CONTINUING TO ADJUST PENALTIES: THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015

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Government Enforcement Alert

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The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("2015 Act") became law in November 2015. The stated purpose of the 2015 Act is "to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect." The 2015 Act requires agencies to: (1) adjust the level of civil monetary penalties with an initial "catch-up" adjustment; and (2) make subsequent annual adjustments for inflation.

This year is the first year for annual inflation adjustments to take effect. Agencies had until January 15, 2017 to publish adjustments to civil penalties.[1] The Office of Management and Budget ("OMB") published the adjustment multiplier, based on the Consumer Price Index For All Urban Consumers (CPI-U), at 1.01636. This number represents the percentage change between October 2016's CPI-U (241.729) and October 2015's CPI-U (237.838). Penalties, therefore, were calculated according to the following formula: the 2016 penalty x 1.01636 = the 2017 penalty (rounded to the nearest dollar).

Prior to the 2015 Act, Congress had attempted to increase penalties using often arcane rules of calculating cost-of-living adjustments, and Congress kept a low cap on inflation increases. Further complicating matters, some agencies were exempt from previous increases, such as the Occupational Safety and Health Administration's ("OSHA") 1990 exemption.[2] As a result, many penalties remained low and were therefore perceived as being less effective at deterring noncompliant conduct with some arguing that the cost of the fine was often less than the cost of compliance. The 2015 Act modernizes and simplifies the previously used rules and enhances penalties' deterrent effect.

Under the 2015 Act's catch-up provision, some penalties increased significantly in 2016 — such as one OSHA penalty that increased from $70,000 to $124,709 — since these penalties had not been adjusted for many years. Not only does the 2015 Act increase penalties for almost all agencies, but it also mandates yearly increases according to inflation, as noted above.

IMPORTANT CONSIDERATIONS

A civil monetary penalty may be imposed through a civil federal court proceeding or an administrative proceeding when a party has violated a federal statute or regulation.[3] The 2015 Act affects only civil monetary penalties and only those penalties with a specific dollar amount. For example, if a penalty states "the maximum of either twice the value of the transaction or $250,000,"[4] then only the $250,000 dollar amount is adjusted according to the CPI-U.

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Those who are affected by applicable penalties should consider three elements of the increases: (1) the catch-up increase (finalized in 2016), (2) the annual increase, and (3) future increases.

Catch-Up Increases

: The penalty under § 113(d)(1) of the Clean Air Act provides an example of a catch-up increase: In 2015, the penalty was $320,000, and in 2016, it increased to $356,312. To calculate this increase, the Environmental Protection Agency ("EPA") multiplied the originally enacted statutory penalty of $200,000 in 1990 by 1.78156, the cost-of-living multiplier set by OMB.[5]

The catch-up provision placed a limit on the amount of increase, which equaled 2.5 times the penalty amount in 2015.[6] In the EPA example, that limit did not change the amount of increase because the cap was $800,000 (2.5 x $320,000).

Annual Increases

: Annual increases are determined by the CPI-U and are currently 1.01636 times the 2016 value, as explained above. For example, the Bureau of Consumer Financial Protection's penalty under 12 U.S.C. 5565(c)(2)(A) increased from $5,437 in 2016 to $5,526 in 2017, an increase of 1.01636 times the starting value.[7]

Future Increases

: While some increases under the 2015 Act are relatively small — like the Bureau of Consumer Financial Protection's penalty increase noted above — changes in CPI-U will vary from year to year and more significant changes in penalties are possible in the future.[8] Under the 2015 Act, agencies will be making annual adjustments for inflation based on the CPI-U. Agencies are required to publish annual inflation adjustments in the Federal Register no later than January 15 of each year. OMB publishes adjusted rate guidance on December 15 each year, allowing a month for agencies to publish their adjustments.

HELPFUL LINKS

The following links offer helpful resources pertaining to current civil penalty amounts:

- Electronic Code of Federal Regulations (click here)
- Federal Register (click here)
- Federal Register – Vol. 81, No. 251 (Dec. 30, 2016) – containing civil monetary penalty adjustments for the Department of Energy (click here)
- Federal Register – Vol. 82, No. 8 (Jan. 12, 2017) – containing civil monetary penalty adjustments for the EPA (click here)
- Federal Register – Vol. 82, No. 11 (Jan. 18, 2017) – containing civil monetary penalty adjustments for the Securities Exchange Commission (click here)
- Federal Register – Vol. 82, No. 11 (Jan. 18, 2017) – containing civil monetary penalty adjustments for the Department of Labor Wage and Hour Division (click here)

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- Federal Register – Vol. 82, No. 17 (Jan. 27, 2017) – containing civil monetary penalty adjustments for the Department of Homeland Security (click here)

CONCLUSION

Those who are affected by the penalties adjusted by the 2015 Act should, therefore, not only be aware of catch-up increases that were finalized in 2016, but also should be mindful of this year's annual increase and aware of further increases that will take effect in the future.

NOTES:

[1] Agencies that have made cost-of-living adjustments to civil penalties as required by other statutes must assess whether an increase is required under the 2015 Act. *See* Office of Mgmt. & Budget, Memorandum for the Heads of Executive Departments and Agencies (Dec. 16, 2016).

[2] U.S. Department of Labor, Fact Sheet (2016), https://www.dol.gov/sites/default/files/2016-inflation-factsheet.pdf.

[3] Specifically, the notes to 28 U.S.C. § 2461 define a civil monetary penalty as "a 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."

[4] Office of Mgmt. & Budget, Memorandum for the Heads of Executive Departments and Agencies (Feb. 24, 2016).

[5] Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 127, 43091 (July 1, 2016).

[6] "Under the simplifying assumption that inflation increases every year at a fixed rate of 2.5%, an increase hitting the new 150% ceiling (tantamount to a new penalty that is two and a half times as large as the original penalty) implies more than 37 years of accrued inflation." James Ming Chen, *Inflation-Based Adjustments in Federal Civil Monetary Penalties*, 34 Yale L. & Pol'y Rev. 1, 42 (2015).

[7] Civil Penalty Inflation Adjustments, 82 Fed. Reg. 8, 3601 (Jan. 12, 2017).

[8] Under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584 (Nov. 2, 2015), to be codified at 28 U.S.C. § 2461 note Sec. 5(C), the maximum adjustment shall not exceed 150% of the amount of the most recently established penalty.

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