



7400-01-P

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Civil Monetary Penalty Inflation Adjustment

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: This final rule adjusts the level of civil monetary penalties (CMPs) in regulations maintained and enforced by the Merit Systems Protection Board (MSPB) with both an initial “catch-up” and annual adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) and Office of Management and Budget (OMB) guidance.

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

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SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Pub. L. 101–410, provided for the regular evaluation of CMPs by Federal agencies. Periodic inflationary adjustments of CMPs ensure that the consequences of statutory violations adequately reflect the gravity of such offenses and that CMPs are properly accounted for and collected by the Federal government. In April 1996, the 1990 Act was amended by the Debt Collection Improvement Act of 1996 (the 1996 Act), Pub. L. 104–134, which required Federal agencies to adjust their CMPs at least once every four years. However,

because inflationary adjustments to CMPs were statutorily capped at ten percent of the maximum penalty amount, but only required to be calculated every four years, CMPs in many cases did not correspond with the true measure of inflation over the preceding four-year period, leading to a decline in the real value of the penalty. To remedy this decline, the 2015 Act (section 701 of Pub. L. 114-74) requires agencies to adjust CMP amounts with an initial “catch-up” adjustment and make subsequent annual inflationary adjustments through a rulemaking using a methodology mandated by the legislation. The purpose of these adjustments is to maintain the deterrent effect of civil penalties.

A civil monetary penalty is “any penalty, fine, or other sanction” that: (1) “is for a specific amount” or “has a maximum amount” under Federal law; and (2) that a Federal agency assesses or enforces “pursuant to an administrative proceeding or a civil action in the Federal courts.”

The MSPB is authorized to assess CMPs pursuant to 5 U.S.C. 1215(a)(3) and 5 U.S.C. 7326 in disciplinary actions brought by the Special Counsel. The corresponding MSPB regulation for both CMPs is 5 CFR 1201.126(a). As required by the 2015 Act, and pursuant to guidance issued by the OMB, the MSPB is now making a one-time catch-up adjustment to the CMPs within its jurisdiction, as well as an annual adjustment for 2017, according to the prescribed formulas.

II. Calculation of Adjustment

A. Initial Catch-up Adjustment

Shortly after enactment of the 2015 Act, OMB issued guidance on calculating the catch-up adjustment. See Memorandum from Shaun Donovan, Dir., OMB, to Heads of Executive Departments and Agencies re: Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-16-06 (Feb. 24, 2016). Pursuant to this guidance, the MSPB has identified applicable civil monetary penalties and

calculated the catch-up adjustment. The calculated catch-up adjustment is based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year of the previous adjustment of the CMP (or in the year of its establishment, if no adjustment has been made) and the October 2015 CPI-U.

Nevertheless, the 2015 Act specifies that the catch-up adjustment amount will in no case exceed 150% of the penalty amount which was in force at the enactment date of the 2015 Act. Therefore, the total catch-up penalty amount will not exceed 250% of the total maximum penalty amount on November 2, 2015.

The CMP listed in 5 U.S.C. 1215(a)(3) was established in 1978 with the enactment of the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, section 202(a), 92 Stat. 1121-30 (Oct. 13, 1978), and originally codified at 5 U.S.C. 1207(b). That CMP was last amended by section 106 of the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, 12 Stat. 1468 (Nov. 27, 2012), now codified at 5 U.S.C. 1215(a)(3), which provided for a CMP “not to exceed \$1,000”. Thus, the 2012 amendment of the CSRA serves as the base figure for the inflation calculation. Between October 2012 and October 2015, the CPI-U has increased by 102.819 percent. The post-catch-up adjustment penalty amount is obtained by multiplying the pre-adjustment penalty amount by the percent change in the CPI-U over the relevant time period, and rounding to the nearest dollar. Therefore, the maximum post-catch-up adjustment penalty under the CSRA is $\$1,000 \times 1.02819 = \$1,028.19$, which rounds to \$1,028. The post-catch-up adjustment penalty is less than 250 percent of the pre-adjustment penalty, so the limitation on the amount of the adjustment under section 4(b) of the 2015 Act is not implicated.

The CMP authorized in 5 U.S.C. 7326 was established in 2012 by section 4 of the Hatch Act Modernization Act of 2012 (Hatch Act), Pub. L. 112-230, 126 Stat. 1617 (Dec. 28,

2012), which provided for a CMP “not to exceed \$1,000.” Thus, the maximum post-catch-up adjustment penalty under the Hatch Act is \$1,028.

B. 2017 Annual Adjustment

OMB also issued guidance on calculating the annual inflationary adjustment for 2017. See Memorandum from Shaun Donovan, Dir., OMB, to Heads of Executive Departments and Agencies re: Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-17-11 (Dec. 16, 2016). Therein, OMB notified agencies that the annual adjustment multiplier for 2017, based on the CPI-U, is 1.01636 and that the 2017 annual adjustment amount is obtained by multiplying the catch-up adjustment penalty amount by the 2017 annual adjustment multiplier, and rounding to the nearest dollar. Therefore, the new maximum penalty under the CSRA and the Hatch Act is $\$1,028 \times 1.01636 = \$1,044.81$, which rounds to \$1,045.

III. Effective Date of Penalties

The revised CMP amounts will go into effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All violations for which CMPs are assessed after the effective date of this rule will be assessed at the adjusted penalty level regardless of whether the violation occurred before the effective date.

IV. Procedural Requirements

A. Administrative Procedures Act

Pursuant to 5 U.S.C. 553(b), the MSPB has determined that good cause exists for waiving the general notice of proposed rulemaking and public comment procedures as to these technical amendments. The notice and comment procedures are being waived because Congress has specifically exempted agencies from these requirements when implementing the 2015 Act. The 2015 Act requires agencies to adjust CMPs with an initial catch-up adjustment through an interim final rule, which does not require the

agency to complete a notice and comment process prior to promulgating the interim final rule. The 2015 Act also explicitly requires the agency to make subsequent annual adjustments notwithstanding 5 U.S.C. 553, the section of the Administrative Procedure Act that normally requires agencies to engage in notice and comment. It is also in the public interest that the adjusted rates for CMPs under the CSRA and the Hatch Act become effective as soon as possible to maintain their effective deterrent effect.

B. Regulatory Impact Analysis: Executive Order 12866

The MSPB has determined that this is not a significant regulatory action under Executive Order 12866. Therefore, no regulatory impact analysis is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). As discussed above, the 2015 Act does not require agencies to first publish a proposed rule when adjusting CMPs within their jurisdiction. Thus, the RFA does not apply to this final rule.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more;
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandate Reform Act of 1995

This rule does not involve a Federal mandate that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandate Reform Act of 1995 (2 U.S.C. 1532).

F. Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights

This rule does not have takings implications.

G. Executive Order 13132, Federalism

This rule does not have federalism implications. The rule does 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.

H. Executive Order 12988, Civil Justice Reform

The MSPB has reviewed this rule in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

I. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, the MSPB has evaluated this rule and determined that it has no tribal implications.

J. Paperwork Reduction Act

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. Chapter 35).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

For the reasons set forth above, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

§ 1201.126 [Amended]

2. Section 1201.126 is amended in paragraph (a) by removing “\$1,000” and adding in its place “\$1,045” and removing “5 U.S.C. 1215(a)(3)” and in its place adding “5 U.S.C. 1215(a)(3), 7326; 28 U.S.C. 2461 note”.

Jennifer Everling,
Acting Clerk of the Board.

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