



Billing Code 8320-01

Department of Veterans Affairs

38 CFR Parts 36 and 42

RIN 2900-AQ22

Federal Civil Penalties Inflation Adjustment Act Amendments

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is providing public notice of inflationary adjustments to the maximum civil monetary penalties assessed or enforced by VA, as implemented by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, for calendar year 2018. VA may impose civil monetary penalties for false loan guaranty certifications. Also, VA may impose civil monetary penalties for fraudulent claims or written statements made in connection with VA programs generally. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, sets forth a formula that increases the maximum statutory amounts for civil monetary penalties and directs VA to give public notice of the new maximum amounts by regulation. Accordingly, VA is providing notice of the calendar year 2018 inflationary adjustments that increase maximum civil monetary penalties from \$21,916 to \$22,363 for false loan guaranty certifications and from \$10,957 to \$11,181 for fraudulent claims or written statements made in connection with VA programs generally.

DATES: Effective Date: This rule is effective [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Michael Shores, Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-4921. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) (Pub. L. 114-74, sec. 701, 129 Stat. 599), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, 104 Stat. 890), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act was codified in a note following 28 U.S.C. 2461. The 2015 Act requires agencies to publish annual adjustments for inflation, based on the percent change between the Consumer Price Index (CPI-U) for the month of October preceding the date of the adjustment and the prior year's October CPI-U. 28 U.S.C. 2461 note 4(b) and 5(b)(1).

Under 38 U.S.C. 3710(g)(4), VA is authorized to levy civil monetary penalties against private lenders that originate VA-guaranteed loans if a lender falsely certifies that they have complied with certain credit information and loan processing standards, as set forth by chapter 37, title 38 U.S.C. and part 36, title 38 CFR. Under section 3710(g)(4)(B), any lender who knowingly and willfully makes such a false certification

shall be liable to the United States Government for a civil penalty equal to two times the amount of the Secretary's loss on the loan involved or to another appropriate amount, not to exceed \$10,000, whichever is greater. VA implemented the penalty amount in 38 CFR 36.4340(k)(1)(i) and (k)(3). On June 22, 2016, VA provided public notice of the adjustment to the \$10,000 figure, as imposed by the 2015 Act's "catch up" formula. See 81 FR 40523-40525; 81 FR 65551-65552, Sept. 23, 2016. The "catch up" formula imposed an adjustment from \$10,000 to \$21,563. See 38 CFR 36.4340(k)(1)(i) and (k)(3). VA did not publish the calendar year 2017 inflation adjustment. On December 16, 2016, the Office of Management and Budget (OMB) published Circular M-17-11. This circular stated that the inflation adjustment to the previously increased "catch up" figure was effectuated by multiplying the "catch up" figure by 1.01636. Consequently, the calendar year 2017 inflation revision imposed an adjustment from \$21,563 to \$21,916, rounded to the nearest dollar. On December 15, 2017, OMB issued Circular M-18-03. This circular reflects that the October 2016 CPI-U was 241.729 and the October 2017 CPI-U was 246.663, resulting in an inflation adjustment multiplier of 1.02041. Accordingly, the calendar year 2018 inflation revision imposes an adjustment from \$21,916 to \$22,363.

Under 31 U.S.C. 3802, VA can impose monetary penalties against any person who makes, presents, or submits a claim or written statement to VA that the person knows or has reason to know is false, fictitious, or fraudulent, or who engages in other covered conduct. The statute permits, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than \$5,000 for each claim. 31 U.S.C. 3802(a)(1) and (2). VA implemented the penalty amount in 38 CFR 42.3(a)(1) and

(b)(1). That amount was subsequently increased to \$5,500. See 61 FR 56449-56450, Nov.1, 1996. On June 22, 2016, VA provided public notice of the adjustment to the \$5,500 figure, as imposed by the 2015 Act's "catch up" formula. See 81 FR 40523-40525; 81 FR 65551-65552, Sept. 23, 2016. The "catch up" formula imposed an adjustment from \$5,500 to \$10,781. See 38 CFR 42.3(a)(1)(iv) and (b)(1). VA did not publish the calendar year 2017 inflation adjustment. Circular M-17-11 stated that the inflation adjustment to the previously increased "catch up" figure was effectuated by multiplying the "catch up" figure by 1.01636. Consequently, the calendar year 2017 inflation revision imposed an adjustment from \$10,781 to \$10,957. Circular M-18-03 reflects an inflation adjustment multiplier of 1.02041. Therefore, the calendar year 2018 inflation revision imposes an adjustment from \$10,957 to \$11,181.

Accordingly, VA is revising 38 CFR 36.4340(k)(1)(i) and (k)(3) and 38 CFR 42.3(a)(1) and (b)(1) to reflect the 2018 inflationary adjustments for civil monetary penalties assessed or enforced by VA.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to dispense with the opportunity for prior notice and public comment and to publish this rule with an immediate effective date. The 2015 Act requires agencies to make annual adjustments for inflation to the allowed amounts of civil monetary penalties "notwithstanding section 553 of title 5, United States Code." 28 U.S.C. 2461 note 4(a) and (b). The penalty adjustments, and the methodology used to determine the adjustments, are set by the terms of the 2015 Act. VA has no discretion

to make changes in those areas. Therefore, an opportunity for prior notice and public comment and a delayed effective date is unnecessary.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by OMB, unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date." This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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 (adjusted annually for inflation) in any one year. This final rule will have no such effect on state, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b). This final rule is exempt from the notice and comment requirements of the APA because the 2015 Act directed the Department to issue the annual adjustments without regard to section 553 of the APA. Therefore, the requirements of the RFA applicable to notice and comment rulemaking do not apply to this rule. Accordingly, the Department is not required either to certify that the final rule would not have a significant economic impact on a substantial number of small entities or to conduct a regulatory flexibility analysis.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.114, Veterans Housing Guaranteed and Insured Loans.

List of Subjects

38 CFR Part 36

Condominiums, Housing, Individuals with disabilities, Loan programs-housing and community development, Loan programs-Veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

38 CFR Part 42

Administrative practice and procedure, Claims, Fraud, Penalties.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on February 23, 2018, for publication.

Dated: February 23, 2018.

Jeffrey Martin,
Impact Analyst,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR parts 36 and 42 as set forth below:

PART 36 – LOAN GUARANTY

1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

§ 36.4340 [Amended]

2. In § 36.4340, amend paragraphs (k)(1)(i) introductory text and (k)(3) by removing “\$21,563” and adding, in its place, “\$22,363.”

PART 42—STANDARDS IMPLEMENTING THE PROGRAM FRAUD CIVIL REMEDIES ACT

3. The authority citation for part 42 continues to read as follows:

Authority: Pub. L. 99–509, secs. 6101–6104, 100 Stat. 1874, codified at 31 U.S.C. 3801–3812.

§ 42.3 [Amended]

4. In § 42.3, amend paragraphs (a)(1)(iv) and (b)(1)(ii) by removing “\$10,781” and adding, in its place, “\$11,181.”

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