

A Pound of Flesh Just Got Heavier

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The Federal Trade Commission announced yesterday that it has approved final amendments to Commission Rule 1.98 that adjust the maximum civil penalty dollar amounts for violations of 16 provisions of law the FTC enforces, as required by the Federal Civil Penalties Inflation Adjustment Act of 2015 (“Adjustment Act”), which requires federal agencies to implement a “catch up” adjustment in 2016 to address due to inflation since the civil penalties in their jurisdiction were last set or adjusted by statute.

The maximum civil penalty amount has increased from \$16,000 to \$40,000 for the following violations and others listed in the [Federal Register Notice](#):

- Section 5(l) of the FTC Act, which pertains to violations of final Commission orders issued under section 5(b) of the FTC Act; and
- Sections 5(m)(1)(A) and 5(m)(1)(B) of the FTC Act: trade regulation rules issued by the Commission under section 18 of the FTC Act that address unfair or deceptive acts or practices.

The new maximum civil penalty amounts will take effect on August 1, 2016, as required per the Adjustment Act. Following this initial catch-up, the Adjustment Act directs agencies to adjust their civil penalties for inflation every January thereafter.

The Adjustment Act applies to civil penalties assessed after the effective date of the applicable adjustment, including civil penalties whose associated violation predated the effective date. The Adjustment Act does not retrospectively change previously assessed or enforced civil penalties. In addition, the Adjustment Act does not alter an agency’s statutory authority to assess penalties below the maximum level; however, to the extent that minimum penalties exist for violations, those are subject to adjustment as well.

How Penalties Were Selected For Adjustment

The Adjustment Act defined “civil monetary penalty” as “any 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.

Agencies were responsible for identifying applicable civil penalties.

Calculation of Inflation Adjustments

The catch-up adjustment is defined as the percentage by which the U.S. Department of Labor's Consumer Price Index for all-urban consumers ("CPI-U") for the month of October 2015 exceeds the CPI-U for the month of October for the year in which the amount of the penalty was last set or adjusted pursuant to law. The Adjustment Act limits the amount of the catch-up increase for 2016 to 150% of the amount of the civil penalty in effect on November 2, 2015.

Guidance regarding calculation of future adjustments is forthcoming. The Office of Management and Budget will issue adjustment rate guidance no later than December 15 each year to adjust for inflation in the CPI-U as of the most recent October.

Notice and Comment Not Used

The Commission did not engage in notice and comment prior to adopting this interim final rule. Per the Commission, "advance opportunity for notice and comment are not required 'when the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'" 5 U.S.C. 553(b)(3)(B) In short, because the Adjustment Act directs agencies to promulgate the adjustment through an interim final rulemaking no later than July 1, 2016, and prescribes the formula for making the adjustment, the Commission determined that good cause exists to forego prior public notice and comment under the Administrative Procedures Act.