Recommendation 72-6

Civil Money Penalties as a Sanction

(Adopted December 14, 1972)

Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed.[1] During Fiscal 1971, seven executive departments and thirteen independent agencies collected well in excess of $10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years.

Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all-or-nothing decisions" (e.g., in license revocation proceedings), sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could better be served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern (e.g., health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

In developing a range of sanctions adequate to meet enforcement needs, Congress and agencies must often determine whether a "criminal fine" or a "civil money penalty," or both, should be applied to a given regulatory offense. The choice they make has large consequences. Criminal penalties expose an offender to the disgrace and disabilities associated with "convictions"; they require special procedural and other protections; and they can not be imposed administratively. These factors make it appropriate to consider whether criminal sanctions should not be supplemented or replaced by civil money penalties.

Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a *de novo* adjudication in Federal district court, whether or not an administrative proceeding has been held previously. The already critical overburdening of the

[1] For purposes of this recommendation, no distinction has been drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (e.g., in FCC legislation) and "fines" (e.g., in Postal Service legislation) so long as (i) the sanction is classified as civil and (ii) money is, in fact, subject to collection by an agency or a court. Excluded are situations involving penalties or liquidated damages assessed pursuant to the terms of a government contract or sums withheld or recovered for failure to comply with the terms of a government grant.

courts argues against flooding them with controversies of this type, which generally have small precedential significance.

Because of such factors as considerations of equity, mitigating circumstances, and the substantial time, effort and expertise such litigation often requires in cases usually involving relatively small sums (an average of less than $1,000 per case), agencies settle well over 90 percent of their cases by means of compromise, remission, or mitigation. Settlements are not wrong *per se*, but the quality of the settlements under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether.

This recommendation is intended to meet the problems posed above.

Recommendation

A. *Desirability of Civil Money Penalties as a Sanction*

1. Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction. Such penalties should not be adopted as a means of supplanting or curtailing other private or public civil remedies.

2. Civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency—such as license suspension or revocation—whose use may prove (a) unduly harsh for relatively minor offenses, or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.

3. Each Federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest. Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment.

B. *Adjudication of Civil Money Penalty Cases in an Administrative Imposition System*

1. In some circumstances it is desirable to commit the imposition of civil money penalties to agencies themselves, without subjecting agency determinations to *de novo* judicial review. Agencies should consider asking Congress to grant them such authority.[2]

Factors whose presence tends to commend such a course with respect to a particular penalty provision include the following:

(a) A large volume of cases likely to be processed annually;

(b) The availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response;

(c) The importance to the enforcement scheme of speedy adjudications;

(d) The need for specialized knowledge and agency expertise in the resolution of disputed issues;

(e) The relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution;

(f) The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and

(g) The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Considerations such as those set forth above should be weighed heavily in favor of administrative imposition when the usual monetary penalty for an offense or a related series of offenses would be relatively small, and should normally be decisive when the penalty would be unlikely to exceed $5,000. However, the benefits to be derived from civil money penalties, and the administrative imposition thereof, should also be considered when the penalties may be relatively large.

2. An administrative imposition system should provide:

[2] Due to the special procedures and status of the United States Tax Court, the rationale for administrative imposition may have only limited applicability to civil money penalties administered by the Internal Revenue Service.

(a) For an adjudication on the record pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 554-57 (1970), at the option of the alleged offender or the agency;

(b) For finality of an agency's decision unless appealed within a specified period of time;

(c) That, if the person on whom the penalty is imposed appeals, an agency's decision will be reviewed in United States Courts of Appeals under the substantial evidence rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 706(e);

(d) That issues made final by reason of (b) above and issues which were raised, or might have been raised, in a proceeding for review under (c) above may not be raised as a defense to a suit by the United States for collection of the penalty.

Agencies should adopt rules of practice which will enable just, inexpensive and speedy determinations. They should provide procedures for settlement by means of remission, mitigation or compromise.

Citations:

38 FR 19792 (July 23, 1973)

__ FR _____ (2012)

2 ACUS 67