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OFFICE OF MANAGEMENT AND BUDGET
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THE DIRECTOR

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M-19-04

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Mick Mulvaney
Director

SUBJECT: Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015

Overview

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) (Public Law 114-74, Sec. 701), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) (Public Law 101-410) was enacted on November 2, 2015.

On an annual basis, the 2015 Act requires agencies to:

- 1) adjust the level of civil monetary penalties for inflation;¹ and
- 2) report inflation adjustments in the Agency Financial Reports (AFRs) as directed by OMB Circular A-136, or any successor thereto.²

The purpose of this guidance is to assist agencies in making the mandatory annual adjustments for inflation, which should be completed no later than January 15, 2019.³

Based on the Consumer Price Index (CPI-U) for the month of October 2018, not seasonally adjusted, the cost-of-living adjustment multiplier for 2019 is **1.02522**.⁴

¹ OMB Memorandum M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, published February 24, 2016, guided agencies on initial "catch-up" adjustment requirements, and M-17-11 Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, published December 16, 2016, and M-18-03 guided agencies on annual adjustment requirements.

² OMB Circular A-136, Financial Reporting Requirements, Section II.4.9, directs that agencies must make annual inflation adjustments to civil monetary penalties and report on the adjustments in the Agency Financial Report (AFR) or Performance and Accountability Report (PAR).

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 each published October's CPI-U. In this case, October 2018 CPI-U (252.885) / October 2017 CPI-U (246.663) = 1.02522.

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.

As recommended in the Government Accountability Office (GAO) report GA0-17-634, *Civil Penalties: Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements*, this guidance clarifies that all agencies should make annual adjustments to applicable penalties within their jurisdiction and report those adjustments annually, whether or not penalties were assessed or enforced in a given year.⁵ Timely adjustments of civil monetary penalty amounts for inflation and publication in the Federal Register help ensure the effectiveness of civil monetary penalties.

Guidance

This memorandum provides guidance to agencies to implement the annual adjustment to civil monetary penalties as required by the 2015 Act. In particular, this memorandum explains agency statutory responsibilities for:

- identifying applicable penalties and performing the annual adjustment;
- publishing in the *Federal Register*;
- applying adjusted penalty levels; and
- 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 within their jurisdiction.

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”⁶

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.”⁷

⁵ GAO noted in GA0-17-634, *Civil Penalties: Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements*, that agencies had differing interpretations of prior guidance.

⁶ Federal Civil Penalties Inflation Adjustment Act of 1990, § 3(2) (emphasis added).

⁷ *Id.* § 5(a).

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 example, \$250,000) is subject to adjustment.

In order to complete the 2019 annual adjustment, agencies should multiply each applicable penalty by the amount, 1.02522, and round to the nearest dollar. This multiplier should be applied to the most recent penalty amount (i.e., the penalty amount the agency updated and published for FY 2018, pursuant to OMB M-18-03).

Example:

In 2018, the Program Fraud Civil Remedies Act penalty was increased to \$11,181 in accordance with the annual adjustment requirement of the 2015 Act.”

For 2019, the inflation adjustment is $\$11,181 \times 1.02522 = \$11,462.98$. When rounded to the nearest dollar, the 2019 penalty amount is \$11,463. The amount \$11,463 should be updated in the Federal Register and reported in the agency AFR.

Per the 2015 Act, “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.”⁸ Therefore, agencies should determine 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; if necessary, agencies may seek clarifying guidance from OMB.

The Office of Information and Regulatory Affairs (OIRA) Administrator has determined agency regulations that 1) exclusively implement the annual adjustment, 2) are consistent with this guidance, and 3) have an annual impact of less than \$100 million are generally not significant regulatory actions under E.O. 12866. Therefore, agencies are generally not required to submit regulations satisfying those criteria to OIRA for review. As those regulations are not significant regulatory actions under E.O. 12866, they are not considered E.O. 13771 regulatory actions.

⁸ *Id.* § 4(d).

Publishing in the Federal Register

Agencies are required to publish annual inflation adjustments in the Federal Register by no later than January 15th each year. In accordance with the 2015 Act, agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act (APA).⁹ This means that the public procedure the APA generally requires (*i.e.*, 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.¹⁰ Agencies must still publish their penalty adjustments in the Federal Register.¹¹

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.¹² The 2015 Act does not change previously assessed penalties that the agency is collecting or has collected.

The statute states, “[a]ny 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 2019 annual adjustment, the new penalty amounts should apply to penalties assessed after the effective date of the 2019 annual adjustment-which will be no later than January 15, 2019-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.

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. Penalty levels for 2019 should include the annual inflation adjustment and be reflected in the agency's AFR for FY 2019.

⁹ *Id.* § 4(b)(2).

¹⁰ *See, e.g.*, Soc. Sec. Admin., Penalty Inflation Adjustments for Civil Monetary Penalties, 81 Fed. Reg. 41438 (June 27, 2016) (codified at 20 C.F.R. § 498.103(g).)

¹¹ 1 C.F.R. § 5.2(c); 1 C.F.R. § 1.1.

¹² Federal Civil Penalties Inflation Adjustment Act of 1990, § 6 (amended 2015).

Summary

The 2015 Act updated the process by which agencies adjust applicable civil monetary penalties for inflation. Agencies are required to make annual inflationary adjustments no later than January 15th of every year. For 2019, the cost-of-living adjustment is 1.02522. Each year, in accordance with the 2015 Act and OMB guidance in Circular A-136, agencies will report in their AFRs the status of adjustments to monetary penalties.

Questions regarding this memorandum should be directed to Stannis Smith (ssmith@omb.eop.gov) in OMB's Office of Federal Financial Management or Steph Tatham (statham@omb.eop.gov) in OMB's Office of Information and Regulatory Affairs.