

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN 3133-AF34

Civil Monetary Penalty Inflation Adjustment

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation.

This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective [DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Gira Bose, Staff Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518-6562.

SUPPLEMENTARY INFORMATION:

I. Legal Background

II. Calculation of Adjustments

III. Regulatory Procedures

I. Legal Background

A. Statutory Requirements

Every Federal agency, including the NCUA, is required by law to adjust its maximum CMP amounts each year to account for inflation. Prior to this being an annual requirement, agencies were required to adjust their CMPs at least once every four years. The previous four-year requirement stemmed from the Debt Collection Improvement Act of 1996,¹ which amended the Federal Civil Penalties Inflation Adjustment Act of 1990.²

The current annual requirement stems from the Bipartisan Budget Act of 2015,³ which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).⁴ This legislation provided for an initial “catch-up” adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment reset CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculated inflation with reference to the year when each CMP was enacted or last modified by Congress. Agencies were required to publish their catch-up adjustments in an interim final rule by July 1, 2016 and make them effective by August 1, 2016.⁵ The NCUA complied with these requirements in a June 2016 interim final rule, followed by a November 2016 final rule to confirm the adjustments as final.⁶

The 2015 amendments also specified how agencies must conduct annual inflation adjustments after the 2016 catch-up adjustment. Following the catch-up adjustment, agencies

¹ Pub. L. 104-134, Sec. 31001(s), 110 Stat. 1321-373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.

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

³ Pub. L. 114-74, 129 Stat. 584 (Nov. 2, 2015).

⁴ 129 Stat. 599.

⁵ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

⁶ 81 FR 40152 (June 21, 2016); 81 FR 78028 (Nov. 7, 2016).

must make the required adjustments and publish them in the Federal Register by January 15 each year.⁷ For 2017, the NCUA issued an interim final rule on January 6, 2017,⁸ followed by a final rule issued on June 23, 2017.⁹ For 2018, 2019, and 2020, the NCUA issued a final rule in each year to satisfy the agency's annual requirements.¹⁰ This final rule satisfies the agency's requirement for the 2021 annual adjustment.

The law provides that the adjustments shall be made notwithstanding the section of the Administrative Procedure Act (APA) that requires prior notice and public comment for agency rulemaking.¹¹ The 2015 amendments also specify that each CMP maximum must be increased by the percentage by which the consumer price index for urban consumers (CPI-U)¹² for October of the year immediately preceding the year the adjustment is made exceeds the CPI-U for October of the prior year.¹³ Thus, for the adjustment to be made in 2021, an agency must compare the October 2019 and October 2020 CPI-U figures.

An annual adjustment under the 2015 amendments is not required if a CMP has been amended in the preceding 12 months pursuant to other authority. Specifically, the statute provides that an agency is not required to make an annual adjustment to a CMP if in the preceding 12 months it has been increased by an amount greater than the annual adjustment required by the 2015 amendments.¹⁴ The NCUA did not make any adjustments in the preceding 12 months pursuant to other authority. Therefore, this rulemaking adjusts the NCUA's CMPs pursuant to the 2015 amendments.

⁷ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

⁸ 82 FR 7640 (Jan. 23, 2017).

⁹ 82 FR 29710 (June 30, 2017).

¹⁰ 83 FR 2029 (Jan. 16, 2018); 84 FR 2055 (Feb. 6, 2019); 85 FR 2009 (Jan. 14, 2020).

¹¹ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

¹² This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: <http://www.bls.gov/cpi/>.

¹³ Pub. L. 114-74, Sec. 701(b)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).

¹⁴ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).

B. Application to the 2021 Adjustments and Office of Management and Budget guidance

This section applies the statutory requirements and the Office of Management and Budget's (OMB) guidance to the NCUA's CMPs and sets forth the Board's calculation of the 2021 adjustments.

The 2015 amendments directed OMB to issue guidance to agencies on implementing the inflation adjustments.¹⁵ OMB is required to issue its guidance each December and, with respect to the 2021 annual adjustment, did so on December 23, 2020.¹⁶ For 2021, Federal agencies must adjust the maximum amounts of their CMPs by the percentage by which the October 2020 CPI-U (260.388) exceeds the October 2019 CPI-U (257.346). The resulting increase can be expressed as an inflation multiplier (1.01182) to apply to each current CMP maximum amount to determine the adjusted maximum. The OMB guidance also addresses rulemaking procedures and agency reporting and oversight requirements for CMPs.¹⁷

The table below presents the adjustment calculations. The current maximums are found at 12 CFR 747.1001, as adjusted by the final rule that the Board approved in January 2020. This amount is multiplied by the inflation multiplier to calculate the new maximum in the far-right column. Only these adjusted maximum amounts, and not the calculations, will be codified at 12 CFR 747.1001 under this final rule. The adjusted amounts will be effective upon publication in

¹⁵ Pub. L. 114-74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).

¹⁶ See OMB Memorandum M-21-10, Implementation of Penalty Inflation Adjustments for 2021, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (December 23, 2020).

¹⁷ Id.

the *Federal Register* and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted.¹⁸

Table: Calculation of Maximum CMP Adjustments

<u>Citation</u>	<u>Description and Tier¹⁹</u>	<u>Current Maximum (\$)</u>	<u>Multiplier</u>	<u>Adjusted Maximum (\$)</u> <u>(Current Maximum X Multiplier, Rounded to Nearest Dollar)</u>
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report	4,098	1.01182	4,146
12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report	40,979	1.01182	41,463
12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard	Lesser of 2,048,915 or 1% of total CU assets	1.01182	Lesser of 2,073,133 or 1% of total CU assets

¹⁸ Pub. Law 114-74, 129 Stat. 600 (Nov. 2, 2015).

¹⁹ The table uses condensed descriptions of CMP tiers. Refer to the U.S. Code citations for complete descriptions.

12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement	3,747	1.01182	3,791
12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement	37,458	1.01182	37,901
12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or	Lesser of 1,872,957 or 1% of total CU assets	1.01182	Lesser of 1,895,095 or 1% of total CU assets

	with reckless disregard			
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	127	1.01182	129
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	297	1.01182	301
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	10,245	1.01182	10,366
12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty	51,222	1.01182	51,827
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	2,048,915	1.01182	2,073,133
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 2,048,915	1.01182	Lesser of 2,073,133 or 1% of total CU assets

		or 1% of total CU assets		
12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions	337,016	1.01182	341,000
15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation)	11,767	1.01182	11,906
15 U.S.C. 1639e(k)	Subsequent violations of the same	23,533	1.01182	23,811
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	2,226	1.01182	2,252

III. Regulatory Procedures

A. Final Rule under the APA

In the 2015 amendments, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,²⁰ which generally requires agencies to follow notice-and-comment procedures in rulemaking and to make rules effective no sooner than 30 days after publication in the *Federal Register*. The 2015 amendments provide a clear exception to these requirements.²¹ In addition, as an independent

²⁰ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

²¹ See 5 U.S.C. 559; *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 396-99 (D.C. Cir. 1998).

basis, the Board finds that notice-and-comment procedures would be impracticable and unnecessary under the APA because of the largely ministerial and technical nature of the rule, which affords agencies limited discretion in promulgating the rule, and the statutory deadline for making the adjustments.²² In these circumstances, the Board finds good cause to issue a final rule without issuing a notice of proposed rulemaking or soliciting public comments. The Board also finds good cause to make the final rule effective upon publication because of the statutory deadline. Accordingly, this final rule is issued without prior notice and comment and will become effective immediately upon publication.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA²³ or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the *Federal Register*.²⁴ Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers FICUs with assets less than \$100 million to be small entities.²⁵

As discussed previously, consistent with the APA,²⁶ the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a

²² 5 U.S.C. 553(b)(3)(B); see *Mid-Tex Elec. Co-op., Inc. v. Fed. Energy Regulatory Comm'n*, 822 F.2d 1123 (D.C. Cir. 1987).

²³ 5 U.S.C. 553(b).

²⁴ 5 U.S.C. 603, 604.

²⁵ NCUA Interpretive Ruling and Policy Statement 15–1. 80 FR 57512 (Sept. 24, 2015).

²⁶ 5 U.S.C. 553(b)(3)(B).

regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board notes that this final rule will not have a significant economic impact on a substantial number of small credit unions because it affects only the maximum amounts of CMPs that may be assessed in individual cases, which are not numerous and generally do not involve assessments at the maximum level. In addition, several of the CMPs are limited to a percentage of a credit union's assets. Finally, in assessing CMPs, the Board generally must consider a party's financial resources.²⁷ Because this final rule will affect few, if any, small credit unions, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.²⁸ For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, or credit unions but does not require any reporting or recordkeeping. Therefore, this final rule will not create new paperwork burdens or modify any existing paperwork burdens.

²⁷ 12 U.S.C. 1786(k)(2)(G)(i).

²⁸ 44 U.S.C. 3507(d); 5 CFR part 1320.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, and federally insured credit unions, including state-chartered credit unions. However, the final rule does not create any new authority or alter the underlying statutory authorities that enable the Board to assess CMPs. Accordingly, this final rule will not have a substantial direct effect on the states, on the connection between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

E. Assessment of Federal Regulations and Policies on Families

The Board has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.²⁹

F. Congressional Review Act

For purposes of the Congressional Review Act,³⁰ the OMB makes a determination as to whether a final rule constitutes a “major” rule. If OMB deems a rule to be a “major rule,” the

²⁹ Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).

³⁰ 5 U.S.C. 801-808.

Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.³¹

For the same reasons set forth above, the Board is adopting the final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.³²

The Board believes this final rule is not a major rule. As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to OMB, Congress, and the Government Accountability Office for review.

List of Subjects in 12 CFR Part 747

Credit unions, Civil monetary penalties.

³¹ 5 U.S.C. 804(2).

³² 5 U.S.C. 808.

By the National Credit Union Administration Board on _____.

Melane Conyers-Ausbrooks,
Secretary of the Board

For the reasons stated in the preamble, the Board amends 12 CFR part 747 as follows:

**PART 747 — ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES
OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS**

1. The authority for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e;
42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; Pub. L. 114-74.

2. Revise § 747.1001 to read as follows:

§ 747.1001 Adjustment of civil monetary penalties by the rate of inflation.

(a) The NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101-410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)), to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report	\$4,146
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report	\$41,463
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard	\$2,073,133 or 1 percent of the total assets of the credit union, whichever is less
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified	\$3,791

	statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement	
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement	\$37,901
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard	\$1,895,095 or 1 percent of the total assets of the credit union, whichever is less
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	\$129
(8) 12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	\$301

(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	\$10,366
(10) 12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty	\$51,827
(11) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	\$2,073,133
(12) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union)	\$2,073,133 or 1 percent of the total assets of the credit union, whichever is less
(13) 12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions	\$341,000
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: \$11,906 Subsequent violations: \$23,811

(15) 42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	\$2,252
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(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred on or after November 2, 2015.