



NATIONAL FOUNDATION FOR THE ARTS AND HUMANITIES

National Endowment for the Arts

45 CFR Parts 1149 and 1158

RIN 3135-AA33

Implementing the Federal Civil Penalties Adjustment Act Improvements Act of 2015

AGENCY: National Endowment for the Arts, National Foundation for the Arts And Humanities

ACTION: Interim final rule; request for comments.

SUMMARY: The National Endowment for the Arts (NEA) is adjusting the maximum civil monetary penalties that may be imposed for violations of the Program Fraud and Civil Remedies Act (PFCRA) and the NEA's Restrictions on Lobbying to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The 2015 Act further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

DATES: *Effective date:* This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. *Comments date:* Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3135-AA33, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: generalcounsel@arts.gov. Include RIN 3135-AA33 in the subject line of the message.
- Mail: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.
- Hand Delivery / Courier: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (3135-AA27) for this rulemaking.

Docket: For access to the docket to read background documents or comments received, go to 400 7th Street, SW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Aswathi Zachariah, Assistant General Counsel, National Endowment for the Arts, 400 7th St., SW, Washington, DC 20506, Telephone: 202-682-5418.

SUPPLEMENTARY INFORMATION:

1. Background

The 2015 Act requires agencies to: (1) Adjust the level of civil monetary penalties with an initial “catch-up” adjustment through an interim final rulemaking; and (2) make subsequent annual adjustments for inflation. Inflation adjustments will be based on the percent change in the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the date of the adjustment, relative to the October CPI-U in the year of the previous adjustment.

The Office of Management and Budget has issued two memoranda, providing guidance on implementing and calculating adjustments.¹

The NEA has identified two civil penalties in its regulations that require adjustment: (1) the penalty associated with Restrictions on Lobbying (45 CFR 1158.400; 45 CFR part 1158, app. A) and (2) the penalty associated with the Program Fraud Civil Remedies Act (45 CFR 1149.9).

2. Method of Calculation

For the first adjustment made in accordance with the 2015 Act, the amount of the adjustment is calculated based on the percent change between the CPI-U for October of the last year in which penalties were previously adjusted (not including any adjustment made pursuant to the Inflation Adjustment Act before November 2, 2015), and the CPI-U for October 2015. The 10 percent cap on adjustments imposed by the Debt Collection Improvement Act of 1996 has been eliminated by the 2015 Act. Instead, the 2015 Act imposes a cap on the amount of this initial adjustment, such that the amount of the increase may not exceed 150 percent of the pre-adjustment penalty amount or range. As a result, the total penalty amount or range after the initial adjustment under the 2015 Act may not exceed 250 percent of the pre-adjustment penalty amount or range.

The 2015 Act also requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the initial adjustment described above. For annual adjustments made in accordance with the 2015 Act, the amount of the adjustment is based on the percent increase between the CPI-U for the month of October preceding the date of the

¹ OMB Memoranda M-16-06 and M-17-11.

adjustment and the CPI-U for the October one year prior to the October immediately preceding the date of the adjustment. If there is no increase, there is no adjustment of civil penalties.

This interim final rule incorporates the initial adjustment and one annual adjustment, and applies those adjustments cumulatively to each of the two civil regulatory penalties identified herein.

A. Adjustments to Penalties under the NEA's Program Fraud and Civil Remedies Act Regulations.

For purposes of the initial adjustment under the 2015 Act, Congress last set or adjusted the amount of PFCRA civil penalties in 1986. Between October 1986 and October 2015, the CPI-U has increased by 215.628 percent. The post-adjustment penalty amount or range is obtained by multiplying the pre-adjustment penalty amount or range by the percent change in the CPI-U over the relevant time period, and rounding to the nearest dollar. Therefore, this post-adjustment maximum penalty under the PFCRA is $\$5,000 \times 2.15628 = \$10,781.40$, which rounds to \$10,781. The new, post-adjustment penalty less than 250 percent of the pre-adjustment penalty, so the limitation on the amount of the adjustment is not implicated. Therefore, the maximum penalty under the PFCRA for false claims or statements for purposes of the first adjustment will be \$10,781.

This regulation also incorporates the subsequent required annual adjustment. The post-adjustment penalty or range is obtained by multiplying the pre-adjustment penalty or range by the percent change in the CPI-U over the relevant time period and rounding to the nearest dollar. Between October 2015 and October 2016, the CPI-U increased by 101.636 percent. Therefore, the new post-adjustment maximum penalty under the PFCRA is $\$10,781 \times 1.01636 = \$10,957.38$, which rounds to \$10,957. The new, post-adjustment penalty is less than 250 percent

of the pre-adjustment penalty, so the limitation on the amount of the adjustment is not implicated. Therefore, the maximum penalty under the PFCRA will be \$10,957.

B. Adjustments to Penalties under the NEA's Restrictions on Lobbying Regulations

For purposes of the initial adjustment under the 2015 Act, Congress last set or adjusted the amount of Restrictions on Lobbying civil penalties in 1989. Between October 1989 and October 2015, the CPI-U has increased by 189.361 percent. The post-adjustment penalty amount or range is obtained by multiplying the pre-adjustment penalty amount or range by the percent change in the CPI-U over the relevant time period, and rounding to the nearest dollar. Therefore, the post-adjustment minimum penalty under the law on Restrictions on Lobbying is $\$10,000 \times 1.89361 = \$18,936.10$, which rounds to \$18,936, and the post-adjustment maximum penalty under law on Restrictions on Lobbying is $\$100,000 \times 1.89361 = \$189,361$. The new, post-adjustment penalties are less than 250 percent of the pre-adjustment penalties, so the limitation on the amount of the adjustment is not implicated. Therefore, the range of penalties under the law on Restrictions on Lobbying, for purposes of the first adjustment shall be between \$18,936 and \$189,361.

This regulation also incorporates the subsequent required annual adjustment. The post-adjustment penalty or range is obtained by multiplying the pre-adjustment penalty or range by the percent change in the CPI-U over the relevant time period and rounding to the nearest dollar. Between October 2015 and October 2016, the CPI-U increased by 101.636 percent. Therefore, the post-adjustment minimum penalty under the law on Restrictions on Lobbying is $\$18,936 \times 1.01636 = \$19,245.79$, which rounds to \$19,246, and the post-adjustment maximum penalty under law on Restrictions on Lobbying is $\$189,361 \times 1.01636 = \$192,458.95$, which rounds to \$192,459. The new, post-adjustment penalties are less than 250 percent of the pre-adjustment

penalties, so the limitation on the amount of the adjustment is not implicated. Therefore, the range of penalties under the law on Restrictions on Lobbying, for purposes of the first adjustment shall be between \$19,246 and \$192,459

3. Subsequent Annual Adjustments

The 2015 Act also requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the initial adjustment described above. For subsequent annual adjustments made in accordance with the 2015 Act, the amount of the adjustment will have the same basis as the annual adjustments previously described herein (the percent increase between the CPI-U for the month of October preceding the date of the adjustment and the CPI-U for the October one year prior to the October immediately preceding the date of the adjustment). If there is no increase, there is no adjustment of civil penalties. Therefore, if the NEA adjusts penalties in January 2018, the adjustment will be calculated based on the percent change between the CPI-U for October 2017 (the October immediately preceding the date of adjustment) and October 2016 (the October one year prior to October 2017). The NEA will publish the amount of these annual inflation adjustments in the Federal Register no later than January 15 of each year.

4. Compliance

Regulatory Planning and Review (Executive Order 12866)

Executive Order 12866 (E.O. 12866) established a process for review of rules by the Office of Information and Regulatory Affairs, which is within the Office of Management and Budget (OMB). Only “significant” proposed and final rules are subject to review under this Executive Order. “Significant,” as used in E.O. 12866, means “economically significant.” It

refers to rules with (1) an impact on the economy of \$100 million; or that (2) were inconsistent or interfered with an action taken or planned by another agency; (3) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (4) raised novel legal or policy issues.

This interim final rule would not be a significant policy change and OMB has not reviewed this interim final rule under E.O. 12866. We have made the assessments required by E.O. 12866 and determined that this rulemaking: (1) will not have an effect of \$100 million or more on the economy; (2) will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (3) will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (4) does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; and (5) does not raise novel legal or policy issues.

Federalism (Executive Order 13132)

This rulemaking does not have Federalism implications, as set forth in E.O. 13132. As used in this order, Federalism implications mean “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.” The NEA has determined that this rulemaking will not have Federalism implications within the meaning of E.O. 13132.

Civil Justice Reform (Executive Order 12988)

This Directive meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988. Specifically, this interim final rule is written in clear language designed to help reduce litigation.

Indian Tribal Governments (Executive Order 13175)

Under the criteria in E.O. 13175, we have evaluated this interim final rule and determined that it would have no potential effects on Federally recognized Indian Tribes.

Takings (Executive Order 12630)

Under the criteria in E.O. 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This rulemaking will not impose any “information collection” requirements under the Paperwork Reduction Act. Under the act, information collection means the obtaining or disclosure of facts or opinions by or for an agency by 10 or more nonfederal persons.

Unfunded Mandates Act of 1995 (Section 202, Pub. L. 104–4)

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

National Environmental Policy Act of 1969 (5 U.S.C. 804)

The interim final rule will not have significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996 (Sec. 804, Pub. L. 104-121)

This interim final rule would not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

E-Government Act of 2002 (44 U.S.C. 3504)

Section 206 of the E-Government Act requires agencies, to the extent practicable, to ensure that all information about that agency required to be published in the Federal Register is also published on a publicly accessible website. All information about the NEA required to be published in the Federal Register may be accessed at www.arts.gov. This Act also requires agencies to accept public comments on their rules “by electronic means.” See heading “Public Participation” for directions on electronic submission of public comments on this interim final rule.

Finally, the E-Government Act requires, to the extent practicable, that agencies ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under the Administrative Procedure Act of 1946 (5 U.S.C. 551 *et seq.*). Under this Act, an electronic docket consists of all submissions under section 553(c) of title 5, United States Code; and all other materials that by agency rule or practice are included in the rulemaking

docket under section 553(c) of title 5, United States Code, whether or not submitted electronically. The website <https://www.regulations.gov> contains electronic dockets for the NEA's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010 (5 U.S.C. 301)

Under this Act, the term "plain writing" means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience. To ensure that this rulemaking has been written in plain and clear language so that it can be used and understood by the public, the NEA has modeled the language of this rule on the Federal Plain Language Guidelines.

Public Participation

The NEA has written this interim final rule in compliance with E.O. 13563 by ensuring its accessibility, consistency, simplicity of language, and overall comprehensibility. In addition, the public participation goals of this order are also satisfied by the NEA's participation in a process in which its views and information are made public to the extent feasible, and before any decisions are actually made. This will allow the public the opportunity to react to the comments, arguments, and information of others during the rulemaking process. The NEA initiates its participation in an open exchange by posting the regulation and its rulemaking docket on <https://www.regulations.gov>.

Finally, Section 2 of E.O. 13563 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking. This provision emphasizes the importance of prior consultation with "those who are likely to benefit from and those who are potentially subject to such rulemaking." One goal is to solicit ideas about alternatives, relevant

costs and benefits (both quantitative and qualitative), and potential flexibilities. The NEA reaches out to interested and affected parties by soliciting comments.

List of Subjects in 45 CFR Parts 1149 and 1158

Administrative practice and procedure, Government contracts, Grant programs, Loan programs, Lobbying, Penalties.

For the reasons stated in the preamble, the NEA amends 45 CFR parts 1149 and 1158 as follows:

PART 1149 – PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

1. The authority citation for part 1149 is revised to read as follows:

Authority: 5 U.S.C. App. 8G(a)(2); 20 U.S.C. 959; 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812.

§1149.9 [Amended]

2. Amend §1149.9(a)(1) by removing “\$5,000” and adding in its place “\$10,957”.

PART 1158 – NEW RESTRICTIONS ON LOBBYING

3. The authority citation for part 1158 is revised to read as follows:

Authority: 20 U.S.C. 959; 28 U.S.C. 2461; 31 U.S.C. 1352.

§1158.400 [Amended]

4. Amend §1158.400(a) and (b) by:
 - a. Removing “\$10,000” and adding in its place “\$19,246” each place it appears.
 - b. Removing “\$100,000” and adding in its place “\$192,459” each place it appears.

Appendix A to Part 1158 [Amended]

5. Amend appendix A to part 1158 by:
 - a. Removing “\$10,000” and adding in its place “\$19,246” each place it appears.
 - b. Removing “\$100,000” and adding in its place “\$192,459” each place it appears.

Dated: June 7, 2017.

Kathy N. Daum,

Director,

Administrative Services Office.

[FR Doc. 2017-12071 Filed: 6/14/2017 8:45 am; Publication Date: 6/15/2017]