

## Civil Fines Jump Across Agencies Under Inflation Adjustment Act

JULY 13, 2016

Civil fines across federal agencies have recently been increased dramatically under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) (Sec. 701 of Public Law 114-74), with some more than doubling. Companies violating the Hart-Scott-Rodino (HSR) Improvements Act, the Securities Exchange Act, or the Occupational Safety and Health Act (OSHA), among others, could soon face civil monetary penalties that are up to 150% higher than the existing levels. According to the Congressional Budget Office, the 2015 Act would increase the federal government's revenue by \$1.3 billion over the next ten years.<sup>1</sup>

The 2015 Act requires federal agencies to (1) adjust the level of civil monetary penalties with an initial "catch-up" adjustment through interim final rulemaking; and (2) implement subsequent annual adjustments for inflation based on the Office of Management and Budget (OMB)'s annual guidance.<sup>2</sup> The 2015 Act takes effect on August 1, 2016, when agencies will begin applying the new penalty levels to any penalties assessed on and after that date. Accordingly, the penalty increases can apply to ongoing investigations of conduct that occurred long before August 1 (if the relevant agency decides to assess penalties on or after August 1).<sup>3</sup> The 2015 Act, however, does not retrospectively change any previously assessed or enforced penalties.<sup>4</sup> Also, penalties under the Internal Revenue Code and the Tariff Act are exempt from the 2015 Act's inflation adjustment.<sup>5</sup>

Below are some of the notable increases in federal civil fines under the 2015 Act:

Agency	Relevant Law	Underlying Violations	Current Penalty	Adjusted Penalty	Increase (%)
		Violations of			
		cease and			
		desist orders			

FTC <sup>6</sup>	Federal Trade Commission Act, 15 U.S.C. 45(l)	issued under Section 5(b) of the FTC Act (e.g., breach of terms under FTC consent order)	\$16,000	\$40,000	150%
	FTC Act, 15 U.S.C. 45(m)(1)	Unfair or deceptive acts or practice in violation of Section 5(m) (1) of the FTC Act	\$16,000	\$40,000	150%
	Hart-Scott-Rodino (HSR) Improvements Act, 15 U.S.C. 18a(g)(1)	Violations of premerger reporting and waiting requirements under the HSR Act (e.g., failure to file or late filing of premerger notification)	\$16,000 (per day)	\$40,000 (per day)	150%
		Violations of cease and			

DOJ <sup>7</sup>	Clayton Act, 15 U.S.C. 21(l)	desist orders issued under Section 11(b) of the Clayton Act	\$8,500	\$21,250	150%
	False Claims Act (FCA), 31 U.S.C. 3729(a)	Violations of FCA (e.g., healthcare fraud, housing and mortgage fraud, and false claims for payment under government contracts)	\$5,500 – \$11,000	\$10,781 – \$21,563	96%
	Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), 12 U.S.C. 1833a(b)(1)	Violations of FIRREA (e.g., financial fraud “affecting a federally insured financial institution”)	Max. \$1,100,000	Max. \$1,893,610	72%
	FIRREA, 12 U.S.C. 1833a(b)(2)	Continuing violations of FIRREA	Max. \$1,100,000 (per day) or \$5,500,000	Max. \$1,893,610 (per day) or \$9,468,050	72%
	Anti-Kickback Act,	Violations			

SEC <sup>8</sup>	41 U.S.C. 8706(a)(1) (B)	involving kickbacks	\$11,000	\$21,563	96%
		Corporate violations of SEC regulations, involving fraud, deceit, manipulation, or deliberate or reckless disregard and resulting in substantial losses or significant risk of such losses to others			
	Securities Act of 1933, 15 U.S.C. 77t(d)		Max. \$775,000	Max. \$890,780	15%
		Foreign corrupt practices for issuer	Max. \$16,000	Max. \$19,787	24%
	Securities Exchange Act of 1934, 15 U.S.C. 78ff(c)(1)(B)	Insider trading for controlling person	Max. \$1,525,000	Max. \$1,978,690	30%
		Violations of various statutes,	Max Daily \$7,500 (Tier One)	Max Daily \$9,468 (Tier One)	

Federal Deposit Insurance (FDI) Act, 12 U.S.C. § 1818(i) (2)	including FIRREA, UDAP, unsafe or unsound practices, breach of fiduciary duty	\$37,500 (Tier Two)	\$47,340 (Tier Two)	26%
		\$1,425,000 (Tier Three)	\$1,893,610 (Tier Three)	
Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 15 U.S.C. 1639e(k)	Violations of the regulation implementing the appraisal independence requirements in Section 1472 of the Dodd-Frank Act	Max. Daily \$10,000 (for first violation)	Max. Daily \$10,875 (for first violation)	9%
	Refusals by any affiliate of a national bank to permit an examiner to make an examination of such affiliate or to provide any information required in the	Max. \$5,000 (per day)	Max. \$9,468 (per day)	89%

OCC <sup>9</sup>	12 U.S.C. 1832(c)	course of such			
		an			
		examination			
		Depository			
	12 U.S.C. 1972(2)(F)	institutions'			
		violations of			
		the restrictions			
		on withdrawals	\$1,100	\$2,750	150%
		by negotiable			
		or transferable			
		instruments			
		for transfers to			
		third parties			
12 U.S.C. 1972(2)(F)	Savings	Max. Daily	Max. Daily		
	associations'				
	violations of	\$7,500	\$9,468	26%	
	anti-tying	(Tier One)	(Tier One)		
	restrictions		\$47,340		
	regarding	\$37,500	(Tier	26%	
	correspondent	(Tier Two)	Two)		
	accounts,				
	unsafe or				
12 U.S.C. 1972(2)(F)	unsound	\$1,425,000	\$1,893,610		
	practices, or	(Tier	(Tier	33%	
	breach of	Three)	Three)		
	fiduciary duty				
		For natural person:	For natural person:		
		Max. Daily	Max. Daily		

		\$7,500 (Tier One)	\$8,908 (Tier One)	19%
	Violations of various provisions of the Securities Act, the Securities Exchange Act, the Investment Company Act, and the Investment Advisers Act	\$70,000 (Tier Two)	\$89,078 (Tier Two)	27%
15 U.S.C. 78u-2(b)		\$140,000 (Tier Three)	\$178,156 (Tier Three)	27%
		<i>For other person: Max. Daily</i>	<i>For other person: Max. Daily</i>	
		\$70,000 (Tier One)	\$89,078 (Tier One)	
		\$350,000 (Tier Two)	445,390 (Tier Two)	27%
		\$700,000 (Tier Three)	\$890,780 (Tier Three)	
	Knowing and material violations of the Interstate Land Sales Full Disclosure Act	Max. \$1,000 (per violation)	Max. \$1,894 (per violation)	
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1717a(a)(2)		\$1,000,000 (per year)	\$1,893,610 (per year)	89%
		Max.	Max.	

Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)	Violations of Federal consumer financial laws, including rules or orders prescribed thereunder	\$5,000 (Tier One)	\$5,437 (Tier One)	9%
		\$25,000 (Tier Two)	\$27,186 (Tier Two)	
		\$1,000,000 (Tier Three)	\$1,087,450 (Tier Three)	
CFPB <sup>10</sup>	Violations of the appraisal independence requirements under the Truth in Lending Act, or regulations prescribed thereunder, in extending credit or in providing any services for a consumer credit transaction secured by the principal dwelling of the	Max. \$10,000 (for first violation); \$20,000 (for subsequent violations)	Max. \$10,875 (for first violation); \$21,749 (for subsequent violations)	9%
	Truth in Lending Act, 15 U.S.C. 1639e(k)			

FDIC <sup>11</sup>	Home Owners' Loan Act, 12 U.S.C. 1464(v)	consumer			
		Savings			
		association's			
		knowing or			
		reckless			
		submission to a			
		federal			
		banking			
		agency of any	Max.	Max.	33%
		false or	\$1,425,000	\$1,893,610	
FDIC <sup>11</sup>	Federal Deposit Insurance (FDI) Act, 1978, the	misleading			
		report or			
		information in			
		violation of			
		Section			
		1464(v) (Tier			
		Three penalty)			
		Violations of	Max. Daily	Max. Daily	
		various	\$7,500	\$9,468	
		statutes,	(Tier One)	(Tier One)	
FDIC <sup>11</sup>	Federal Deposit Insurance (FDI) Act, 1978, the	including		\$47,340	
		FIRREA, the	\$37,500	(Tier	
		International	(Tier Two)	Two)	
		Banking Act of			

Treasury (FinCEN) <sup>12</sup>	12 U.S.C. 1818(i)(2)	Truth in Lending Act, the Fair Credit Reporting Act, and the Equal Credit Opportunity Act	\$1,425,000 (Tier Three)	\$1,893,610 (Tier Three)	26%
	Bank Secrecy Act (BSA), 12 U.S.C. 1829b(j)	Recordkeeping violations for funds transfers in violation of 12 U.S.C. 1829b	Max. \$10,000	Max. \$19,787	98%
	BSA, 31 U.S.C. 5330(e)	Failure to register as money transmitting business in violation of 31 U.S.C. 5330	Max. \$5,000	Max. \$7,954	59%
	BSA, 31 U.S.C. 5321(a)(1)	Willful violations of BSA requirements	\$25,000 – \$100,000	\$53,907 – \$215,628	116%
DOL <sup>13</sup>	Occupational Safety and Health Act (OSHA), 29 CFR 1903.15(d)(3)	Serious violations of OSHA	Max. \$7,000	Max. \$12,471	78%

FAA <sup>14</sup>	Violations of FAA regulations				
	Federal Aviation Act (e.g., air of 1958, 49 U.S.C. 46318	carrier's failure to obtain a certificate to operate under Section 41101)	\$25,000	\$34,172	37%
FCC <sup>15</sup>	Failure to				
	Telecommunications comply with Act of 1996, 47 U.S.C. 214(d)	any FCC order issued under Section 214	Max. \$1,320 (per day)	Max. \$2,272 (per day)	72%
	Making				
FCC <sup>15</sup>	Telecommunications Act of 1996, 47 U.S.C. 223(b)	obscene or harassing interstate calls in violation of Section 223	Max. \$80,000	Max. \$117,742	47%
	Violations of Section 31(c) of the FPA				
	Federal Power Act (FPA), 16 U.S.C. 823b(c)	(e.g., failure to comply with any FERC order with respect to license or	Max. \$11,000 (per day)	Max. \$21,563 (per day)	96%

FERC <sup>16</sup>	permit issued)			
	Violations of Section 315(a) of the FPA (e.g., failure to comply with any FERC order, failure to file any report required by Part III of the FPA, or failure to comply with any rule or regulation issued thereunder)			
	FPA, 16 U.S.C. 825n(a)	Max. \$1,100	Max. \$2,750	150%

The 2015 Act mandates that federal agencies publish interim final rules with the initial penalty adjustments by July 1, 2016, and there is no requirement that they provide notice and comment process before promulgation.<sup>17</sup> Agencies have taken slightly varied approaches to determining their respective fine increases under the 2015 Act. For instance, the Federal Trade Commission, the Financial Crimes Enforcement Network of the Department of Treasury, and the Federal Aviation Administration, among others, published their finalized fine increases in late June and early July. Some agencies, such as the Department of Justice, the Securities and Exchange Commission, and the Federal Deposit Insurance Corporation, have invited public comment on their published increases with comment periods variously closing from mid-August to early September. Notably, these published fine increases will take effect on August 1, 2016 per the 2015 Act, notwithstanding the notice and comment period will not have expired.

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<sup>1</sup> Congressional Budget Office, [Estimate of the Budgetary Effects of H.R. 1314, the Bipartisan Budget Act of 2015](#), as reported by the House Committee on Rules on October 27, 2015, Oct. 28, 2015, at 4.

<sup>2</sup> OMB Memorandum M-16-06, [Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015](#), Feb. 24, 2016 (“OMB Memorandum M-16-06”), at 1.

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 1. Penalties under OSHA and the Social Security Act (which were previously exempt) are now subject to the 2016 and subsequent inflation adjustments under the 2015 Act. *Id.*

<sup>6</sup> [Adjustment of Civil Monetary Penalty Amounts](#), 81 Fed. Reg. 42,476 (June 30, 2016).

<sup>7</sup> [Civil Monetary Penalties Inflation Adjustment](#), 81 Fed. Reg. 42,491 (June 30, 2016). The DOJ requested for public comments to be submitted by August 29, 2016.

<sup>8</sup> [Adjustments to Civil Monetary Penalty Amounts](#), SEC Release Nos. 33-10104; 34-78156; IA-4437; IC-32162; File No. S7-11-16 (June 27, 2016). The SEC requested for public comments to be submitted by August 15, 2016.

<sup>9</sup> [Rules of Practice and Procedure; Rules of Practice and Procedure in Adjudicatory Proceedings; Civil Money Penalty Inflation Adjustments](#), 81 Fed. Reg. 43,021 (July 1, 2016). The Office of the Comptroller of the Currency (OCC) requested for public comments to be submitted by August 30, 2016.

<sup>10</sup> [Civil Penalty Inflation Adjustments](#), 81 Fed. Reg. 38,569 (June 14, 2016). The Consumer Financial Protection Bureau (CFPB) requested for public comments to be submitted by July 14, 2016, the effective date of this rule.

<sup>11</sup> [Rules of Practice and Procedure](#), FDIC 3064-AE43 (June 21, 2016). The FDIC requested for public comments to be submitted by September 1, 2016.

<sup>12</sup> [Civil Monetary Penalty Adjustment and Table](#), 81 Fed. Reg. 42,503 (June 30, 2016).

<sup>13</sup> [Appendix 1: Inflation Adjustment Act – Penalty Adjustments](#), Dep’t of Labor.

<sup>14</sup> [Revisions to the Civil Penalty Inflation Adjustment Tables](#), 81 Fed. Reg. 43,463 (July 5, 2015).

<sup>15</sup> [Order, In the Matter of Amendment of Section 1.80\(b\) of the Commission's Rules: Adjustment of Civil Monetary Penalties to Reflect Inflation](#), DA 16-644 (FCC June 9, 2016). This order took effect as of July 1, 2016.

<sup>16</sup> [Civil Monetary Penalty Inflation Adjustments](#), 155 FERC 61,320, Dkt. No. RM16-16-000, Order No. 826 (June 29, 2016).

OMB Memorandum M-16-06 at 3.

<sup>17</sup> OMB Memorandum M-16-06 at 3.

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