publication in the Federal Register of a notice of proposed rulemaking and a final rule. Agencies seeking a reduced catch-up adjustment determination should submit their associated notices of proposed rulemaking to the Office of Information and Regulatory Affairs (OIRA), OMB, for review under Executive Order (E.O.) 12866 as soon as possible, and no later than May 2, 2016. OMB expects determination concurrences to be rare.

d. Agencies implementing the prescribed catch-up adjustment must publish the new penalty levels through an interim final rule in the Federal Register no later than July 1, 2016, to take effect no later than August 1, 2016. As the 2015 Act requires agencies to adjust penalties for the catch-up adjustment through an interim final rulemaking, agencies are not required to complete a notice and comment process prior to promulgation.³

e. The new penalty levels shall take effect no later than August 1, 2016. Agencies will apply the new penalty levels to any penalties assessed on and after the effective date. Agencies

³ *Id.* § 4(b)(1)(A).

will send their interim final rules to OIRA in order to determine whether the regulatory action is significant under E.O. 12866 by May 2, 2016. OIRA will endeavor to designate interim final rules as significant or not significant within 10 working days of receipt of the rulemaking document.

f. Pursuant to the 2015 Act, in the event a violation took place prior to the effective date of the new penalty level, and the agency assesses a penalty after the effective date, the new penalty level shall be assessed in a manner consistent with applicable law. The 2015 Act does not alter an agency's statutory authority, to the extent it exists, to assess penalties below the maximum level; however, minimum penalty levels should be increased for inflation as discussed in other sections of this guidance. As the 2015 Act applies to penalties assessed after the effective date of the applicable adjustment, the 2015 Act adjusts penalties prospectively. The 2015 Act does not retrospectively change previously assessed or enforced penalties that the agency is actively collecting or has collected.

Making future annual adjustments for inflation

Previously, the Inflation Adjustment Act required agencies to adjust civil monetary penalty levels every four years. The 2015 Act updates this requirement with annual adjustments for inflation based on OMB guidance.

In accordance with the 2015 Act, OMB plans to issue adjustment rate guidance no later than December 15, 2016, and no later than December 15 for each following year, to adjust for inflation in the CPI-U as of the most recent October. Agencies are required to publish annual inflation adjustments in the Federal Register no later than January 15, starting in 2017, and each subsequent year. In accordance with the 2015 Act, agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedures Act.⁴

The 2015 Act does not alter existing agency authorities to adjust penalties. Additionally, future penalties or penalty adjustments enacted by statute or regulation will not be adjusted for inflation in the first year those penalty levels are in effect. Finally, as described in part f. above, agencies should apply new penalty levels to any penalties assessed on and after the date that the new level takes effect. However, statutory authorities to assess penalties below the maximum level, within the new inflation-adjusted ranges, remain unchanged.

Performing agency oversight of inflation adjustments

Under the 2015 Act, agency heads are responsible for implementing this guidance on applicable civil monetary penalties and for submitting relevant information to OMB annually through AFRs in accordance with OMB Circular A-136.

Summary

The 2015 Act updates the process by which agencies adjust applicable civil monetary penalties for inflation to retain the deterrent effect of those penalties. Agencies are required to make a catch-up adjustment for civil monetary penalties with the new levels published by July 1,

⁴ *Id.* § 4(b)(2).

2016, to take effect no later than August 1, 2016. Moving forward, agencies are required to make annual inflationary adjustments, starting January 15, 2017, and each year following, based on OMB guidance with adjusted penalties to take effect immediately. Finally, each year in accordance with guidance in OMB Circular A-136, agencies will report in the AFRs the status of adjustments to civil monetary penalties.

Questions regarding this memorandum should be directed to Dan Keenaghan (dkeenaghan@omb.eop.gov) in OMB's Office of Federal Financial Management or Claire Monteiro (cmonteiro@omb.eop.gov) in OMB's Labor Branch.

Table A: 2016 Civil Monetary Penalty Catch-Up Adjustment Multiplier by Calendar Year

Select multiplier based on the latest year when the penalty level was established (originally enacted by Congress) or last adjusted by statute or regulation (other than pursuant to the Inflation Adjustment Act before November 2, 2015).

A	B		A	B		A	B
Year	Multiplier		Year	Multiplier		Year	Multiplier
1914*	23.54832		1948	9.74746		1982	2.42422
1915	23.31745		1949	10.03536		1983	2.35483
1916	21.04761		1950	9.66821		1984	2.25867
1917	17.61763		1951	9.07779		1985	2.18802
1918	14.86488		1952	8.90779		1986	2.15628
1919	13.14022		1953	8.80881		1987	2.06278
1920	11.95166		1954	8.87455		1988	1.97869
1921	13.59074		1955	8.84156		1989	1.89361
1922	14.24180		1956	8.64865		1990	1.78156
1923	13.74786		1957	8.40417		1991	1.73099
1924	13.82779		1958	8.22969		1992	1.67728
1925	13.43718		1959	8.08973		1993	1.63238
1926	13.51352		1960	7.98114		1994	1.59089
1927	13.66885		1961	7.92793		1995	1.54742
1928	13.82779		1962	7.82362		1996	1.50245
1929	13.74786		1963	7.72201		1997	1.47177
1930	14.41442		1964	7.64752		1998	1.45023
1931	15.96228		1965	7.50278		1999	1.41402
1932	17.88256		1966	7.22912		2000	1.36689
1933	18.01803		1967	7.05751		2001	1.33842
1934	17.61763		1968	6.73762		2002	1.31185
1935	17.36044		1969	6.37635		2003	1.28561
1936	16.98843		1970	6.03650		2004	1.24588
1937	16.29027		1971	5.81511		2005	1.19397
1938	16.98843		1972	5.62265		2006	1.17858
1939	16.98843		1973	5.21575		2007	1.13833
1940	16.98843		1974	4.65436		2008	1.09819
1941	15.54497		1975	4.33220		2009	1.10020
1942	14.24180		1976	4.10774		2010	1.08745
1943	13.66885		1977	3.86101		2011	1.05042
1944	13.43718		1978	3.54453		2012	1.02819
1945	13.14022		1979	3.16274		2013	1.01838
1946	11.43452		1980	2.80469		2014	1.00171
1947	10.34078		1981	2.54645		2015	1.00000

* For penalties established or last adjusted prior to 1914, use the multiplier for 1914.

Table B: Summary Schedule of Key Dates

<u>Action</u>	<u>Agency</u>	<u>Issued No Later Than</u>	<u>Effective</u>
Issue Implementation and Catch-up Guidance	OMB	February 29, 2016	Upon Issuance
Submit Interim Final Rules (IFRs) for OMB review	Agencies with Applicable Civil Monetary Penalties	May 2, 2016	Not applicable
Publish Penalty Levels with Catch-up Adjustment	Agencies with Applicable Civil Monetary Penalties	July 1, 2016	No Later Than August 1, 2016
Report adjustments in AFR	Agencies with Applicable Civil Monetary Penalties	November 15 (Annually)	Upon Publication
Publish Adjusted Rate Guidance	OMB	December 15 (Annually)	Upon Publication
Publish Penalty Levels with Annual Adjustments	Agencies with Applicable Civil Monetary Penalties	January 15 (Annually)	Upon Publication

Appendix: Instructions for the Catch-up Adjustment Calculation using Table A

Step 1: In Table A, column A, identify the latest year the penalty level or penalty range was established (*i.e.*, originally enacted) or last adjusted by statute or regulation (other than pursuant to the Inflation Adjustment Act). In column B, identify the corresponding multiplier to adjust the penalty level or range for inflation.

Step 2: Multiply the corresponding amount in column B by the amount of the maximum penalty level or the range of minimum and maximum penalties as most recently established or adjusted by statute or regulation (other than pursuant to the Inflation Adjustment Act before November 2, 2015), as applicable. Round the amount to the nearest dollar.

Step 3: Compare the new amount or range of the penalty with the amount or range reported by the agency in the prior year's AFR, to ensure the maximum increase is not more than 150 percent of the most recent level(s).⁵ If the new amount or range exceeds 150 percent above the last reported level(s), the new amount or range should be reduced to 150 percent over the last reported level(s). The resulting penalty level(s) in this case will be 250 percent of the last reported level(s).

Calculation:

1) Determine the year and amount that the maximum penalty level or the range of minimum and maximum penalties was established or last adjusted by statute or regulation (exclude any previous adjustments made under the Inflation Adjustment Act); then identify the corresponding multiplier from Table A, Column B.

a. = Year _____ **b.** = Multiplier _____ **c.** = Penalty Level or Range _____

2) Use the applicable multiplier (b.) to multiply the penalty level or range (c.) and achieve the penalty level or range adjusted for inflation (d.). Round to the nearest dollar.

d. = (b.) X (c.) = Inflation-Adjusted Penalty Level or Range _____
Rounded to the nearest dollar _____

3) Identify the penalty level(s) in effect on November 2, 2015, including Inflation Adjustment Act increases (this may come from the agency reported 2015 AFR).

e. = November 2, 2015, Penalty Level or Range _____

4) Multiply the November 2, 2015 level(s) (e.) by 2.5 to achieve a 150 percent increase (f.). Round to the nearest dollar.

f. = (e.) X 2.5 = 150 percent increase _____ Rounded to the nearest dollar _____

5) Compare the amounts of (d.) and (f.) If the maximum penalty level or range in (d.) is larger than the maximum penalty level or range in (f.), the 150 percent limit applies, and

⁵ In the event that the AFR does not include the amount or range, agencies should compare the new amount or range of the penalty with the previous amount or range of the penalty.

the penalty level or range in (f.) should be selected.

The new “catchup” penalty level is the lesser of (d.) or (f.): _____

This is the new maximum civil monetary penalty level (or range of minimum and maximum civil monetary penalty levels), which applies (apply) to any civil monetary penalties assessed on or after the effective date of the adjustment.

Examples for using Table A to calculate the Catch-Up Adjustment:

A) Example in which a penalty level has not been adjusted since establishment:

A maximum penalty level, established in 2002, is \$1,000 and the agency has not updated the penalty level since establishment.

- The table indicates the multiplier for 2002 is 1.31185. ($\$1,000 \times 1.31185 = \$1,311.85$, which rounds to \$1,312.)
- The new maximum penalty level is \$1,312.

B) Example in which a penalty level has been increased by previous Inflation Adjustment Act calculations and the catch-up adjustment is less than the 250 percent cap:

A maximum penalty level established in 1981 was \$5,000. The agency increased the amount in 1996, to \$5,500 due to the Inflation Adjustment Act of 1990.

- The agency should set aside the previous increase and use Table A to adjust the penalty starting from the 1981 amount of \$5,000.
- According to Table A, the adjustment multiplier for a penalty last established/adjusted in 1981 is 2.54645.
- To determine the cost-of-living adjustment, the agency should multiply the originally enacted amount of \$5,000 by $2.54645 = \$12,732.25$, which rounds to \$12,732.
- The agency should then determine whether \$12,732 exceeds the catch-up adjustment cap of 250 percent of the penalty level in effect as of November 2, 2015.
- Using this formula, the catch-up adjustment cap for this penalty is $\$13,750$ ($\$5,500 \times 250 \text{ percent} = \$13,750$).
- The new maximum penalty level is the lesser of \$12,732 vs. \$13,750.
- The new maximum penalty level is \$12,732.

C) Example in which a range of penalty levels has been increased by previous Inflation Adjustment Act calculations and the catch-up adjustment is less than the 250 percent cap:

A penalty range established in 1990 was \$3,000 - \$5,000. The agency increased the range in 1996 to \$3,300 - \$5,500 due to the Inflation Adjustment Act.

- According to Table A, the adjustment multiplier for a penalty last established/adjusted in 1990 is 1.78156.
- To determine the cost-of-living adjustment, the agency should multiply the originally enacted minimum of \$3,000 by $1.78156 = \$5,344.68$, which rounds to \$5,345, and the originally enacted maximum of \$5,000 by $1.78156 = \$8,907.80$, which rounds to \$8,908.
- The agency should then determine whether the \$5,345 and \$8,908 exceed the catch-up

adjustment cap of 250 percent of the penalty level in effect as of November 2, 2015.

- The 250 percent catch-up adjustment cap for \$3,300 = \$8,250 ($\$3,300 \times 250$ percent).
- The 250 percent catch-up adjustment cap for \$5,500 = \$13,750 ($\$5,500 \times 250$ percent).
- For the \$3,300 last adjusted penalty level, the new maximum penalty level is the lesser of \$5,345 vs. \$8,250, which is \$5,345.
- For the \$5,500 last adjusted penalty level, the new maximum penalty level is the lesser of \$8,908 vs. \$13,750, which is \$8,908.
- The new penalty range is \$5,345-\$8,908.

D) Example in which a penalty level has been increased by Congress or by regulation, but not by previous Inflation Adjustment Act calculations: A penalty level was established in 1994 at \$4,000 and adjusted to \$6,000 in 2000 by enactment of legislation through Congress; the adjustment was made by statute and not due to agency compliance with the Inflation Adjustment Act.

- The agency should take the penalty leveled enacted in 2000 at \$6,000 and use the corresponding multiplier for the year 2000, which is 1.36689. ($\$6,000 \times 1.36689 = \$8,201.31$, which rounds to \$8,201.)
- The new maximum penalty level is \$8,201.

E) Example in which the 250 percent cap must be applied: A penalty level was established in 1948 at \$1,000. The agency had previously updated the penalty levels every four years since 1990, in compliance with the Inflation Adjustment Act. The penalty level was \$1,200 on November 2, 2015, the date of enactment for the 2015 Act.

- The agency should use the 1948 penalty level and the 1948 multiplier of 9.74746. ($\$1,000 \times 9.74746 = \$9,747.46$, which rounds to \$9,747.)
- The agency should then determine whether \$9,747 exceeds the catch-up adjustment cap of 250 percent of the penalty level in effect as of November 2, 2015.
- Using this formula, the catch-up adjustment cap for this penalty is \$1,200 ($\$1,200 \times 250$ percent = \$3,000).
- The new maximum penalty level is the lesser of \$9,747 vs. \$3,000.
- The new maximum penalty level is \$3,000.

F) Example in which Congress established a penalty level by statute in 2015: A penalty level was established in 2015 at \$10,000.

- The agency should use the multiplier for 2015, which is 1.00000. ($\$10,000 \times 1 = \$10,000$.)
- The penalty remains at \$10,000. Like all other penalties, the agency will review this penalty for inflation increases annually, and will publish the first annually updated penalty level in January 2017.

Note: Agencies should apply the new penalty levels to penalties assessed on and after the effective date of the publication that adjusts the penalty levels, which shall be no later than August 1, 2016. Agencies will adjust these penalty levels annually for inflation in accordance with OMB guidance.