

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN: 3133-AE67

Civil Monetary Penalty Inflation Adjustment

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation. This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This interim final rule is effective [DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on “Civil Monetary Penalty Inflation Adjustment” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: All public comments are available on the agency’s website at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Ian Marena, Senior Trial Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Legal Background

II. Calculation of Adjustments

III. Regulatory Procedures

I. Legal Background

A. Statutory Requirements and OMB Guidance

The Debt Collection Improvement Act of 1996¹ (DCIA) amended the Federal Civil Penalties Inflation Adjustment Act of 1990² (FCPIA Act) to require every federal agency to enact regulations that adjust each CMP provided by law under its jurisdiction by the rate of inflation at least once every four years.

In November 2015, Congress further amended the CMP inflation requirements in the Bipartisan Budget Act of 2015,³ which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).⁴ This legislation provided for an initial “catch-up” adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment re-set CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculated inflation with reference to the year when

¹ Pub. L. 104-134, § 31001(s), 110 Stat. 1321-373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.

² Pub. L. 101-410, 104 Stat. 890 (Oct. 5, 1990), codified at 28 U.S.C. 2461 note.

³ Pub. L. 114-74, 129 Stat. 584 (Nov. 2, 2015).

⁴ 129 Stat. 599.

each CMP was enacted or last modified by Congress. Agencies were required to publish their catch-up adjustments in an interim final rule by July 1, 2016 and make them effective by August 1, 2016.⁵ NCUA complied with these requirements in a June 2016 interim final rule, followed by an October 2016 final rule to confirm the adjustments as final.⁶

The 2015 amendments also specified how agencies must conduct annual inflation adjustments after the 2016 catch-up adjustment. Beginning in 2017, agencies must make the required adjustments and publish them in the Federal Register by January 15 of each succeeding year.⁷

The statute provides that the adjustments shall be made notwithstanding the section of the Administrative Procedure Act (APA) that requires prior notice and public comment for agency rulemaking.⁸ The 2015 amendments also specify that each CMP maximum must be increased by the percentage by which the consumer price index for urban consumers (CPI-U)⁹ for October of the year immediately preceding the year the adjustment is made exceeds the CPI-U for October of the prior year.¹⁰ For example, for the adjustment made in 2017, agencies must compare the October 2016 CPI-U with the October 2015 CPI-U.

The 2015 amendments also provide that agencies may forgo the required annual adjustments in certain circumstances. Specifically, in a subsection titled “Other Adjustments Made,” the statute provides that an agency is not required to make an annual adjustment to a CMP if it has been

⁵ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

⁶ 81 FR 40152 (June 21, 2016); 81 FR 78028 (Nov. 7, 2016).

⁷ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

⁸ Id.

⁹ This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: <http://www.bls.gov/cpi/>.

¹⁰ Pub. L. 114-74, Sec. 701(b)(1)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).

increased by a greater amount than the contemplated annual adjustment in the preceding 12 months.¹¹ When these criteria are met, the agency has discretion not to make the adjustments otherwise required by the statute.

In addition, the 2015 amendments directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the inflation adjustments.¹² OMB is required to issue its guidance each December and did so on December 16, 2016.¹³ This OMB guidance for the upcoming 2017 adjustments includes an inflationary multiplier (1.01636) to apply to each current CMP maximum amount to determine the adjusted maximum. The guidance also addresses the exception described above for adjustments made in the preceding 12 months, indicating that the exception applies to adjustments made due to a law other than the 2015 amendments.¹⁴ Finally, the guidance addresses rulemaking procedures and agency reporting and oversight requirements.

The next section sets forth the Board's calculation of the adjustments for 2017, in accordance with the foregoing requirements.

B. Application to the 2017 Adjustments

This section applies the statutory requirements and OMB's guidance to NCUA CMPs.

¹¹ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).

¹² Pub. L. 114-74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).

¹³ Id.; OMB, 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), *available at* https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf (noting that the applicable 2017 CMP-adjustment multiplier is 1.01636).

¹⁴ Id. at 3.

As explained above, the 2015 amendments require NCUA to adjust the maximum amounts of its CMPs by the percentage by which the October 2016 CPI-U (241.729) exceeds the October 2015 CPI-U (237.838). This percentage is 1.636. This percentage increase can be expressed as an inflation multiplier (the quotient of the October 2016 figure divided by the October 2015 figure). Accordingly, each CMP maximum amount should be multiplied by 1.01636 to determine the adjusted maximum amount. OMB's guidance identifies the same multiplier.

The Board has considered the exception in the 2015 amendments for adjustments made in the preceding 12 months, discussed above, but has decided not to invoke it. The OMB guidance indicates that this exception applies when the adjustments in the preceding 12 months were made under authority other than the 2015 amendments. The Board finds this reading of the statute reasonable. Even if this exception did apply as a threshold matter, there would be good reasons not to apply it. First, the adjustments calculated below are relatively minor, as the maximums will increase by about 1.6 percent. Second, NCUA is not required to and historically has not assessed CMPs at the maximum levels. Third, if NCUA chose to forgo the increases this year, it would not be able to capture this inflation in later years, which would cause the maximums to fall out of line with annual inflation. Finally, the Board anticipates that the federal banking agencies will not apply this exception to CMPs for which NCUA and the banking agencies have concurrent jurisdiction. Although NCUA is not required to make its adjustments in accord with any other agency, maintaining consistency in this area is desirable. In sum, even if the exception might apply, the Board would not invoke it this year.

The table below presents the adjustment calculations. The current maximums are found at 12 C.F.R. 747.1001, as adjusted in June 2016. This amount is multiplied by the inflation multiplier to calculate the new maximum in the far right column. Only these adjusted maximum amounts, and not the calculations, will be codified at 12 C.F.R. 747.1001 under this interim final rule. The adjusted amounts will be effective January 15, 2017, and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted.

Table: Calculation of Maximum CMP Adjustments

<u>Citation</u>	<u>Description/Tier</u> ¹⁵	<u>Current Maximum (\$)</u>	<u>Multiplier</u>	<u>Adjusted Maximum (\$)</u> <u>(Current Maximum X Multiplier)</u>
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report	3,787	1.01636	3,849
12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report	37,872	1.01636	38,492
12 U.S.C. 1782(a)(3)	Failure to submit a report or the	Lesser of 1,893,610 or 1% of	1.01636	Lesser of 1,924,589 or 1% of total CU assets

¹⁵ The table uses condensed descriptions of CMP tiers. Refer to the U.S. Code citations for complete descriptions.

	submission of a false or misleading report done knowingly or with reckless disregard	total CU assets		
12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to NCUSIF, or inadvertent submission of false or misleading statement	3,462	1.01636	3,519
12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement	34,620	1.01636	35,186
12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done	Lesser of 1,730,990 or 1% of total CU assets	1.01636	Lesser of 1,759,309 or 1% of total CU assets

	knowingly or with reckless disregard			
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	118	1.01636	120
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	275	1.01636	279
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	9,468	1.01636	9,623
12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty	47,340	1.01636	48,114
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	1,893,610	1.01636	1,924,589

12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 1,893,610 or 1% of total CU assets	1.01636	Lesser of 1,924,589 or 1% of total CU assets
12 U.S.C. 1786(w)(5)(A)(ii)	Non- compliance with senior examiner post- employment restrictions	311,470	1.01636	316,566
15 U.S.C. 1639e(k)	Non- compliance with appraisal independenc e standards (first violation)	10,875	1.01636	11,053
15 U.S.C. 1639e(k)	Subsequent violations of the same	21,749	1.01636	22,105
42 U.S.C. 4012a(f)(5)	Non- compliance with flood insurance requirements	2,056	1.01636	2,090

III. Regulatory Procedures

A. Interim Final Rule under the APA

In the 2015 amendments to the FCPIA Act, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,¹⁶ which requires agencies to follow notice-and-comment procedures in rulemaking and to make

¹⁶ Pub. L. 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

rules effective no sooner than 30 days after publication in the Federal Register. The 2015 amendments provide a clear exception to these requirements.¹⁷ In addition, the Board finds that notice-and-comment procedures would be impracticable and unnecessary under the APA because of the largely ministerial and technical nature of the rule, which affords agencies limited discretion in promulgating the rule, and the statutory deadline for making the adjustments.¹⁸ In these circumstances, the Board finds good cause to issue an interim final rule without issuing a notice of proposed rulemaking. The Board also finds good cause to make the interim final rule effective upon publication because of the statutory deadline. Accordingly, this interim final rule is issued without prior notice and will become effective immediately upon publication. However, the Board invites comments on all aspects of the interim final rule. The Board will review and consider all comments before issuing a final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires the Board to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.¹⁹ For purposes of this analysis, the Board considers small credit unions to be those having under \$100 million in assets.²⁰ This interim final rule will not have a significant economic impact on a substantial number of small credit unions because it only affects the maximum amounts of CMPs that may be assessed in individual cases, which are not numerous and generally do not involve assessments at the maximum level. In addition, several of the CMPs are limited to a percentage

¹⁷ See 5 U.S.C. 559; *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 396-99 (D.C. Cir. 1998).

¹⁸ 5 U.S.C. 553(b)(3)(B); see *Mid-Tex Elec. Co-op., Inc. v. Fed. Energy Regulatory Comm'n*, 822 F.2d 1123, 1133-34 (D.C. Cir. 1987).

¹⁹ 5 U.S.C. 603(a).

²⁰ Interpretive Ruling and Policy Statement 15-1, 80 FR 57512 (Sept. 24, 2015).

of a credit union's assets. Finally, in assessing CMPs, the Board generally must consider a party's financial resources.²¹ Because this interim final rule will affect few, if any, small credit unions, the Board certifies that the final rule will not have a significant economic impact on small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.²² For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This interim final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, or credit unions but does not require any reporting or recordkeeping. Therefore, this interim final rule will not create new paperwork burdens or modify any existing paperwork burdens.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This interim final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, and federally insured credit unions, including state-chartered credit unions. However, the interim final rule does not create any new authority or alter the underlying statutory authorities that enable the Board to assess CMPs.

²¹ 12 U.S.C. 1786(k)(2)(G)(i).

²² 44 U.S.C. 3507(d); 5 CFR part 1320.

Accordingly, this interim final rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has determined that this interim final rule does not constitute a policy that has federalism implications for purposes of the executive order.

E. Assessment of Federal Regulations and Policies on Families

The Board has determined that this interim final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.²³

F. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996²⁴ (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where the Board issues a final rule as defined by Section 551 of the APA.²⁵ The Board has submitted this interim final rule to OMB for it to determine whether it is a “major rule” within the meaning of the relevant sections of SBREFA.

List of Subjects in 12 CFR Part 747

Credit unions, Civil monetary penalties.

²³ Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).

²⁴ Pub. L. 104–121, 110 Stat. 857 (Mar. 29, 1996).

²⁵ 5 U.S.C. 551.

By the National Credit Union Administration Board on January 6, 2017.

/s/

Gerard S. Poliquin

Secretary of the Board

For the reasons stated above, the NCUA Board amends 12 CFR part 747 as follows:

**PART 747 — ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES
OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS**

1. The authority for Part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e;
42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; Pub. L. 114-74.

2. Revise § 747.1001 to read as follows:

Subpart K – Inflation Adjustment of Civil Monetary Penalties

§ 747.1001 – Adjustment of civil monetary penalties by the rate of inflation.

(a) NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101-410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)) to adjust the maximum amount of each civil monetary penalty within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report	\$3,849
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report	\$38,492
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard	\$1,924,589 or 1 percent of the total assets of the credit union, whichever is less
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to NCUSIF,	\$3,519

	or inadvertent submission of false or misleading statement	
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement	\$35,186
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard	\$1,759,309 or 1 percent of the total assets of the credit union, whichever is less
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	\$120
(8) 12 U.S.C. 1785(e) (3)	Non-compliance with NCUA security requirements	\$279
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements	\$9,623
(10) 12 U.S.C. 1786(k)(2)(A)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for	\$48,114

		recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty	
(11)	12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person)	For a person other than an insured credit union: \$1,924,589; For an insured credit union: \$1,924,589 or 1 percent of the total assets of the credit union, whichever is less
(12)	12 U.S.C. 1786(w)(5)(ii)	Non-compliance with senior examiner post-employment restrictions	\$316,566
(13)	15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: \$11,053 Subsequent violations: \$22,105
(14)	42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	\$2,090

(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred after November 2, 2015.