

RECEIVED
FEDERAL ELECTION
COMMISSION

2002 JAN 17 P 3:54



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of: 1-24-02

JAN 17 2002

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence H. Norton *[Signature]*
General Counsel

N. Bradley Litchfield *[Signature]*
Associate General Counsel

Rosemary C. Smith *[Signature]*
Assistant General Counsel

Michael Marinelli *[Signature]*
Attorney

SUBJECT: Civil Penalty Inflation Adjustments (11 C.F.R. § 111.24)

STATUTORY BACKGROUND

The Debt Collection Improvement Act of 1996, Pub. L. 104-134, at § 31001(s) ("DCIA") amended the Federal Civil Penalties Inflation Adjustment Act ("the Inflation Adjustment Act"), 28 U.S.C. § 2461 nt. to require the Commission to adopt regulations no later than 180 days after enactment of the DCIA and at least once every four years thereafter, adjusting for inflation the maximum amount of the civil monetary penalties contained in statutes administered by the Commission. In accordance with the rulemaking priorities approved by the Commission on August 23, 2001 (See Agenda Doc. # 01-44), the Office of General Counsel has prepared this memorandum and

28
29
30
31
32
33
34
35

1 recommendations to the Commission regarding the statutory requirement to periodically
2 reexamine the civil penalties prescribed by the FECA.¹

3
4 A civil monetary penalty ("CMP") is defined as "any penalty, fine or other
5 sanction that: (A)(i) is for a specific amount, as provided by Federal law; or (ii) has a
6 maximum amount provided for by Federal law; and (B) is assessed or enforced by an
7 agency pursuant to Federal law; and is assessed or enforced pursuant to an administrative
8 proceeding or a civil action in the Federal courts." See 28 U.S.C. § 2641 nt. sec. 3(2).
9 The Commission previously determined that this definition encompasses the monetary
10 penalty provisions administered by the Commission at 2 U.S.C. §§ 437g(a)(5), (6), and
11 (12). See Explanation and Justification for Regulations on Adjustments to Civil
12 Monetary Penalty Amounts, 62 *Fed Reg.* 11316 (1997).

13
14 The Inflation Adjustment Act requires that these penalties be adjusted by the cost
15 of living adjustment set forth in section 5 of the Inflation Adjustment Act. The cost of
16 living adjustment is defined in section 5a as "the percentage (if any) for each civil
17 monetary penalty by which (1) The Consumer Price Index for the month of June of the
18 calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the
19 month of June of the Calendar year in which the amount of such civil penalty was last set
20 or adjusted pursuant to law." See 28 U.S.C. § 2641nt sec 3(2).²

21
22 The adjusted amounts are then rounded in accordance with a specified rounding
23 formula found at 28 U.S.C. § 2641nt sec 5(a). However, the Inflation Adjustment Act
24 limited to 10% the maximum increase for each penalty for the first adjustment.

25
26 As noted above, the Commission's statutory CMP provisions for violations of the
27 FECA are found at 2 U.S.C. §§ 437g(a)(5), (6) and (12). The original penalties (as
28 enacted in 1976 and 1980) provided for a civil penalty not to exceed the greater of \$5,000
29 or an amount equal to any contribution or expenditure involved in the violation. These
30 amounts were doubled in the case of a knowing and willful violation, to \$10,000 or an
31 amount equal to 200 percent of any contribution or expenditure involved in the violation.
32 In addition, the FECA prescribes civil penalties for violations of its confidentiality
33 provisions. 2 U.S.C. 437g(a)(12). The civil penalty for violating this section was
34 originally not more than \$2,000, or \$5,000 in the case of a knowing and willful violation.
35 Sections 437g(a)(5) and (6) were enacted in 1976. Pub. L. 94-283, sec. 109, 90 Stat. 475,

¹ The Inflation Adjustment Act at § 3(1) defines "agency" as an executive agency as defined under 5 U.S.C. § 105. That definition includes executive departments, government corporations, and independent establishments. "Independent establishment" is defined at 5 U.S.C. § 104 as "an establishment in the executive branch which is not an executive department, military department, government corporation, or part thereof, or part of an independent establishment." This is the broadest definition of "agency" found in the U.S. Code. In 1997, the Commission determined that it was covered by this definition. See Explanation and Justification for Regulations on Adjustments to Civil Monetary Penalty Amounts, 62 *Fed Reg.* 11316 (1997).

² The Consumer Price Index is defined as "the Consumer Price Index (CPI) for all-urban consumers published by the Department of Labor." See 28 U.S.C. § 2641nt sec 3(3). The CPI published by the Department of Labor may be found over the Internet at <http://stats.bls.gov/datahome>.

1 483 (May 11, 1976). Section 437g(a)(12) was added in 1980. Pub. L. 96-187, sec. 108.
2 93 Stat. 1339, 1361 (Jan. 8, 1980).

3
4 In 1997, Commission applied the Inflation Adjustment Act for the first time
5 subject to the 10% limit, and adjusted the above penalties. See Explanation and
6 Justification for Regulations on Adjustments to Civil Monetary Penalty Amounts, 62 *Fed.*
7 *Reg.* 11316 (1997). The Inflation Adjustment Act required that each agency adjust its
8 civil monetary penalty "by regulation" and until that point the Commission's penalties
9 had been found only in the statutory language. Therefore, when adjusting the civil
10 penalties, the Commission also enacted, for the first time, the regulatory restatement of
11 Commission's civil penalties now found in 11 C.F.R. § 111.24(a) and (b). Section
12 111.24(a) increased the civil penalty found at 2 U.S.C. § 437g(a)(5) and (6) to a monetary
13 amount not to exceed the greater of \$5,500 or an amount equal to any contribution or
14 expenditure involved in the violation. These amounts are doubled in the case of a
15 knowing and willful violation to \$11,000 or an amount equal to 200% of any contribution
16 or expenditure involved in the violation. See 11 C.F.R. § 111.24(a). Section 111.24(b)
17 increased the civil penalty found at 2 U.S.C. § 437g(a)(12) which now shall not exceed
18 \$2,200 or \$5,500 in case of a knowing and willful violation. The civil penalties
19 established in those sections have not subsequently been revised.³

20 21 CALCULATION OF CIVIL MONETARY PENALTY

22 *Determination of the inflationary increase*

23
24
25 As noted above, the Inflation Adjustment Act directs federal agencies to calculate
26 each CMP adjustment by comparing the CPI for the June of the calendar year a revision
27 was last made with the CPI for the June of the calendar year preceding proposed
28 revisions. Since the Commission began the process for this round of adjustments in
29 calendar year 2001 for the period 2001-2004 and made the last round of adjustment in
30 calendar year 1997, the inflation adjustment amount for each CMP is calculated by
31 comparing the CPI for June 1997 (160.3) with the CPI for June 2000 (172.3) resulting in
32 an inflation adjustment of 7.5.⁴

33
34 This initial determination of the inflation adjustment, when done by other
35 agencies, has been fairly straightforward. An examination of the notices of agency action
36 in the Federal Register indicates that most federal agencies are implementing the statute
37 by determining the amount of inflation, multiplying the current penalty by this percentage

³ An inflation adjustment analysis for the administrative fine schedule found at 11 C.F.R. § 111.43 is not required. The Office of General Counsel notes that the amounts of these penalties were established by regulations rather than by statute. Furthermore, the effective date of the fine schedule at § 111.43 was January 1, 2001, still within the four-year examination period. Thus an examination of the fine schedule is not yet necessary. See Explanation and Justification for Regulations on Administrative Fines, 65 *Fed. Reg.* 38415 (June 21, 2001) *et. seq.*

⁴ This number results from calculating the amount of the increase (12.3) between June 1997 and June 2000 and dividing it by the June 1997 value of 160.3.

1 to determine the amount of the increase, and referencing the rounding provisions to
2 decide the final amount of the civil penalty.

3
4 *Application of the rounding formula*

5
6 The Inflation Adjustment Act contains rounding rules that require, once the initial
7 determination of the increase has been made, that "any increase determined under this
8 subsection shall be rounded to the nearest- (1) multiple of \$10 in case of penalties less
9 than or equal to \$100; (2) multiple of \$100 in case of penalties greater than \$100 but less
10 than or equal to \$1,000; (3) multiple of \$1,000 in case of penalties greater than \$1,000
11 but less than or equal to \$10,000; (4) multiple of \$5,000 in the case of penalties greater
12 than \$10,000 but less than or equal to 100,000; (5) multiple of \$10,000 in the case of
13 penalties greater than \$100,000 but less than or equal to \$200,000; and (6)
14 \$25,000 in the case of penalties greater than \$200,000." See 28 U.S.C. § 2641 nt. sec.
15 5(a).

16
17 The application of cited sec. 5(a) has, however, produced several conflicting
18 interpretations. This Office has examined sixty *Federal Register* notices that concern the
19 agency application of the Inflation Adjustment Act. Of these notices, 20 provide
20 sufficient detail to indicate how the federal agency calculated the civil penalty adjustment.
21 Three different interpretations of rounding formula in section 5(a) can be seen. The
22 interpretation chosen by the Commission is of consequence since it will determine the
23 amount of an increase, if any, in the FECA's current CMP.

24
25 The most common approach used by 14 agencies has been to determine the
26 amount of inflation, multiplying the current civil penalty by this percentage to determine
27 the amount of the increase, then using original unadjusted *penalty* to determine which
28 range of numbers should be used to round the increase. If any increase was left after the
29 rounding, it would be added to the pre-existing CMP. The National Credit Union
30 Administration ["NCUA"], for example, while acknowledging the potential for different
31 interpretations, states, "[we have] chosen to follow the language in the statute and
32 therefore [have] adopted an interpretation that selects the appropriate rounding rule based
33 upon the amount of the penalty." See Civil Monetary Inflation Adjustment, 65 *Fed. Reg.*
34 57277 (2000). This method produces the smallest increases but seems to track the
35 language of the statute.

36
37 Four federal agencies have followed a second more intuitive approach. They have
38 first added the preliminary increase to the original civil penalty and then, taking the entire
39 new penalty amount, they have rounded it according to the numerical range the new
40 penalty fell into.⁵

⁵ See e.g. National Highway Traffic Safety Administration Notice of Proposed Rulemaking 66 *Fed. Reg.* 27621 (2001) and Civil Penalties, 65 *Fed. Reg.* 16690 (1999), Transportation Department; Inflation Adjustment of Civil Monetary Penalties, 65 *Fed. Reg.* 49741 (2000) Federal Maritime Commission; Amendments to HUD's Civil Money Penalty Regulations; Proposed Rule, 65 *Fed. Reg.* 39501 (2000) Housing and Urban Development and; Adjustment of Civil Penalties for Inflation, Miscellaneous

1
2 A third approach was used by two agencies in which they determined the size of
3 the increase and rounded that number, but rounded on the basis of the size of the increase
4 alone, not the size of the original penalty, and then added this number to the original
5 penalty.⁶

7 *Examples of different approaches*

8
9 The effects of the differing interpretations can be seen by using the penalties
10 adjustment proposed by the NCUA in its *Federal Register* notice. NCUA adjusts a
11 penalty by calculating the increase, in this case \$1,650 (a 6% inflation factor applied to a
12 \$27,500 penalty), and rounding this increase to the nearest multiple of \$5,000, (the
13 required rounding range for a penalty of \$27,500). Rounding \$1,650 to the \$5,000
14 produces an adjustment of -0- and no change in the CMP. If using the second method of
15 inflating first and then rounding, the NCUA would instead have a penalty of \$30,000
16 (\$1,650 added to 27,500, then rounded to the nearest \$5,000). If the third approach is
17 used, instead, that of rounding per the size of the increase, the penalty would have been
18 \$29,500 ($27,500 \times .06 = \$1,650$, rounded to the nearest \$1,000 = \$2,000 increase).

19 Similarly, these three approaches would produce three different sets of results when
20 applied to the Commission's civil penalties at 11 C.F.R. § 111.24. The inflation increase
21 for 11 C.F.R. § 111.24(a) at \$5,500 is \$412, which rounded to the nearest \$1,000 is 0.
22 The inflation increase for 11 C.F.R. § 111.24(b) at \$2,200 is \$165, which rounded to the
23 nearest \$1,000 is also 0. Therefore, using the first method would leave the civil penalties
24 of section 111.24 unchanged. If the second most common approach (adding the increase
25 and then rounding according to the penalty) was used instead, this would result in a CMP
26 for section 111.24(a) of \$5,912, which rounded to the nearest \$1,000 is \$6,000. The
27 penalty for § 111.24(b) would still remain unchanged since the CMP of \$2,365 would be
28 rounded to the nearest \$1,000, resulting in no change to the civil penalty. The third
29 method (determining the increase and rounding it according to the increase amount rather
30 than the penalty amount) produces a revised civil penalty of \$5,900 for section 111.24(a)
31 (\$412 is rounded to the nearest hundred and added to \$5,500) and revised civil penalty of
32 \$2,400 for section 111.24(b) (\$165 is rounded to the nearest hundred and added to
33 \$2,200).

34 Of the three methods, while the second seems most intuitive, the first, adhered to by
35 more agencies, more closely conforms to the language of the statute itself. The statute
36 specifically requires the rounding of "the increase," rather than the penalty, and uses the
37 term "penalty" for determining which rounding range should be used to round the

Administrative Changes and Revision of the NRC Enforcement Policy; Final Rule and Notice, 65 *Fed. Reg.* 59269 (2000), Nuclear Regulatory Commission.

⁶ See e.g. Civil Monetary Penalties; Adjustment for Inflation, 61 *Fed. Reg.* 55092 (1996) and Civil Monetary Penalties; Adjustment for Inflation, 65 *Fed. Reg.* 65260 (2000) indicating the Commerce Department's interpretation of PL 101-410 to round per the size of the increase. See also Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation, 65 *Fed. Reg.* 46087 (2000) demonstrating the Farm Credit Administration's use of the same method.

1 increase. Further, while legislative history also yields no clarification on this point (the
2 history focuses on the intent to remedy the erosion of penalties and does not elaborate on
3 the workings of the rounding mechanism), our review of other recent legislation provides
4 strong support for concluding that Congress' intent was to round the increase only, and
5 not the entire inflated penalty. A brief review of other public laws containing rounding
6 provisions reveals that Congress, when wishing to round the amount plus the increase,
7 will refer to the "amount after adjustment" *See e.g.* Internal Revenue Service
8 Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 26 U.S.C. § 6323 (2).
9 Other public laws refer to the "amount as adjusted." *See e.g.* Economic Growth and Tax
10 Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 26 U.S.C. § 1022 (4)(B). It is
11 easily inferred that Congress makes this distinction intentionally; therefore, the proper
12 interpretation of the statute calls for a determination of the increase and a rounding of
13 only the increase before adding it to the prior penalty. Accordingly, the Office of General
14 Counsel recommends that the Commission adopt the first interpretation of the rounding
15 provision.

16 With respect to the civil monetary penalties of 11 C.F.R. 111.24(a) and (b), as
17 noted earlier, application of this interpretation would result in no increase in the current
18 penalty amounts. Both of the other interpretations would produce an increase in at least
19 one of the civil penalties. However, while leaving the penalties unchanged for the
20 present, the first interpretation would not prevent a recalculation of the civil penalty
21 within the next four-year period to determine whether an inflation adjustment is required.
22 Since no changes would have been made in 2002 to the Commission's CMP, the next
23 adjustment, according to the language of the Inflation Adjustment Act, would apply the
24 inflationary changes occurring since 1996 (rather than 2002).⁷

25 **Recommendation**

26
27 The Office of General Counsel recommends that the Commission make no change
28 to the civil penalties set out in 11 C.F.R. § 111.24 at this time.
29

⁷ If no changes are made at this time to the civil penalties at 11 C.F.R. § 111.24, no *Federal Register* notice is needed.