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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 107, 120, 142, and 146

RIN 3245-AH03

Civil Monetary Penalties Inflation Adjustments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to adjust for inflation the amount of certain civil monetary penalties that are within the jurisdiction of the agency. These adjustments comply with the requirement in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, to make annual adjustments to the penalties. The rule also makes a technical amendment to ensure that a reference to the penalty amount imposed on SBA Supervised Lenders for failure to file reports is consistent with current and future adjustments.

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

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SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Adjustment Improvements Act), Public

Law 114-74, 129 Stat. 584, was enacted. This Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890 (the 1990 Inflation Adjustment Act), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect (hereinafter, both collectively referred to as “the Act”). The Act required agencies to issue a final rule by August 1, 2016, to adjust the level of civil monetary penalties with an initial “catch-up” adjustment, and to annually adjust these monetary penalties for inflation by January 15 of each subsequent year. The Act also authorizes agencies to implement the annual adjustments without regard to the requirements for public notice and comment or delayed effective date under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B) and (d)(3), respectively.

In addition, based on the definition of a “civil monetary penalty” in the 1990 Inflation Adjustment Act, agencies are to make adjustments only to the civil penalties that (i) are for a specific monetary amount as provided by Federal law or have a maximum amount provided for by Federal law; (ii) are assessed or enforced by an agency; and (iii) are enforced or assessed in an administrative proceeding or a civil action in the Federal courts. Therefore, penalties that are stated as a percentage of an indeterminate amount or as a function of a violation (penalties that encompass actual damages incurred) are not to be adjusted.

On May 19, 2016, SBA published its initial adjustments to the civil monetary penalties, including an initial “catch-up” adjustment. 81 FR 31489. These adjusted penalties became effective on August 1, 2016. SBA published its most recent annual adjustments to the monetary penalties in the Federal Register on February 21, 2018 (83

FR 7361), with an immediate effective date. This rule will establish the penalty amounts required to be adjusted in 2019.

The formula for calculating the annual adjustments is based on the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the adjustment, and specifically on the change between the October CPI-U preceding the date of adjustment and the prior year's CPI-U. Based on this methodology, the 2019 civil monetary penalty adjustment formula is $\text{October 2018 CPI-U (252.885) / October 2017 CPI-U (246.663)} = 1.02522$. See, OMB memorandum, M-19-04, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, (December 14, 2018).

II. Civil Money Penalties Adjusted by This Rule

This rule makes adjustments to civil monetary penalties authorized by the Small Business Act, the Small Business Investment Act of 1958 (SBIAct), the Program Fraud Civil Remedies Act, and the Byrd Amendment to the Federal Regulation of Lobbying Act. These penalties and the implementing regulations are discussed below.

1. 13 CFR 107.665 – Civil Penalties.

SBA licenses, regulates and provides financial assistance to financial entities called small business investment companies (SBICs). Pursuant to section 315 of the SBIAct, 15 U.S.C. 687g, SBA may impose a penalty on any SBIC for each day that it fails to comply with SBA's regulations or directives governing the filing of regular or special reports. The penalty for non-compliance is incorporated in § 107.665 of the SBIC program regulations.

This rule amends § 107.665 to adjust the current civil penalty from \$259 to \$266 per day of failure to file. The current civil penalty of \$259 was multiplied by the multiplier of 1.02522 to reach a product of \$266, rounded to the nearest dollar.

2. 13 CFR 120.465 – Civil penalty for late submission of required reports.

According to the regulations at § 120.465, any SBA Supervised Lender, as defined in 13 CFR 120.10, that violates a regulation or written directive issued by the SBA Administrator regarding the filing of any regular or special report is subject to the civil penalty amount stated in § 120.465(b) for each day the lender fails to file the report, unless the SBA Supervised Lender can show that there is reasonable cause for its failure to file. This penalty is authorized by section 23(j)(1) of the Small Business Act, 15 U.S.C. 650(j)(1).

This rule amends § 120.465(b) to adjust the current civil penalty from \$6,460 to \$6,623 per day of failure to file. The current civil penalty of \$6,460 was multiplied by the multiplier of 1.02522 to reach a product of \$6,623, rounded to the nearest dollar.

3. 13 CFR 120.1500 – Types of enforcement actions—SBA Lenders.

Currently, the regulation in 13 CFR 120.1500(c)(4), references the penalty amount in §120.465 and identifies it as \$5,000. However, due to multiple inflation adjustments the amount has increased, and after publication of this rule, it will be further increased to \$6,623. To resolve the inconsistency between §§ 120.1500 and 120.465, and to avoid future confusion, SBA is amending § 120.1500(c)(4) to remove the reference to the amount of the penalty.

4. 13 CFR 142.1 – Overview of Regulations.

SBA has promulgated regulations at 13 CFR part 142 to implement the civil penalties authorized by the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801-3812. Under the current regulations at § 142.1(b), a person who submits, or causes to be submitted, a false claim or a false statement to SBA is subject to a civil penalty of not more than \$11,181, for each statement or claim. The adjusted civil penalty amount was calculated by multiplying the current civil penalty of \$11,181 by the multiplier of 1.02522 to reach a product of \$11,463, rounded to the nearest dollar.

5. 13 CFR 146.400 – Penalties.

SBA’s regulations at 13 CFR part 146 govern lobbying activities by recipients of federal financial assistance. These regulations implement the authority in 31 U.S.C. 1352 to impose penalties on any recipient that fails to comply with certain requirements in the part. Specifically, under § 146.400(a) and (b), penalties may be imposed on those who make prohibited expenditures or fail to file the required disclosure forms or to amend such forms, if necessary.

This rule amends § 146.400(a) and (b) to adjust the current civil penalty amounts to “not less than \$20,134 and not more than \$201,340.” The current civil penalty amounts of \$19,639 and \$196,387 were multiplied by the multiplier of 1.02522 to reach a product of \$20,134 and \$201,340, respectively, rounded to the nearest dollar.

This rule also amends § 146.400(e) to adjust the civil penalty that may be imposed for a first-time violation of § 146.400(a) and (b) to a maximum of \$20,134, and for second and subsequent offenses, to “not less than \$20,134 and not more than \$201,340.” The current civil penalty amounts of \$19,639 and \$196,387 were multiplied

by the multiplier of 1.02522 to reach a product of \$20,134 and \$201,340 respectively, rounded to the nearest dollar.

III. Justification for Final Rule

The Act provides that agencies shall annually adjust civil monetary penalties for inflation notwithstanding Section 553 of the APA. The Act also provides a non-discretionary cost-of-living formula for adjusting the annual civil monetary penalties. For these reasons, the requirements in sections 553(b) and (c) of the APA relating to notice and comment are inapplicable.

IV. Justification for Immediate Effective Date

Section 553(d) of the APA requires agencies to publish their rules at least 30 days before their effective dates, except if the agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest. By expressly exempting this rule from section 553, the Act has provided SBA with the good cause justification for this rule to become effective on the date it is published in the Federal Register.

Compliance with Executive Orders 12866, 12988, 13132, 13771, and the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Order 12866

The Office of Management and Budget has determined that this final rule is not a significant regulatory action under Executive Order 12866. This is also not a major rule under the Congressional Review Act, 5 U.S.C. 801.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate

ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this final rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Paperwork Reduction Act

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements.

Regulatory Flexibility Act (RFA)

The RFA requires agencies to consider the effect of their regulatory actions on small entities, including small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of such small entities. However, the RFA requires such analysis only where notice and comment rulemaking are required. As stated above, SBA has express statutory authority to issue this rule without regard to the notice and comment requirement of the Administrative Procedure Act. Since notice and comment is not required before this rule is issued, SBA is not required to prepare a regulatory analysis.

List of Subjects

13 CFR Part 107

Investment companies, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 120

Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 142

Administrative practice and procedure, Claims, Fraud, Penalties.

13 CFR Part 146

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, SBA amends 13 CFR parts 107, 120, 142, and 146 as follows:

PART 107 – SMALL BUSINESS INVESTMENT COMPANIES

1. The authority citation for part 107 continues to read as follows:

Authority: 15 U.S.C. 681, 683, 687(c), 687b, 687d, 687g, 687m.

§ 107.665 [Amended]

2. In § 107.665, remove “\$259” and add in its place “\$266”.

PART 120 – BUSINESS LOANS

3. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3) and 7, and 697(a) and (e); Pub. L. 111-5, 123 Stat. 115, Pub. L. 111-240, 124 Stat. 2504.

§ 120.465 [Amended]

4. In § 120.465, amend paragraph (b) by removing “\$6,460” and adding in its place “\$6,623”.

§ 120.1500 [Amended]

5. In § 120.1500, amend paragraph (c)(4) by removing the words “of not more than \$5,000 a day”.

PART 142 – PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

6. The authority citation for part 142 continues to read as follows:

Authority: 15 U.S.C. 634(b); 31 U.S.C. 3803(g)(2).

§ 142.1 [Amended]

7. In § 142.1, amend paragraph (b) by removing “\$11,181” and adding in its place “\$11,463”.

PART 146 – NEW RESTRICTIONS ON LOBBYING

8. The authority citation for part 146 continues to read as follows:

Authority: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 15 U.S.C. 634(b)(6).

§ 146.400 [Amended]

9. In § 146.400, amend paragraphs (a), (b), and (e) by removing “\$19,639” wherever it appears and adding in its place “\$20,134” and by removing “\$196,387” and adding in its place “\$201,340”.

Dated: March 25, 2019.

Linda E. McMahon,
Administrator

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