



Administrative Conference Recommendation 2012-8

Inflation Adjustment Act

Adopted December 7, 2012

Civil monetary penalties are used by the Congress and federal agencies to enforce and promote compliance with federal laws and regulations by deterring violations. These laws and regulations serve vital public purposes such as ensuring workplace or transportation safety, preserving the environment, and protecting consumers from dangerous products. As the then Deputy Director of the Office of Management and Budget testified to Congress regarding an earlier version of the Federal Civil Penalties Inflation Adjustment Act of 1990 (“the Act” or “the Inflation Adjustment Act”), civil monetary penalties “do more than recover funds and sanction wrongdoers. They often serve as an effective alternative to court prosecutions and provide added deterrence to would be wrongdoers intending to defraud or abuse government programs.”¹

This Recommendation and the supporting Report build upon important earlier Administrative Conference works on agency authority to adjust and impose civil monetary penalties or on inflation adjustment. For example, in Recommendation 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*, the Conference encouraged Congress to “systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.”² Recommendation 79-3, *Agency*

¹ *Federal Civil Penalties Inflation Adjustment Act of 1987: Hearing on S.1014 Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Gov't Affairs*, 101st Cong. 41 (1988) (statement of Joseph Wright Jr., Deputy Director of the Office of Management and Budget) [hereinafter 1988 Senate Hearing].

² ACUS, Recommendation 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*, 49 Fed. Reg. 49,840 (Dec. 24, 1984).



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Assessment and Mitigation of Civil Money Penalties, examined agency civil monetary penalty assessment and mitigation practices.³

Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 in recognition that “the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations.”⁴ Congress sought to “improve the collection by the Federal Government of civil monetary penalties” given that “inflation has weakened the deterrent effect of such penalties” and that the government did not “maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.”⁵ The 1990 statute required the President to report annually to Congress on federal civil monetary penalties covered by the law, and to calculate a cost-of-living adjustment for those penalties.⁶ At the time, agencies did not have legal authority to adjust civil monetary penalties directly. Any such modification had to be made by the passage of new legislation. Due to the slow pace of amendments of agency organic statutes in recent years, substantial periods of time could elapse between specific statutory adjustments of civil monetary penalty amounts, and the deterrent effect of the penalties could be diminished by the effects of inflation in the interim period. Accordingly, Congress considered adoption of a freestanding provision that would establish a procedure through which regulatory agencies could modify the amounts of the penalties they may assess without further legislative action.

³ ACUS, Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*, 44 Fed. Reg. 38,824 (July 3, 1979).

⁴ Pub. L. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note § 2(a)).

⁵ *Id.* § 2(b). See also 1988 Senate Hearing, *supra* note 1, at 3 (statement of Senator Levin) (discussing the need to increase penalties to account for inflation and improve deterrence and noting that civil monetary penalties collected were over \$400 million per year).

⁶ *Id.* §§ 4-5.



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In 1996, Congress amended the Federal Civil Penalties Inflation Adjustment Act to authorize and require the agencies, with limited exceptions for four statutory programs, to adjust their civil monetary penalties for inflation.⁷ However, the implementation data demonstrate that under the mechanisms adopted by Congress, the adjustments regulatory agencies are authorized to make have not allowed the penalties to keep pace with the rate of inflation that has been experienced.⁸ The existing pattern of adjustments has several anomalous features that may not have been apparent to the members of Congress when they adopted the 1996 legislation. These results raise two questions: whether the current pattern of penalty adjustments carries out the purposes of the statute, and whether Congress should adopt a modified adjustment procedure under which future changes in penalties would more closely track the actual rate of inflation.

Three statutory provisions account for why the adjustments lag behind the actual inflation rate. First, the Inflation Adjustment Act imposes a ten percent cap on initial penalty adjustments.⁹ That cap creates an “inflation gap” which reflects the sometimes considerable difference between penalties, as adjusted under the Act, and the levels that such penalties would reach if the first adjustment had been based on changes in the cost of living that had actually occurred. This gap, once established in the first capped adjustment, grows over time as subsequent adjustments are made and can never be closed under the current statutory scheme.¹⁰

⁷ Pub. L. No. 104-134, 110 Stat. 1321 (1996) (excluding penalties under the Internal Revenue Code, the Occupational Safety and Health Act, the Social Security Act, and the Tariff Act).

⁸ James Ming Chen, *Inflation Based Adjustments in Federal Civil Monetary Penalties* (2012) (report to the Administrative Conference of the U.S.), available at www.acus.gov [hereinafter Chen Report]; see also United States General Accounting Office (GAO), GAO-03-409, CIVIL PENALTIES: AGENCIES UNABLE TO FULLY ADJUST PENALTIES FOR INFLATION UNDER CURRENT LAW (2003).

⁹ Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321, 1373 (1996).

¹⁰ Chen Report, *supra* note 8, at III.A.



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Second, the Act directs federal agencies to use Consumer Price Index (“CPI”) data in ways that are out of sync with inflation. Because of the Act’s definition of “cost-of-living adjustment,” agencies must use CPI data that are at least seven months old, and sometimes as much as 18 months old in their adjustments, depending on when the agency chooses to update its penalties.¹¹ Adjustment of penalties using out-dated data creates a phenomenon known as “CPI lag.” The legislative history of the Act suggests that the “CPI lag” may have resulted from changes introduced during the iterative legislative drafting process, rather than by conscious design.¹² As with the “inflation gap” issue, CPI-based adjustments prescribed by the Act result in chronic underadjustment of civil monetary penalties relative to actual inflation.¹³

Third, the Act’s elaborate rounding rules effectively prevent a second inflation adjustment for some penalties until inflation has increased by a total of at least 45 percent.¹⁴ In an apparent scrivener’s error, the Act ties the rounding of civil monetary penalty increases to the amount of the underlying civil penalty, rather than the base amount of the increase.¹⁵ Over time, the rounding mechanism has the effect of deferring increases for certain penalties, only to unleash dramatic penalty increases after a long latency period (in some instances greater than the actual increase in inflation). For example, at an inflation rate of 2.5 percent, the rounding provisions, coupled with the 10 percent initial cap, could prevent an agency from adjusting its penalties for inflation for 15 years or more.¹⁶ As with nonadjustment or underadjustment, over-adjustment may also alter the intended effect of civil monetary penalties.

¹¹ Inflation Adjustment Act, *supra* note 4, § 5.

¹² See Chen Report, *supra* note 8, at II (providing an extensive discussion of the legislative history and the evolution of the Act’s cost-of-living adjustment methodology).

¹³ *Id.* at III.B.

¹⁴ Inflation Adjustment Act, *supra* note 4, § 5(a); Chen Report, *supra* note 8, at III.C.

¹⁵ Chen Report, *supra* note 8, at III.C.

¹⁶ *Id.*



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The Department of Homeland Security's 2011 adjustment of a host of penalties for violations of the Immigration and Nationality Act offers an excellent illustration of how the Inflation Adjustment Act works in action and why Congress should consider revisiting the operation of these procedures.¹⁷ These penalties relate to a number of serious legal violations, including: failure to depart the U.S. voluntarily, failure to comply with removal orders or to remove alien stowaways, failure to report an illegal landing or desertion of an alien crewmen or passenger, or failure to prevent the unauthorized landing of aliens.¹⁸ The following table, which is based on the Department's 2011 inflation adjustment, displays:

- the current penalty amount;
- the raw amount by which each penalty would be increased if adjusted for actual inflation;
- the effect of the Inflation Adjustment Act's constraint on inflation adjustment through, for example, capping the penalty adjustment at a maximum of a ten percent increase;
- the amount of the penalty increase prescribed the Act; and
- the distortion created by the variance between the raw adjusted penalty and the adjustment prescribed by the Act.

Although aggregate data are not available, the following example illustrates that the distortions created by the Act are considerable, particularly when considered in relation to the size of the unadjusted penalty.

¹⁷ See Department of Homeland Security, *Civil Monetary Penalties Inflation Adjustment*, 76 Fed. Reg. 74,625, 74,627-28 (Dec. 1, 2011). It is important to note, however, that several penalties adjusted in 2011 had not previously been adjusted or had not been adjusted for many years. As a result, the distortions caused by the Inflation Adjustment Act may have been magnified.

¹⁸ *Id.*



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Department of Homeland Security, Immigration and Nationality Act
Civil Monetary Penalties Inflation Adjustment (2011)¹⁹

| [A] INA § Statute | [B] Current penalty | [C] Year last adjusted | [D] CPI factor (2011) (%) | [E] Raw increase (2011) [B x D] | [F] Rounder [Inflation Adjustment Act constraint] | [G] Rounded increase [Inflation Adjustment Act increase] | [H] Raw adjusted penalty* [B + E] | [I] Adjusted penalty [per IAA] [B + G] | [J] Inflation Adjustment Act distortion* [I - H] |
|--|------------------------|---------------------------|------------------------------|---------------------------------------|--|---|---|--|--|
| INA § 231(g); 8 U.S.C. 1221(g) | \$1,000.00 | Enacted 2002 | 21.16 | \$211.60 | 10% statutory cap | \$100.00 | \$1,211.60 | \$1,100.00 | -\$111.60 |
| INA § 234; 8 U.S.C. 1224 | \$2,200.00 | 1999 | 31.15 | \$685.30 | \$1,000.00 [rounder] | \$1,000.00 | \$2,885.30 | \$3,200.00 | +\$314.70 |
| INA § 243(c)(1)(A); 8 U.S.C. 1253(c)(1)(A) | \$2,000.00 | Enacted 1996 | 39.10 | \$782.00 | 10% statutory cap | \$200.00 | \$2,782.00 | \$2,200.00 | -\$582.00 |
| INA § 243(c)(1)(B); 8 U.S.C. 1253(c)(1)(B) | \$5,000.00 | Enacted 1996 | 39.10 | \$1,955.00 | 10% statutory cap | \$500.00 | \$6,955.00 | \$5,500.00 | -\$1,455.00 |

* * *

The issues with the Federal Civil Penalties Inflation Adjustment Act described above arise from its plain language, and federal regulatory agencies may not themselves adjust the penalty levels to track the inflation rate more closely. As the Government Accountability Office has found, some agencies have attempted to adjust civil monetary penalties in common-sense ways that better reflect the real economic impact of inflation.²⁰ However, these good faith

¹⁹ This table presents a subset of four penalties from the table of penalty adjustments contained in the 2011 *Federal Register* notice from the Department of Homeland Security, *id.*, together with two additional columns ([H] and [J], denoted by a *) from the Chen Report, *supra* note 8, at IV.C.

²⁰ *E.g.*, GAO, GAO-02-1084R, COMPLIANCE WITH THE INFLATION ADJUSTMENT ACT (2002) (reporting that the Farm Credit Administration had rounded its penalty increase by the size of the increase rather than the penalty size); GAO, GAO-02-1085R, DEPARTMENT OF COMMERCE: COMPLIANCE WITH THE INFLATION ADJUSTMENT ACT (2002) (reporting that the



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efforts objectively did not comply with the plain language of the Inflation Adjustment Act. They also subjected agencies to the risk of legal challenges to penalty adjustments.

Review of *Federal Register* notices also shows that several agencies have failed to comply with the statutory requirement to review and, if necessary, adjust penalties at least once every four years.²¹ Regular penalty adjustments ensure the continued deterrent effect of civil monetary penalties. This is especially important where maximum penalties are imposed by agencies to punish the worst offenders. It is essential to enforcement policy that the penalties have their intended deterrent effect and are not simply viewed as a cost of doing business.

The Administrative Conference therefore recommends that Congress reexamine the procedures set forth in the Inflation Adjustment Act and make such changes to the Act as are appropriate. The Recommendation also advises agencies to comply with the letter of the law, by applying the rounding adjustment based on the size of the penalty, rather than the size of the increase, and by making adjustments every four years. Agencies should be mindful of the financial or other adverse consequences of failing to adjust civil monetary penalties regularly, in compliance with the Inflation Adjustment Act, or of failing to comply with the adjustment provisions currently set forth in the Act.²²

The current Recommendation is intentionally circumscribed in scope. The underlying research commissioned by the Conference examined only the existing statutory process for inflation adjustments under the Inflation Adjustment Act. The Recommendation does not address other potential issues involving the current process, including: the appropriateness of

Department of Commerce had rounded its penalty increase by the size of the increase rather than the penalty size).

²¹ *E.g.*, Department of Agriculture, *Department of Agriculture Civil Monetary Penalties Adjustment*, 75 Fed. Reg. 17,555 (Apr. 7, 2010) (remediating erroneous exclusion of some civil monetary penalties from earlier rounds of adjustments); Department of Transportation, *Civil Penalties*, 75 Fed. Reg. 5,244 (Feb. 2, 2010) (reporting last inflation adjustment six years ago, rather than four years ago as the Act's quadrennial interval prescribes).

²² *See supra* notes 20 and 21.



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the Act's existing exemption for civil monetary penalties under four statutes or whether additional agency programs should be exempt; the effectiveness of self-enforcement by federal agencies; obligations for reporting compliance; the lack of a central authority for administering the Act; alternative metrics for measuring inflation; or alternative forms of civil monetary penalties (*e.g.*, percentages rather than fixed values). These important issues warrant thoughtful consideration and may lead to future Conference recommendations.

RECOMMENDATION

A. Recommendation to Congress

1. Congress should change the current statutory framework by which agencies must make periodic inflation adjustments to civil monetary penalties set forth in the Federal Civil Penalties Inflation Adjustment Act, codified as amended at 28 U.S.C. § 2461 note (2012), as appropriate in light of the distortions resulting from:

(a) The "inflation gap" created by a ten percent cap on the initial penalty adjustment, which grows over time and can never be closed under the current statutory provision.

(b) The "CPI lag" that results from the statute's definition of the term "cost-of-living adjustment," which directs agencies to base their adjustments on CPI data that are at least seven months old and may be as much as 18 months old, and thus lag behind the actual inflation rate.

(c) The rounding rules that tie rounding of increases to the size of the penalty, rather than the size of the increase, and that may result in significant periods of nonadjustment of civil monetary penalties followed by abrupt and substantial increases.



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B. Recommendation to Agencies

2. Federal agencies subject to the Inflation Adjustment Act should review and, if necessary, adjust their civil monetary penalties for inflation at least once every four years, as required by the Act. Agencies should review their implementation procedures and practices to ensure that inflation adjustments comply with the plain language of the Act, and particularly its rounding provisions.