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Alert: Retroactive Civil Penalty Increases?

Civil Penalties Set to Increase Significantly, Many Present Retroactivity Concerns

By **Matthew T. Martens, Reginald J. Brown, Daniel P. Kearney, Jr. and J. Andrew Jaco**

Over the past several months, many federal agencies have adopted rules significantly increasing the maximum civil monetary penalties (CMPs) they can potentially impose. The increased penalty amounts were adopted in response to recent legislation from Congress requiring that federal agencies make adjustments to “catch up” with inflation. The catch-up adjustments allow agencies to increase their penalty amounts by as much as 150 percent of their November 2, 2015 values. In addition, agencies must make annual adjustments to their CMPs for inflation going forward.

Aside from the obvious impact of the increased penalty amounts, the new regulations present a more subtle concern, of which interested parties should take note. Many agencies adopted rules that would apply the increased penalty amounts retroactively to violations that occurred before Congress passed the law requiring such increases. This retroactive application of increased penalty amounts is unlikely to withstand judicial scrutiny. The time period for submitting comments to many agencies concerning these retroactive increases has not closed. These issues are discussed further below.

Background

The Debt Collection Improvement Act of 1996¹ amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIA Act of 1990)² to require that, at least once every four years, federal agencies adopt regulations to adjust the CMPs under their jurisdiction to account for inflation. On November 2, 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015³ (2015 Act). The 2015 Act significantly reformed the CMP inflation adjustment regime, requiring that agencies adjust CMPs for inflation annually, rather than every four years.⁴ Additionally, the 2015 Act required agencies to adopt regulations in 2016 imposing an initial catch-up adjustment to the CMPs within their jurisdiction.⁵

Specifically, the 2015 Act implemented the following procedural changes:

- For 2016, agencies were required to adopt an interim final rule no later than July 1, 2016, and effective by August 1, 2016, adjusting their CMPs to catch up to inflation since the last adjustment of the particular penalty;⁶
- The 2016 catch-up adjustment is capped at 150 percent of the value of each CMP as of November 2, 2015, the date the amendment was passed;⁷
- Starting in 2017, agencies must adopt final rules, effective January 15 of each year, adjusting their CMPs to account for inflation;⁸

- The annual CMP adjustment is to be calculated based on the Consumer Price Index (CPI) as of October of each year; however, the head of an agency may adjust the CMP below the amount prescribed “if the otherwise required amount will have a negative economic impact” or “the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits. . . .”⁹
- The adjusted amounts apply to CMPs assessed after the adjustment takes effect (in most cases August 1, 2016), “including those whose associated violation predated [the] increase.”¹⁰
- Agencies need not follow the notice and comment rulemaking procedures when making the required CMP adjustments;¹¹ and
- The Office of Management and Budget (OMB) is instructed to publish annual guidance (not later than December 15 of each year) for agencies to follow when calculating their CMP adjustments.¹²

In late June and early July 2016, impacted agencies adopted interim final rules implementing the catch-up adjustment. The table below summarizes implementation of the 2015 Act by certain agencies. Notably, agencies took different views as to the retroactive application of these catch-up adjustments.

Agency	Pre-2015 Act Retroactivity?	Date Rule Published	Rule Language
Federal Trade Commission (FTC)	Unclear	06/30/2016	The increased penalties “apply only to penalties assessed after August 1, 2016, including those penalties whose associated violation predated August 1, 2016.” ¹³
Board of Governors of the Federal Reserve	Yes	07/20/2016	“The Board will apply these adjusted maximum penalty levels to any penalties assessed on or after August 1, 2016.” ¹⁴
Office of the Comptroller of the Currency (OCC)	Unclear	07/01/2016	“The maximum amount of each civil money penalty . . . applies to penalties assessed on or after August 1, 2016.” ¹⁵
Federal Deposit Insurance Corporation (FDIC)	Unclear	06/29/2016	“The increased amounts apply to penalties that may be assessed on or after August 1, 2016 . . .” ¹⁶
National Credit Union Administration (NCUA)	Unclear	06/21/2016	“The adjusted amounts . . . apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations predate the increase.” ¹⁷

Consumer Financial Protection Bureau (CFPB)	Yes	06/14/2016	"The adjustments . . . shall apply to civil penalties assessed after July 14, 2016, regardless of when the violation for which the penalty is assessed occurred." ¹⁸
Securities and Exchange Commission (SEC)	Yes	07/01/2016	"The adjustments . . . apply to all penalties imposed after August 1, 2016, including to penalties imposed for violations that occur before August 1, 2016." ¹⁹
Department of Defense (DOD)	Unclear	05/26/2016	Applies to penalties, "including those whose associated violation predated such increase, which are assessed after the date the increase takes effect (i.e., July 1, 2016)." ²⁰
Department of Energy (DOE)	Unclear	06/28/2016	Applies to penalties assessed after the date the increase takes effect, "including those whose associated violation predated such increase . . ." ²¹
Department of Energy (DOE)/Federal Energy Regulatory Commission (FERC)	Yes	07/06/2016	Applies to any "civil monetary penalty applicable at the time of assessment of a civil penalty, regardless of the date on which the violation occurred." ²²
Commodity Futures Trading Commission (CFTC)	Unclear, but in any event only for actions initiated after August 1, 2016		Applies to penalties "assessed after the date the increase takes effect," "including those whose associated violation predated such increase," but "the new penalty amounts may be applied only in Commission administrative or civil injunctive enforcement proceedings that are initiated on or after the effective date of this amendment, August 1, 2016. " ²³
Department of Justice (DOJ)	No	06/30/2016	Applies to penalties "assessed after August 1, 2016, whose associated violations occurred after November 2, 2015 . . ." ²⁴
Treasury Department/FinCEN	No	06/30/2016	"[A]pplicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, . . ." ²⁵

Treasury Department/Office of Foreign Assets Control (OFAC)	No	07/01/2016	"The adjusted civil penalty amounts . . . are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, . . ." ²⁶
Department of Labor (DOL)	No	07/01/2016	"The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violation occurred after November 2, 2015, . . ." ²⁷
Department of Homeland Security (DHS)	No	07/01/2016	"The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violation occurred after November 2, 2015, . . ." ²⁸
Environmental Protection Agency (EPA)	No	07/01/2016	The increased penalties "will apply to all statutory civil penalties assessed on or after August 1, 2016, for violations that occurred after November 2, 2015 . . ." ²⁹
Department of Education	No	08/01/2016	"[T]he adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015 . . ." ³⁰
Department of Transportation (DOT)/Federal Aviation Administration (FAA)	No	07/05/2016	Applies to "violations occurring on or after August 5, 2016." ³¹
Federal Housing Finance Agency (FHFA)	No	07/01/2016	Applies to penalties assessed "for violations occurring after August 1, 2016." ³²
Department of Housing and Urban Development (HUD)	No	06/15/2016	"These new penalties apply to violations occurring after August 16, 2016." ³³

Retroactivity Concerns

As evidenced by the above table, many of the interim final rules adopted by agencies purport to apply the increased CMP amounts to all penalties assessed after the effective date, regardless of when the associated violation occurred. These retroactive applications appear to result from two facts. First, prior to the 2015 Act, the FCPIA Act of 1990 restricted any increase in CMP amounts to violations that occurred after the date on which the regulatory increase took effect. The 2015 Act eliminated this restriction, stating that increases in CMP amounts would apply to "penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect."³⁴ Second, the OMB

guidance issued in February 2016 includes a series of ambiguous statements regarding the extent of the 2015 Act's retroactive application.³⁵

We think it unlikely that agency efforts to apply the increased penalty amounts to violations that occurred prior to the passage of the 2015 Act will withstand judicial scrutiny. As the Supreme Court explained in *Landgraf v. USI Film Products*,³⁶ “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”³⁷ In this regard, the *Landgraf* court observed that it had never “read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute’s enactment.”³⁸

Applying *Landgraf's* presumption against retroactivity here, there is a strong argument that any increase in CMP amounts should not be applied to conduct that predates the November 2, 2015 date on which the 2015 Act became law. The language of the 2015 Act does not “require the result” that the increased penalty amounts apply to violations that occurred before the date the statute was enacted. Rather, the language requires only that the increased penalty amounts apply to violations committed after the date the Act was passed (November 2, 2015), even if those violations occur before the date that regulations were adopted increasing the penalty amounts. In other words, the 2015 Act merely states that increased penalty amounts should apply to violations that “**predated such increase**,” and is silent as to violations that **predated the statutory amendment**.

The aggressive interpretations by a number of agencies (the CFPB and SEC foremost among them) of ambiguous directives from Congress and the OMB raise significant retroactivity concerns that interested parties should take note of if facing an increased CMP for conduct that occurred prior to November 2, 2015. With regard to a number of agencies, there is still time for interested parties to submit comments concerning those agencies' proposed amendments.

¹ Public Law 104-134, sec. 31001(s), 110 Stat. 1321-373 (Apr. 26, 1996), codified at 28 U.S.C. § 2461 note.

² Public Law 101-410, 104 Stat. 890 (Oct. 5, 1990), codified at 28 U.S.C. § 2461 note.

³ Public Law 114-74, 129 Stat. 584, 599 (Nov. 2, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ Public Law 114-74, sec. 701(b)(1)(A), 129 Stat. 599. For the initial catch-up adjustment, agencies must calculate the amount of the adjustment by comparing the CPI for October 2015 with the CPI in October of the year the CMP at issue was *first established or last adjusted by Congress*. In other words, the initial adjustment is based on the CMP as Congress set it, without regard to any agency adjustments made under the FCPIA Act since 1996. See 129 Stat. 600.

⁷ Public Law 114-74, sec. 701(b)(2)(A), 129 Stat. 600.

⁸ 129 Stat. 599.

⁹ [The Consumer Price Index](#) is published by the Department of Labor, Bureau of Labor Statistics.

¹⁰ 129 Stat. 600.

¹¹ 129 Stat. 599.

¹² 129 Stat. 601. OMB published its initial guidance on February 24, 2016. See [Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015](#) (2016) [hereinafter “OMB Memorandum”].

¹³ 81 FR 42,476.

¹⁴ 81 FR 47,006.

¹⁵ 81 FR 43,021.

¹⁶ 81 FR 42,235.

¹⁷ 81 FR 40,152.

¹⁸ 81 FR 38,569.

¹⁹ 81 FR 43,042.

²⁰ 81 FR 33,389.

²¹ 81 FR 41,790.

²² 81 FR 43,937.

²³ 81 FR 41,435.

24 81 FR 42,491.
25 81 FR 42,503.
26 81 FR 43,070.
27 81 FR 43,429.
28 81 FR 42,983.
29 81 FR 43,091.
30 81 FR 50,321.
31 81 FR 43,463.
32 81 FR 43,028.
33 81 FR 38,931.
34 129 Stat. 600 (emphasis added).

35 See OMB Memorandum at 4. The memorandum states that “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.” *Id.* Unfortunately, the guidance goes on to muddy the waters further by explaining only that the 2015 amendment “does not retrospectively change previously assessed or enforced penalties,” but the guidance is silent as to the impact on violations that predate the 2015 amendment. *Id.*
36 511 U.S. 244 (1994).
37 *Id.* at 264 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).
38 *Id.* at 284.

FOR MORE INFORMATION ON THIS OR OTHER SECURITIES LITIGATION AND ENFORCEMENT MATTERS, CONTACT:

[Jamie Gorelick](mailto:jamie.gorelick@wilmerhale.com) +1 202 663 6500 jamie.gorelick@wilmerhale.com

[William R. McLucas](mailto:william.mclucas@wilmerhale.com) +1 202 663 6622 william.mclucas@wilmerhale.com

[Matthew T. Martens](mailto:matthew.martens@wilmerhale.com) +1 202 663 6921 matthew.martens@wilmerhale.com

[Reginald J. Brown](mailto:reginald.brown@wilmerhale.com) +1 202 663 6430 reginald.brown@wilmerhale.com

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