



NATIONAL FOUNDATION FOR THE ARTS AND HUMANITIES

National Endowment for the Arts

45 CFR Parts 1149 and 1158

RIN 3135-AA33

Civil Penalties Adjustment for 2018

AGENCY: National Endowment for the Arts, National Foundation for the Arts and Humanities.

ACTION: Final rule.

SUMMARY: The National Endowment for the Arts (NEA) is adjusting the maximum civil monetary penalties (CMPs) that may be imposed for violations of the Program Fraud 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. This final rule provides the 2018 annual inflation adjustments to the initial "catch-up" adjustments made on June 15, 2017.

DATES: *Effective date:* This rule is effective January 15, 2018. *Applicability date:* The adjusted civil monetary penalties established by this rule are applicable only to civil penalties assessed after January 15, 2018.

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

On December 12, 2017 the NEA issued a final rule entitled “Federal Civil Penalties Adjustments” which finalized the NEA’s June 15, 2017 interim final rule entitled “Implementing the Federal Civil Penalties Adjustment Act Improvements Act”, implementing the 2015 Act (section 701 of Pub. L. 114-74), which amended the Inflation Adjustment Act (28 U.S.C. 2461 note) requiring catch-up and annual adjustments to the NEA’s CMPs. The 2015 Act requires agencies make annual adjustments to its CMPs for inflation.

A CMP is defined in the Inflation Adjustment Act as any penalty, fine, or other sanction that is (1) for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

These annual inflation adjustments are based on the percentage 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 formula for the amount of a CMP inflation adjustment is prescribed by law, as explained in OMB Memorandum M-16-06 (February 24, 2016), and therefore the amount of the adjustment is not subject to the exercise of discretion by the Chairman of the National Endowment for the Arts (Chairman).

The Office of Management and Budget has issued guidance on implementing and calculating the 2018 adjustment under the 2015 Act.¹ Per this guidance, the CPI-U adjustment multiplier for this annual adjustment is 1.02041. In its prior rules, the NEA identified two civil penalties which require adjustment: the penalty for false statements under the PFCRA and the penalty for violations of the NEA's Restrictions on Lobbying. The NEA adjusts the amount of those CMPs amount accordingly.

2. Effective Dates

The inflation adjustments contained in this rule shall apply to any violations assessed after January 15, 2018, the effective date of this rule.

3. Adjustments

Two civil penalties in NEA regulations require adjustment in accordance with the 2015 Act: (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).

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

The current penalty under the PFCRA for false claims and statements is currently set at \$10,957. 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 2016 and October 2017, the CPI-U increased by 102.041 percent. Therefore, the new post-adjustment maximum penalty under the PFCRA for false

¹ OMB Memorandum M-18-03 (December 15, 2017).

statements is $\$10,957 \times 1.02041 = \$11,180.63$, which rounds to \$11,180. Therefore, the maximum penalty under the PFCRA for false claims and statements will be \$11,180.

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

The penalty for violations of the Restrictions on Lobbying is currently set at a range of a minimum of \$19,246 and a maximum of \$192,459. 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 2016 and October 2017, the CPI-U increased by 102.041 percent. Therefore, the new post-adjustment minimum penalty under the Restrictions on Lobbying is $\$19,246 \times 1.02041 = \$19,638.81$, which rounds to \$19,639, and the maximum penalty under the Restrictions on Lobbying is $\$192,459 \times 1.02041 = \$196,387.09$, which rounds to \$196,387. Therefore, range of penalties under the law on the Restrictions on Lobbying shall be between \$19,639 and \$196,387.

Administrative Procedure Act

Section 553 of the Administrative Procedure Act requires agencies to provide an opportunity for notice and comment on rulemaking and also requires agencies to delay a rule's effective date for 30 days following the date of publication in the Federal Register unless an agency finds good cause to forgo these requirements. However, section 4(b)(2) of the 2015 Act requires agencies to adjust civil monetary penalties notwithstanding section 553 of the Administrative Procedure Act (APA) and publish annual inflation adjustments in the Federal Register. "This means that the public procedure the APA generally requires . . . is not required for agencies to issue regulations implementing the annual adjustment." OMB Memorandum M-18-03.

Even if the 2015 Act did not except this rulemaking from section 553 of the APA, the NEA has good cause to dispense with notice and comment. Section 553(b)(B), authorizes agencies to dispense with notice and comment procedures for rulemaking if the agency finds good cause that notice and comment are impracticable, unnecessary, or contrary to public interest. The annual adjustments to civil penalties for inflation and the method of calculating those adjustments are established by section 5 of the FCPIAA, as amended, leaving no discretion for the NEA. Accordingly, public comment would be impracticable because the NEA would be unable to consider such comments in the rulemaking process.

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 final rule would not be a significant policy change and OMB has not reviewed this final rule under E.O. 12866. The NEA has made the assessments required by E.O. 12866 and determined that this rule: (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.

Executive Order 13771

Executive Order 13771 section 5 requires that agencies, in most circumstances, remove or rescind two regulations for every regulatory action (such as the promulgation of regulations) unless they request and are specifically exempted from that order's requirements by the Director of the Office of Management and Budget (the Director).

This rule is not subject to the requirements of Executive Order 13771 because this rule is not significant under Executive Order 12866. Per OMB guidance, annual inflation adjustments “are not significant regulatory actions under E.O. 12866, they are not considered E.O. 13771 regulatory actions.”² Furthermore, the NEA has requested and has received an exemption from the requirement that the agency rescind two regulations for every regulation it promulgate from the Director.

Federalism (Executive Order 13132)

This rule 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)

² *Id.*

This Directive meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988. Specifically, this 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, the NEA has evaluated this 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 rule 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 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 final rule would not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This 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 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 rule 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 encourages public participation by ensuring its documentation is understandable by the general public, and has written this final rule in compliance with E.O. 13563 by ensuring its accessibility, consistency, simplicity of language, and overall comprehensibility.

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 chapter XI, subchapter B, as follows:

PART 1149 – PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

1. The authority citation for part 1149 continues 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.

2. Revise §1149.9(a)(1) to read as follows:

§ 1149.9 What civil penalties and assessments may I be subjected to?

(a) * * *

(1) A civil penalty of not more than \$10,957 for each false, fictitious or fraudulent statement or claim; and

* * * * *

PART 1158 – NEW RESTRICTIONS ON LOBBYING

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

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

4. Revise §1158.400(a), (b), and (e) to read as follows:

§1158.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$19,639 and not more than \$196,387 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B of this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$19,639 and not more than \$196,387 for each such failure.

* * * * *

(e) First offenders under paragraph (a) or (b) of this section shall be subject to a civil penalty of \$19,639, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$19,639 and \$196,387, as determined by the agency head or his or her designee.

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Appendix A to Part 1158 [Amended]

5. Amend appendix A to part 1158 by:
 - a. Removing “\$19,246” and adding in its place “\$19,639” each place it appears.
 - b. Removing “\$192,459” and adding in its place “\$196,387” each place it appears.

Dated: January 9, 2018.

Jillian Miller,

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the Arts.

[FR Doc. 2018-00537 Filed: 1/12/2018 8:45 am; Publication Date: 1/16/2018]