



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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THE DIRECTOR

M-17-11

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: 
Shaun Donovan
Director

SUBJECT: Implementation of the 2017 annual adjustment pursuant to 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).

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) in 2016;¹
- (2) make subsequent annual adjustments for inflation, beginning in 2017; and
- (3) report annually in Agency Financial Reports (AFRs) on these inflation adjustments.²

The purpose of this guidance is to assist agencies in making the annual adjustment for inflation, item (2) above, which agencies must complete no later than January 15, 2017.³ The cost-of-living adjustment multiplier for 2017, based on the Consumer Price Index (CPI-U) for the month of October 2016, not seasonally adjusted, is **1.01636**.⁴

This adjustment applies to all civil monetary penalties covered by the Inflation Adjustment Act. Penalties under the Internal Revenue Code and the Tariff Act remain exempt from the inflation calculations of the 2015 Act.

¹ [M-16-06](#): Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, February 24, 2016 guided agencies on the initial catch-up adjustment requirement.

² [OMB Circular A-136](#), Financial Reporting Requirements, Section II.5.11 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.

³ Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 4(a)(1), 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. § 2461 note).

⁴ Annual inflation adjustments are based on the percent change between the October CPI-U preceding the date of the adjustment, and the prior year's October CPI-U. In this case, October 2016 CPI-U (241.729) / October 2015 CPI-U (237.838) = 1.01636.

Guidance

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

- identifying applicable penalties and performing the annual adjustment
- publishing in the *Federal Register*
- finalizing 2016 interim final rules
- applying adjusted penalty levels
- performing agency oversight of inflation adjustments

Identifying applicable penalties and performing the annual adjustment

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....”⁵

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.”⁶

Adjustments 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” is not 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, is subject to adjustment.

In order to complete the 2017 annual adjustment, agencies should multiply each applicable penalty by the multiplier, 1.01636, and round to the nearest dollar. The multiplier should be applied to the most recent penalty amount, i.e., the one that includes the catch-up adjustment that the 2015 Act required agencies to issue not later than July 1, 2016.

⁵ Federal Civil Penalties Inflation Adjustment Act of 1990, § 3(2) (emphasis added).

⁶ *Id.* at § 5(a).

Example:

The Program Fraud Civil Remedies Act penalty was increased to \$10,781 in 2016, in accordance with the catch-up adjustment requirement of the 2015 Act.

$\$10,781 \times 1.01636 = \$10,957.38$

When rounded to the nearest dollar, the new penalty is \$10,957.

The statute states “If a civil monetary penalty subject to a cost-of-living adjustment under this Act is, during the 12 months preceding a required cost-of-living adjustment, increased by an amount greater than the amount of the adjustment required under subsection (a), the head of the agency is not required to make the cost-of-living adjustment for that civil monetary penalty in that year.”⁷ Therefore, if such other adjustments to a civil monetary penalty were made (i.e., due to a law other than the 2015 Act) in the twelve months preceding January 15, 2017, the agency should assess whether an increase is required.

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, if necessary, seek clarifying guidance from OMB.

The OIRA Administrator has determined that agency regulations exclusively implementing the annual adjustment are not significant regulatory actions under E.O. 12866, provided they are consistent with this guidance. Therefore, agencies are not required to submit such regulations to OIRA for review.

Publishing in the Federal Register

Agencies are required to publish annual inflation adjustments in the Federal Register by no later than January 15, 2017, and by no later than January 15 each subsequent year. In accordance with the 2015 Act, agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedures Act.⁸ This means that the public procedure the APA generally requires—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.

Specific penalty amounts that are codified in the Code of Federal Regulations (CFR) should be updated through regulation amending the CFR. Some agencies have chosen to remove their specific penalty amounts from the CFR and have instead codified the statutory formula for inflation adjustments.⁹ Agency penalty adjustments must still be published in the Federal Register.¹⁰

⁷ *Id.* at §4(d).

⁸ *Id.* at § 4(b)(2).

⁹ *See, e.g.,* Soc. Sec. Admin., Penalty Inflation Adjustments for Civil Monetary Penalties, 81 Fed. Reg. 41438 (June 27, 2016) (codified at 29 C.F.R. §498.103(f).)

¹⁰ 1 C.F.R. §5.2(c); 1 C.F.R. §1.1.

Finalizing 2016 interim final rules

The 2015 Act required agencies to make the initial “catch-up” adjustment through an interim final rule (IFR) by July 1, 2016. Agencies have flexibility to finalize their 2016 inflation adjustment IFR as appropriate, such as together in a rulemaking with their 2017 annual inflation adjustment.

Applying adjusted penalty levels

The new penalty levels shall take effect immediately upon the effective date of the adjustment. Adjustments to civil monetary penalties under the 2015 Act apply to penalties assessed after the effective date of the applicable adjustment.¹¹ The 2015 Act does not change previously assessed penalties that the agency is actively collecting or has collected.

The statute states “Any increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.” For the 2017 annual adjustment, the new penalty amounts should apply to penalties assessed after the effective date of the 2017 annual adjustment—which will be no later than January 15, 2017—including, if consistent with agency policy, assessments whose associated violations occurred on or after November 2, 2015.

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 required by law and discussed in other sections of this guidance. 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.

Performing agency oversight of inflation adjustments

Under the 2015 Act, agency heads are responsible for implementing this adjustment for applicable civil monetary penalties. Agencies must maintain and report updates to civil monetary penalties on an annual basis through their AFRs, as directed by OMB Circular A-136. The new penalty levels incorporating the 2017 annual inflation adjustment should be reflected in agencies’ FY 2017 AFRs.

Summary

The 2015 Act updates the process by which agencies adjust applicable civil monetary penalties for inflation. Agencies are required to make annual inflationary adjustments, by January 15, 2017, and not later than January 15 of every year thereafter, based on annual OMB guidance. The cost-of-living adjustment for 2017 is 1.01636. Each year in accordance with guidance in OMB Circular A-136, agencies will report in their AFRs the status of adjustments to civil monetary penalties.

¹¹ Federal Civil Penalties Inflation Adjustment Act of 1990, § 6 (amended 2015).

Questions regarding this memorandum should be directed to Claire Monteiro (cmonteiro@omb.eop.gov) in OMB's Labor Branch, or Dan Keenaghan or Stannis Smith in OMB's Office of Federal Financial Management at (202) 395-9339.

Questions regarding regulations should be directed to Steph Tatham (statham@omb.eop.gov) in OMB's Office of Information and Regulatory Affairs.