7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN: 3133-AE83

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: Ian Marenna, Senior Trial Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Legal Background

II. Calculation of Adjustments

III. Regulatory Procedures

I. Legal Background

A. Statutory Requirements and OMB Guidance

The Debt Collection Improvement Act of 1996[1] (DCIA) amended the Federal Civil Penalties Inflation Adjustment Act of 1990[2] (FCPIA Act) to require every federal agency to enact regulations that adjust each CMP provided by law under its jurisdiction by the rate of inflation at least once every four years.

In November 2015, Congress further amended the CMP inflation requirements in 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

[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.
[3] Pub. L. 114-74, 129 Stat. 584 (Nov. 2, 2015).
[4] 129 Stat. 599.

"catch-up" adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment re-set 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 an October 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] The NCUA issued an interim final rule on January 6, 2017,[8] followed by a final rule issued on June 23, 2017.[9] This final rule will satisfy the agency's requirement for the 2018 annual adjustments.

The statute 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.[10] 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)[11] for October of the year immediately preceding the year the adjustment is made exceeds the CPI-U for

---

[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] Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).
[11] This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: http://www.bls.gov/cpi/.

October of the prior year.[12] For example, for the adjustment made in 2018, agencies must compare the October 2016 and 2017 CPI-U figures.

The 2015 amendments also provide that agencies may forgo the required annual adjustments in certain circumstances. Specifically, in a subsection titled "Other Adjustments Made," the statute provides that an agency is not required to make an annual adjustment to a CMP if it has been increased by a greater amount than the contemplated annual adjustment in the preceding 12 months.[13] When these criteria are met, the agency has discretion not to make the adjustments otherwise required by the statute.

In addition, the 2015 amendments directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the inflation adjustments.[14] OMB is required to issue its guidance each December and did so on December 15, 2017.[15] This OMB guidance for the 2018 adjustments includes an inflationary multiplier (1.02041) to apply to each current CMP maximum amount to determine the adjusted maximum. The guidance also addresses rulemaking procedures and agency reporting and oversight requirements for CMPs.[16]

The next section sets forth the Board's calculation of the adjustments for 2018, in accordance with the foregoing requirements.

---

[12] Pub. L. 114-74, Sec. 701(b)(1)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).
[13] Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).
[14] Pub. L. 114-74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).
[15] Id.; OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-18-03 (Dec. 15, 2017), *available at https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf* (noting that the applicable 2017 CMP-adjustment multiplier is 1.02041).
[16] Id.

B. Application to the 2018 Adjustments

This section applies the statutory requirements and OMB's guidance to the NCUA's CMPs.

As explained above, the 2015 amendments require the NCUA to adjust the maximum amounts of its CMPs by the percentage by which the October 2017 CPI-U (246.663) exceeds the October 2016 CPI-U (241.729). The percentage change is 2.041. This percentage increase can be expressed as an inflation multiplier (the quotient of the October 2017 figure divided by the October 2016 figure). Accordingly, each CMP maximum amount should be multiplied by 1.02041 to determine the adjusted maximum amount. OMB's guidance identifies the same multiplier.

The Board has considered the exception in the 2015 amendments for adjustments made in the preceding 12 months, discussed above, and has determined that it does not apply. All of the adjustments calculated below are equal to or greater than the adjustments made in January 2017 for each CMP. Accordingly, the exception for greater adjustments in the preceding 12 months does not apply. Thus, the Board lacks discretion to decline to make the adjustments calculated below.

The table below presents the adjustment calculations. The current maximums are found at 12 C.F.R. 747.1001, as adjusted in January 2017. 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 January 15, 2018, and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted. The table to be published in the CFR adds a separate row for tier 3 penalties against insured credit unions under 12 U.S.C. 1786(k). This is a format change to conform the table in the CFR with the table below, which lists the tier 3 penalties against credit unions and natural persons separately, following the structure of the statute.

Table: Calculation of Maximum CMP Adjustments

Citation	Description/Tier[17]	Current Maximum ($)	Multiplier	Adjusted Maximum ($) (Current Maximum X Multiplier, Rounded to Nearest Dollar)
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report	3,849	1.02041	3,928
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	38,492	1.02041	39,278
12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission	Lesser of 1,924,589 or 1% of	1.02041	Lesser of 1,963,870 or 1% of total CU assets

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

	of a false or misleading report done knowingly or with reckless disregard	total CU assets		
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	3,519	1.02041	3,591
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	35,186	1.02041	35,904
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 1,759,309 or 1% of total CU assets	1.02041	Lesser of 1,795,216 or 1% of total CU assets

	with reckless disregard			
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	120	1.02041	122
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	279	1.02041	285
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	9,623	1.02041	9,819
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	48,114	1.02041	49,096
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	1,924,589	1.02041	1,963,870
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 1,924,589	1.02041	Lesser of 1,963,870 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	316,566	1.02041	323,027
15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation)	11,053	1.02041	11,279
15 U.S.C. 1639e(k)	Subsequent violations of the same	22,105	1.02041	22,556
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	2,090	1.02041	2,133

III. Regulatory Procedures

A. Final Rule under the APA

In the 2015 amendments to the FCPIA Act, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,[18] which 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.[19] In addition, the Board finds that

[18] Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).
[19] See 5 U.S.C. 559; Asiana Airlines v. Fed. Aviation Admin., 134 F.3d 393, 396-99 (D.C. Cir. 1998).

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.[20] 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 requires the Board to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.[21] For purposes of this analysis, the Board considers small credit unions to be those having under $100 million in assets.[22] This final rule will not have a significant economic impact on a substantial number of small credit unions because it only affects 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.[23] Because this final rule will affect few, if any, small credit unions,

[20] 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, 1133-34 (D.C. Cir. 1987).
[21] 5 U.S.C. 603(a).
[22] Interpretive Ruling and Policy Statement 15-1, 80 FR 57512 (Sept. 24, 2015).
[23] 12 U.S.C. 1786(k)(2)(G)(i).

the Board certifies that the final rule will not have a significant economic impact on 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.[24] 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

[24] 44 U.S.C. 3507(d); 5 CFR part 1320.

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.[25]

F. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996[26] (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.[27] The Board has submitted this final rule to OMB for it to determine whether it is a "major rule" within the meaning of the relevant sections of SBREFA.

List of Subjects in 12 CFR Part 747

Credit unions, Civil monetary penalties.

By the National Credit Union Administration Board on January 9, 2018.

[25] Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).
[26] Pub. L. 104–121, 110 Stat. 857 (Mar. 29, 1996).
[27] 5 U.S.C. 551.

Gerard S. 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	$3,928
(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	$39,278
(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	$1,963,870 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,	$3,591

	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	$35,904
(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	$1,795,216 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	$122
(8) 12 U.S.C. 1785(e) (3)	Non-compliance with NCUA security requirements	$285
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	$9,819
(10) 12 U.S.C. 1786(k)(2)(A)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for	$49,096

	recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty	
(11) 12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	$1,963,870
(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)	$1,963,870 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	$323,027
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: $11,279 Subsequent violations: $22,556
(15) 42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	$2,133

(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 after November 2, 2015.