



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 an 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: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jennifer Everling, Acting Clerk of the Board, Merit Systems Protection Board, 1615 M Street N.W., Washington, DC 20419; Phone: (202) 653-7200; Fax: (202) 653-7130; or email: mspb@mspb.gov.

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 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) 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 an annual adjustment for 2018, according to the prescribed formulas.

II. Calculation of Adjustment

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”. 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.” On June 5, 2017, the MSPB issued a final rule which increased the maximum CMP allowed under both 5 U.S.C. 1215(a)(3) and 5 U.S.C. 7326 to \$1,045 for the year 2017. *See* 82 FR 25715 (June 5, 2017). This increase reflected both a catch-up adjustment and an annual increase for the year 2017, as mandated by the 2015 Act. On December 15, 2017, OMB issued guidance on calculating the annual inflationary adjustment for 2018. *See* Memorandum from Mick Mulvaney, Dir., OMB, to Heads of Executive Departments and Agencies re: Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-18-03 (Dec. 15, 2017). Therein, OMB notified agencies that the annual adjustment multiplier for 2018, based on the Consumer Price Index for All Urban Consumers (CPI-U), is 1.02041 and that the 2018 annual adjustment amount is obtained by multiplying the 2017 penalty amount by the 2018 annual adjustment multiplier, and rounding to the nearest dollar. Therefore, the new maximum penalty under the CSRA and the Hatch Act is $\$1,045 \times 1.02041 = \$1,066.32$, which rounds to \$1,066.

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 Procedure 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 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: E.O. 12866*

The MSPB has determined that this is not a significant regulatory action under E.O. 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 Mandates Reform Act of 1995*

This rule does not involve a Federal mandate that may result in the expenditure by State, local, and 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 Mandates Reform Act of 1995 (2 U.S.C. 1532).

F. *E.O. 12630, Government Actions and Interference With Constitutionally Protected Property Rights*

This rule does not have takings implications.

G. *E.O. 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. *E.O. 12988, Civil Justice Reform*

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

I. *E.O. 13175, Consultation and Coordination With Indian Tribal Governments*

In accordance with E.O. 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 “\$1,045” and adding in its place “\$1,066.”

Jennifer Everling,

Acting Clerk of the Board.

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