

RESCINDED

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The Office of Thrift Supervision (OTS) has published the attached final rule containing increased maximum civil money penalties. The highest permissible penalty is now \$1.1 million a day, an increase of \$100,000.

OTS took the action to comply with a 1996 law requiring federal agencies to adjust their maximum civil money penalties at least once every four years to keep pace with inflation and maintain their deterrent value. Congress requires the agencies to use a formula based on the Consumer Price Index. Agencies have no discretion in choosing whether to adjust their maximum civil money penalty, how much of an adjustment to make, or the methods used to determine the adjustment.

The new maximum penalties were effective on the date of publication in the *Federal Register*, and will apply to violations that occur after that date.

The maximums serve as a cap beyond which civil money penalties may not go. Actual civil money penalties are calculated by OTS on a case-by-case basis taking into consideration a variety of factors such as the gravity of the violation, whether it was willful or recurring, and whether any harm was done to the financial institution.

The final rule was published in the October 31, 1996, edition of the *Federal Register*, Vol. 61, No. 212, pp. 56118-56120.

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Director
Office of Thrift Supervision

Attachment

DEPARTMENT OF THE TREASURY**Office of Thrift Supervision****12 CFR Part 510****[96-102]****RIN 1550-AB01****Civil Monetary Penalty Inflation Adjustment****AGENCY:** Office of Thrift Supervision, Treasury.**ACTION:** Final rule.

SUMMARY: Congress, in the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required all federal agencies with the statutory authority to impose civil monetary penalties (CMPs) to regularly evaluate those CMPs and adjust the maximum CMPs to reflect inflation to ensure that the CMPs continue to maintain their deterrent value. Consequently, OTS is issuing this final rule to implement the required adjustments to each of OTS's CMP statutes.

EFFECTIVE DATE: October 31, 1996.

FOR FURTHER INFORMATION CONTACT: Richard Blanks, Counsel (Banking and Finance), (202) 906-7037, Chief Counsel's Office, Regulations and Legislation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The Federal Civil Monetary Penalties Inflation Adjustment Act of 1990

(FCMPIAA)¹ provided for the regular evaluation of CMPs² to ensure that they continued to maintain their deterrent value and that penalty amounts due the Federal Government were properly accounted for and collected. Section 31,001(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRRA) sets forth the Debt Collection Improvement Act of 1996 (DCIA),³ which was enacted to provide more effective tools for governmentwide collection of delinquent debt. More specifically, section 31,001(s)(1) of the OCRRA amended the FCMPIAA by requiring each agency to make inflationary adjustments to the CMPs found in statutes that it administers.⁴ Such adjustments must be made by regulation published in the Federal Register. The first inflation adjustment is required by October 23, 1996—180 days after the enactment of the DCIA. Thereafter, agencies must make inflation adjustments by regulation at least once every four years. Any increase in a CMP applies only to violations that occur after the date the increase takes effect.⁵ These increases in maximum CMPs will not necessarily affect the amount of any CMP OTS seeks in connection with a particular violation because OTS calculates particular CMPs on a case-by-case basis based upon a variety of factors (including the gravity of the violation, whether it was willful or recurring, and any harm to the depository institution). Thus, the maximums merely serve as a cap beyond which CMPs may not go.

The statute provides that the inflation adjustment shall be determined by increasing the maximum CMP for each CMP by a cost-of-living adjustment. The term "cost-of-living" adjustment is defined as the percentage for each CMP by which the Consumer Price Index (CPI) for the month of June of the

calendar year preceding the adjustment exceeds the CPI for the month of June of the calendar year in which the amount of such CMP was last set or adjusted pursuant to law. Any increase calculated under the statute must be rounded according to rounding rules set forth in the statute. Agencies do not have discretion in choosing whether to adjust a maximum CMP, by how much to adjust a maximum CMP, or the methods used to determine the adjustment.

To help explain the six-step statutorily-mandated inflation adjustment calculation, we will use the following example. Pursuant to 12 U.S.C. 1818(i), OTS may impose a daily maximum third-tier CMP not to exceed \$1,000,000 for violations of certain banking laws. The first step in the calculation requires finding the Consumer Price Index for the All Urban Consumers (CPI-U) for two different time periods.⁶ The statute requires that the CPI-U for the year preceding the year of adjustment be used, which here, because the adjustment will occur in 1996, will be the CPI-U for June, 1995, which is 456.7. The CPI-U for June of the year the CMP was last set by law or adjusted for inflation also must be determined. Because section 1818(i) was adopted in August, 1989, the CPI-U used is June, 1989, which is 371.7.

Second, to calculate the cost of living adjustment or inflation factor, we divide the CPI-U for June of the preceding year of the adjustment by the CPI-U for June of the year the CMP was last set by law or adjusted for inflation. Using our example, the CPI for June, 1995 (456.7) divided by the CPI-U for June, 1989 (371.7) equals 1.23. Therefore, 1.23 is our inflation factor.

Third, to calculate the raw inflation adjustment, we multiply the maximum penalty amounts set by law by the inflation factor. In our example, \$1,000,000 multiplied by our inflation factor of 1.23 equals \$1,230,000.

Fourth, we have to round the raw inflation adjustment amounts according to the rounding rules set forth in the FCMPIAA. Since we round the increased amount, we calculate the increased amount by subtracting the original maximum penalty amounts from the raw maximum inflation adjustments. The increased amount for the maximum penalty in our example is \$1,230,000 minus \$1,000,000, which equals \$230,000. According to the rounding rules, if the penalty is greater

¹ Pub. L. 101-410; 28 U.S.C. 2461 note.

² Under the FCMPIAA, the term CMP means any penalty, fine, or other sanction that (1) is for a specific monetary amount as provided by federal law, or has a maximum amount provided for by federal law; (2) is assessed or enforced by an agency pursuant to federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the federal courts. See 12 U.S.C. 2461 note. All three requirements must be met for a fine to be defined as a CMP.

³ Pub. L. 104-134 (April 26, 1996) (to be codified at 28 U.S.C. 2461 note).

⁴ Some of OTS's CMPs are in a commonly administered statute, 12 U.S.C. 1818. Each agency that administers this statute is making the identical adjustments.

⁵ We note here that while the CMP statutes of other agencies frequently provide for a minimum and maximum penalty amount, all of OTS's CMP statutes provide only for a daily maximum amount and do not contain daily minimum amounts. Today's rule therefore refers only to maximum CMPs.

⁶ The Consumer Price Index described herein was obtained from the Bureau of Labor Statistics of the Department of Labor. There are several Consumer Price Indices. The statute requires the use of the CPI-U.

than \$200,000, then we round the increase to the nearest multiple of \$25,000. Therefore, the maximum penalty increase for our example, after application of the rounding rules, is \$225,000.

Fifth, we find the inflation adjustment maximum penalty after rounding by adding the rounded increase to the original maximum penalty amount set by law to calculate the maximum inflation adjusted penalty amounts. In our example, \$1,000,000 plus \$225,000 yields a maximum inflation adjusted penalty amount of \$1,225,000.

Finally, the statute provides that the inflation adjustment of the maximum penalty amount cannot exceed 10% of the original maximum penalty amount. Ten percent of the original maximum penalty amount of \$1,000,000 in our example equals \$100,000. Because the increase in the maximum penalty amount cannot exceed 10% of the original maximum penalty amount, the adjusted maximum penalty amount in our example is \$1,100,000. This is the amount set forth in the regulation.

The six-step calculation just described has been applied to all of OTS's CMP statutes, and the maximum penalty amount for each statute is set out in the regulation.

Need for an Immediately Effective Final Rule

Section 553 of the Administrative Procedure Act⁷ requires separate findings for good cause, first, that notice and comment are impracticable, unnecessary, or contrary to the public interest when an agency determines to issue a rule without prior notice and comment and second, when it determines to make a rule effective

without a 30-day delay. Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994⁸ requires that a regulation that imposes new requirements take effect on the first day of the quarter following publication of the final rule. That section provides, however, that an agency may determine that the rule should take effect earlier upon a finding of good cause.

Under the statute, agencies must make the required CMP inflation adjustments (1) according to the very specific formula set forth in the statute and (2) by October 23, 1996. Agencies have no discretion either as the inflation adjustment amount or the timing of the adjustment. Due to this lack of agency discretion, the OTS believes that notice and comment are unnecessary. For these same reasons, the OTS believes that there is good cause to make this rule effective immediately upon publication.

Executive Order 12866

The Director of the OTS has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires

an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the rule will not result in expenditures by state, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 510

Administrative practice and procedure, Penalties.

Accordingly, OTS amends title 12, chapter V, part 510 of the Code of Regulations as set forth below.

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

The authority citation for part 510 is revised to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; Pub. L. 101-410, 104 Stat. 890; Pub. L. 104-134, 110 Stat. 1321-358.

2. Section 510.6 is added to read as follows:

§ 510.6 Civil money penalty inflation adjustment.

Pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, 110 Stat. 1321-358), OTS is required to make inflationary adjustments for civil monetary penalties in statutes that it administers. The following chart displays those adjustments, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
12 U.S.C. 1464(v)(4)	Reports of Condition—1st Tier	\$2,000
12 U.S.C. 1464(v)(5)	Reports of Condition—2nd Tier	22,000
12 U.S.C. 1464(v)(6)	Reports of Condition—3rd Tier	1,100,000
12 U.S.C. 1467(d)	Refusal to Cooperate in Exam	5,500
12 U.S.C. 1467a(i)(3)	Holding Company Act Violation	5,500
12 U.S.C. 1467a(r)(1)	Late/Inaccurate Reports—1st Tier	2,000
12 U.S.C. 1467a(r)(2)	Late/Inaccurate Reports—2nd Tier	22,000
12 U.S.C. 1467a(r)(3)	Late/Inaccurate Reports—3rd Tier	1,100,000
12 U.S.C. 1817(j)(16)(A)	Change in Control—1st Tier	5,500
12 U.S.C. 1817(j)(16)(B)	Change in Control—2nd Tier	27,500
12 U.S.C. 1817(j)(16)(C)	Change in Control—3rd Tier	1,100,000
12 U.S.C. 1818(i)(2)(A)	Violation of Law or Unsafe or Unsound Practice—1st Tier	5,500
12 U.S.C. 1818(i)(2)(B)	Violation of Law or Unsafe or Unsound Practice—2nd Tier	27,500
12 U.S.C. 1818(i)(2)(C)	Violation of Law or Unsafe or Unsound Practice—3rd Tier	1,100,000
12 U.S.C. 3349(b)	Appraisals Violation—1st Tier	5,500
12 U.S.C. 3349(b)	Appraisals Violation—2nd Tier	27,500
12 U.S.C. 3349(b)	Appraisals Violation—3rd Tier	1,100,000
42 U.S.C. 4012a(f)	Flood Insurance	350/105,000

⁷ 5 U.S.C. 553.

⁸ 12 U.S.C. 4802.

Dated: October 22, 1996.

By the Office of Thrift Supervision.

Nicolas P. Retsinas,

Director.

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