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FARM CREDIT ADMINISTRATION

12 CFR Part 622

RIN 3052-AD16

Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation

AGENCY: Farm Credit Administration.

ACTION: Final rule.

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SUMMARY: This regulation implements inflation adjustments to civil money penalties (CMPs) that the Farm Credit Administration (FCA) may impose or enforce pursuant to the Farm Credit Act of 1971, as amended (Farm Credit Act), and pursuant to the Flood Disaster Protection Act of 1973, as amended by the National Flood Insurance Reform Act of 1994 (Reform Act), and further amended by the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act). The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (1996 Act) and the Federal Civil Penalties Inflation Adjustment Act of 2015 (2015 Act) (collectively, 1990 Act, as amended), requires all Federal agencies with the authority to enforce CMPs to evaluate those CMPs each year

to ensure that they continue to maintain their deterrent value and promote compliance with the law.

EFFECTIVE DATE: This regulation is effective on August 1, 2016.

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SUPPLEMENTARY INFORMATION:

I. Objective

The objective of this regulation is to adjust the maximum CMPs for inflation with an initial "catch-up" adjustment through an interim final rulemaking (IFR) to retain the deterrent effect of such penalties.

II. Background

A. Introduction

Section 3(2) of the 1990 Act, as amended, defines a civil monetary penalty<sup>1</sup> as any penalty, fine, or other sanction that: (1) Either is for a specific monetary

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<sup>1</sup>While the 1990 Act, as amended by 1996 and 2015 Acts, uses the term "civil monetary penalties" for these penalties or other sanctions, the Farm Credit Act and the FCA Regulations use the term "civil money penalties." Both terms have the same meaning. Accordingly, this rule uses the term "civil money penalty", and both terms may be used interchangeably.

amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.<sup>2</sup>

The FCA imposes and enforces CMPs through the Farm Credit Act and the Flood Disaster Protection Act of 1973, as amended. FCA's regulations governing CMPs are found in 12 CFR parts 622 and 623. Part 622 establishes rules of practice and procedure applicable to formal and informal hearings held before the FCA, and to formal investigations conducted under the Farm Credit Act. Part 623 prescribes rules with regard to persons who may practice before the FCA and the circumstances under which such persons may be suspended or debarred from practice before the FCA.

B. CMPs Issued Under the Farm Credit Act

The Farm Credit Act provides that any Farm Credit System (System) institution or any officer, director, employee, agent, or other person participating in the conduct of the affairs of a System institution who violates the terms of a cease-and-desist order that has become final pursuant to section 5.25 or 5.26 of the Farm Credit Act

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<sup>2</sup> See 28 U.S.C. 2461 note.

must pay up to a maximum daily amount of \$1,000<sup>3</sup> during which such violation continues. This CMP maximum was set by the Farm Credit Amendments Act of 1985, which amended the Farm Credit Act. Orders issued by the FCA under section 5.25 or 5.26 of the Farm Credit Act include temporary and permanent cease-and-desist orders. In addition, section 5.32(h) of the Farm Credit Act provides that any directive issued under sections 4.3(b)(2), 4.3A(e), or section 4.14A(i) of the Farm Credit Act "shall be treated" as a final order issued under section 5.25 of the Farm Credit Act for purposes of assessing a CMP.

Section 5.32(a) of the Farm Credit Act also states that "[a]ny such institution or person who violates any provision of the [Farm Credit] Act or any regulation issued under this Act shall forfeit and pay a civil penalty of not more than \$500<sup>4</sup> per day for each day during which such violation continues." This CMP maximum was set by the Agricultural Credit Act of 1987, which was enacted in 1988, and amends the Farm Credit Act. Current, inflation-

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<sup>3</sup> The inflation-adjusted CMP in effect on November 2, 2015, for a violation of a final order is \$1,100 per day, as set forth in § 622.61(a)(1) of FCA regulations.

<sup>4</sup> The inflation-adjusted CMP in effect on November 2, 2015, for a violation of the Farm Credit Act or a regulation issued under the Farm Credit Act is \$750 per day, as set forth in § 622.61(a)(2) of FCA regulations.

adjusted CMP maximums are set forth in existing § 622.61 of FCA regulations.<sup>5</sup>

The FCA also enforces the Flood Disaster Protection Act of 1973,<sup>6</sup> as amended by the National Flood Insurance Reform Act of 1994,<sup>7</sup> which requires FCA to assess CMPs for a pattern or practice of committing certain specific actions in violation of the National Flood Insurance Program. The existing maximum CMP for a violation under the Flood Disaster Protection Act of 1973 is \$2,000.<sup>8</sup>

C. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015

1. In General

The 2015 Act requires all Federal agencies with authority to issue CMPs to make inflation-based adjustments to all CMPs within their jurisdictions no later than July 1, 2016. The 2015 Act also requires every Federal agency to adjust the CMPs yearly, starting January 15, 2017.

Under Section 4(b) of the 1990 Act, as amended, for the first adjustment made in accordance with the 2015 Act amendments, Federal agencies are to make a “catch up” adjustment to the civil monetary penalties through an IFR, with the adjustment taking effect no later than August 1,

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<sup>5</sup> Prior adjustments were made under the 1990 Act.

<sup>6</sup> 42 U.S.C. 4012a.

<sup>7</sup> Pub. L. 103-325, title V, 108 Stat. 2160, 2255-87 (September 23, 1994).

<sup>8</sup> Pub. L. 112-141, 126 Stat. 405 (July 6, 2012).

2016.<sup>9</sup> Subsequent adjustments are to be made yearly thereafter, no later than January 15. Section 6 of the 1990 Act, as amended, states that any increase to a civil monetary penalty under this Act applies only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

Section 5(b) of the 1990 Act, as amended, defines the term "cost-of-living adjustment" as the percentage (if any) for each civil monetary penalty by which (1) the Consumer Price Index (CPI) for the month of October of the calendar year preceding the adjustment, exceeds (2) the CPI for the month of October 1 year before the month of October referred to in (1) of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.<sup>10</sup>

The "catch-up" adjustment under the 2015 Act amendments requires Federal agencies to use the cost-of-living adjustment calculated by determining the percentage change (if any) for each civil monetary penalty by which the CPI for the month of October 2015 exceeds the CPI for the month of October during the calendar year in which the

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<sup>9</sup> Pub. L. 114-74, sec. 701(b)(1).

<sup>10</sup> The CPI is published by the Department of Labor, Bureau of Statistics, and is available at its Web site:  
<ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

CMP was created or last adjusted for any reason other than pursuant to the 1996 Act. Several adjustments have been made since the Farm Credit Act established the CMP maximums. Those maximums are to be disregarded for purposes of the 2015 Act amendment initial "catch-up" adjustment calculation. However, agencies are limited to a 150-percent increase in CMPs, based upon the CMP in effect on November 2, 2015. The 150-percent limitation is on the amount of the increase; therefore, the adjusted penalty level(s) will be up to 250 percent of the level(s) in effect on November 2, 2015.<sup>11</sup>

The increase for each CMP adjusted for inflation must be rounded using a method prescribed by section 5(a) of the 1990 Act, as amended, by the 2015 Act.<sup>12</sup>

## 2. Other Adjustments

If a civil monetary penalty is subject to a cost-of-living adjustment under the 1990 Act, as amended, but is adjusted to an amount greater than the amount of the adjustment required under the Act within the 12 months preceding a required cost-of-living adjustment, the agency

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<sup>11</sup> OMB Circular M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

<sup>12</sup> Per section 5(a)(3) of the 2015 Act, any increase determined under the subsection shall be rounded to the nearest \$1.

is not required to make the cost-of-living adjustment to that CMP in that calendar year.<sup>13</sup>

### III. Catch-Up Adjustments

#### A. Mathematical Calculations of Catch-Up Adjustments

The adjustment requirement affects two provisions of section 5.32(a) of the Farm Credit Act. For the "catch-up" adjustments to the CMPs set forth by the Farm Credit Act, the calculation required by the 2015 Act is based on the percentage by which the CPI for October 2015 exceeds the CPIs for October 1985 and October 1988, respectively. The maximum CMPs for violations under section 5.32(a) were established in 1985 and 1988. The White House Office of Management and Budget (OMB) set forth guidance, as required by the 2015 Act,<sup>14</sup> with a grid of multipliers for calculating the new CMP values.<sup>15</sup> The OMB multiplier for the 1985 CMPs is 2.18802. The OMB multiplier for the 1988 CMPs is 1.97869.

The adjustment also affects the CMPs set by the Flood Disaster Protection Act of 1973, as amended. For the "catch-up" adjustments to the CMP set forth by the Flood Disaster Protection Act of 1973, as amended, the calculation required by the 2015 Act is based on the

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<sup>13</sup> Per section 4(d) of the 1990 Act, as amended.

<sup>14</sup> 28 U.S.C. 2461 note, section 7(a).

<sup>15</sup> OMB Circular M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

percentage by which the CPI for October 2012 exceeds the CPI for October 2015. The maximum CMPs for violations were created in 2012 by the Biggert-Waters Act, which amended the Flood Disaster Protection Act of 1973. The multiplier for the 2012 CMPs is 1.02819.

If any of the CMP increases exceed 150 percent of the maximums in effect as of November 2, 2015, the new maximum CMPs will reflect a simple 150-percent increase over the November 2, 2015, CMP maximums.<sup>16</sup>

1. New Penalty Amount in § 622.61(a)(1)

While the inflation-adjusted CMP currently in effect for violations of a final order occurring on or after November 2, 2015, is a maximum daily amount of \$1,100,<sup>17</sup> the 2015 Act amendments require FCA to use the maximum daily amount of \$1,000 to compute the catch-up adjustment as this was the amount in effect in 1985. Multiplying the \$1,000 CMP by the 1985 OMB multiplier, 2.18802, yields a total of \$2,188.02. When that number is rounded as required by section 5(a) of the 1990 Act, as amended the inflation-adjusted maximum increases to \$2,188. The CMP in effect on November 2, 2015 was \$1,100. Increasing the 2015 CMP maximum of \$1,100 by 150 percent yields a CMP of \$2,750.

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<sup>16</sup> The 150-percent limitation is on the amount of the increase; therefore, the adjusted penalty level(s) will be up to 250 percent of the level(s) in effect on November 2, 2015. OMB Circular, M-16-06.

<sup>17</sup> 12 CFR 622.61(a)(1).

Since the new CMP maximum calculated with the 1985 OMB multiplier is less than the 150-percent maximum increase established by the 2015 Act amendments, the new CMP maximum is \$2,188.

2. New Penalty Amount in § 622.61(a) (2)

While the inflation-adjusted CMP currently in effect for violations of the Farm Credit Act or regulations issued under the Farm Credit Act occurring on or after November 2, 2015, is a maximum daily amount of \$750,<sup>18</sup> the 2015 Act amendments require FCA to use the maximum daily amount of \$500 to compute the catch-up adjustment as this was the amount in effect in 1988. Multiplying the \$500 CMP maximum by the 1988 OMB multiplier, 1.97869, yields a total of \$989.35. When that number is rounded as required by section 5(a) of the 1990 Act, as amended the inflation-adjusted maximum increases to \$989. The CMP in effect on November 2, 2015 was \$750. Increasing the 2015 CMP of \$750 by 150 percent yields a total of \$1,875. Since the new CMP maximum calculated with the 1988 OMB multiplier is less than the 150-percent maximum increase established by the 2015 Act amendments, the new CMP maximum is \$989.

3. New Penalty Amounts for Flood Insurance Violations under § 622.61(b)

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<sup>18</sup> 12 CFR 622.61(a) (2).

The existing maximum CMP for a pattern or practice of flood insurance violations pursuant to 42 U.S.C. 4012a(f)(5) is \$2,000. Multiplying \$2,000 by the 2012 OMB multiplier, 1.02819, yields a total of \$2,056.38. When that number is rounded as required by section 5(a) of the 1990 Act, as amended, the new maximum assessment of the CMP for violating 42 U.S.C. 4012a(f)(5) is \$2,056. The CMP in effect on November 2, 2015 was \$2,000. Increasing the 2015 CMP of \$2,000 by 150 percent yields \$5,000. Since the new CMP maximum calculated with the OMB multiplier is lower than the 150-percent maximum increase established by the 2015 Act amendments, the new CMP maximum is \$2,056.

#### IV. Notice and Comment Not Required by Administrative Procedure Act

The 1990 Act, as amended, gives Federal agencies no discretion in the adjustment of CMPs for the rate of inflation. Further, these revisions are ministerial, technical, and noncontroversial. For these reasons, the FCA finds good cause to determine that public notice and an opportunity to comment are impracticable, unnecessary, and contrary to the public interest pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(B), and adopts this rule in final form.

V. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the FCA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 622

Administrative practice and procedure, Crime, Investigations, Penalties.

For the reasons stated in the preamble, part 622 of chapter VI, title 12 of the Code of Federal Regulations is amended to read as follows:

PART 622--RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 622 continues to read as follows:

Authority: Secs. 5.9, 5.10, 5.17, 5.25-5.37 of the Farm Credit Act (12 U.S.C. 2243, 2244, 2252, 2261-2273); 28 U.S.C. 2461 note; and 42 U.S.C. 4012a(f).

2. Revise § 622.61 to read as follows:

§ 622.61 Adjustment of civil money penalties by the rate of inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

(a) The maximum amount of each civil money penalty within FCA's jurisdiction is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), as follows:

(1) Amount of civil money penalty imposed under section 5.32 of the Act for violation of a final order issued under section 5.25 or 5.26 of the Act: The maximum daily amount is \$2,188 for violations that occur on or after August 1, 2016.

(2) Amount of civil money penalty for violation of the Act or regulations: The maximum daily amount is \$989 for each violation that occurs on or after August 1, 2016.

(b) The maximum civil money penalty amount assessed under 42 U.S.C. 4012a(f) is: \$385 for each violation that occurs on or after January 16, 2009, but before July 1, 2013, with total penalties under such statute not to exceed \$120,000 for any single institution during any calendar year; \$2,000 for each violation that occurs on or after July 1, 2013, but before August 1, 2016, with no cap on the total amount of penalties that can be assessed against any single institution during any calendar year; and \$2,056 for

each violation that occurs on or after August 1, 2016, with no cap on the total amount of penalties that can be assessed against any single institution during any calendar year.

Dated: May 16, 2016.\_\_\_\_\_

Dale L. Aultman,  
Secretary,  
Farm Credit Administration Board.

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