

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN: 3133-AF09

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 four-year requirement stemmed from the Debt Collection Improvement Act of 1996¹, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990².

¹ Pub. L. 104-134, § 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.

The 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 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 and 2019, the NCUA issued a final rule in each year to satisfy the agency’s requirement for the 2018 and 2019 annual adjustments.¹⁰ This final rule satisfies the agency’s requirement for the 2020 annual adjustment.

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).

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).

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 For example, for the adjustment to be made in 2020, an agency must compare the October 2018 and 2019 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.

B. Application to the 2020 Adjustments and Office of Management and Budget guidance

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).

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 2020 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 2020 annual adjustment, did so on December 16, 2019.¹⁶ For 2020, federal agencies must adjust the maximum amounts of their CMPs by the percentage by which the October 2019 CPI-U (257.346) exceeds the October 2018 CPI-U (252.885). The resulting increase can be expressed as an inflation multiplier (1.01764) 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 2019. 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 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

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

¹⁶ See OMB Memorandum M-20-05, Implementation of Penalty Inflation Adjustments for 2020, pursuant to the 2015 amendments (Dec. 16, 2019).

¹⁷ Id.

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

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	4,027	1.01764	4,098
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	40,269	1.01764	40,979
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 2,013,399 or 1% of total CU assets	1.01764	Lesser of 2,048,915 or 1% of total CU assets
12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified	3,682	1.01764	3,747

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

	statement of insured shares and charges due to NCUSIF, or inadvertent submission of false or misleading statement			
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	36,809	1.01764	37,458
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	Lesser of 1,840,491 or 1% of total CU assets	1.01764	Lesser of 1,872,957 or 1% of total CU assets
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	125	1.01764	127
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA	292	1.01764	297

	security requirements			
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	10,067	1.01764	10,245
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	50,334	1.01764	51,222
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	2,013,399	1.01764	2,048,915
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 2,013,399 or 1% of total CU assets	1.01764	Lesser of 2,048,915 or 1% of total CU assets
12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions	331,174	1.01764	337,016

15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation)	11,563	1.01764	11,767
15 U.S.C. 1639e(k)	Subsequent violations of the same	23,125	1.01764	23,533
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	2,187	1.01764	2,226

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, 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

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).
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).

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 requires the Board to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.²³ For purposes of this analysis, the Board considers small credit unions to be those having under \$100 million in assets.²⁴ 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.²⁵ 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

²³ 5 U.S.C. 603(a).

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

²⁵ 12 U.S.C. 1786(k)(2)(G)(i).

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.²⁶ 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.

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

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

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, 1999.²⁷

F. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996²⁸ (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where the Board issues a final rule as defined by Section 551 of the APA.²⁹ The NCUA does not believe this rule is a “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA submitted this final rule to OMB for it to determine if the final rule is a “major rule” for purposes of SBREFA. OMB determined the final rule was not a major rule. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects in 12 CFR Part 747

²⁷ Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).

²⁸ Pub. L. 104–121, 110 Stat. 857 (Mar. 29, 1996).

²⁹ 5 U.S.C. 551.

Credit unions, Civil monetary penalties.

By the National Credit Union Administration Board on _____, 2020.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, the NCUA 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:

Subpart K – Inflation Adjustment of Civil Monetary Penalties

§ 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 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	\$4,098
(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	\$40,979
(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	\$2,048,915 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 statement of insured shares and charges due to NCUSIF, or inadvertent submission of false or misleading statement	\$3,747
(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	\$37,458
(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	\$1,872,957 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	\$127
(8) 12 U.S.C. 1785(e) (3)	Non-compliance with NCUA security requirements	\$297

(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	\$10,245
(10) 12 U.S.C. 1786(k)(2)(A)	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
(11) 12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	\$2,048,915
(12) 12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union)	\$2,048,915 or 1 percent of the total assets of the credit union, whichever is less
(13) 12 U.S.C. 1786(w)(5)(ii)	Non-compliance with senior examiner post-employment restrictions	\$337,016
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: \$11,767 Subsequent violations: \$23,533

(15)	42 U.S.C.	Non-compliance with flood	\$2,226
	4012a(f)(5)	insurance requirements	

(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.