



## **Inflation Adjustment Act**

### **Committee on Administration and Management**

**Proposed Recommendation | December 6-7, 2012**

#### **Proposed Amendments**

***This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).***

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

11           This Recommendation and the supporting Report build upon important earlier  
12 Administrative Conference works on agency authority to adjust and impose civil monetary  
13 penalties or on inflation adjustment. For example, in Recommendation 84-7, *Administrative*  
14 *Settlement of Tort and Other Monetary Claims Against the Government*, the Conference  
15 encouraged Congress to “systematically raise ceilings on all agency authority to settle claims

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<sup>1</sup> *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].



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16 where inflation has rendered obsolete the present levels.”<sup>2</sup> Recommendation 79-3, *Agency*  
17 *Assessment and Mitigation of Civil Money Penalties*, examined agency civil monetary penalty  
18 assessment and mitigation practices.<sup>3</sup>

19 Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 in  
20 recognition that “the power of Federal agencies to impose civil monetary penalties for  
21 violations of Federal law and regulations plays an important role in deterring violations and  
22 furthering the policy goals embodied in such laws and regulations.”<sup>4</sup> Congress sought to  
23 “improve the collection by the Federal Government of civil monetary penalties” given that  
24 “inflation has weakened the deterrent effect of such penalties” and that the government did  
25 not “maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess  
26 and collect civil monetary penalties.”<sup>5</sup> The 1990 statute required the President to report  
27 annually to Congress on federal civil monetary penalties covered by the law, and to calculate a  
28 cost-of-living adjustment for those penalties.<sup>6</sup> At the time, agencies did not have legal  
29 authority to adjust civil monetary penalties directly. Any such modification had to be made by  
30 the passage of new legislation. Due to the slow pace of amendments of agency organic  
31 statutes in recent years, substantial periods of time could elapse between specific statutory  
32 adjustments of civil monetary penalty amounts, and the deterrent effect of the penalties could  
33 be diminished by the effects of inflation in the interim period. Accordingly, Congress  
34 considered adoption of a freestanding provision that would establish a procedure through

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

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

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

<sup>5</sup> *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).

<sup>6</sup> *Id.* §§ 4-5.



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35 which regulatory agencies could modify the amounts of the penalties they may assess without  
36 further legislative action.

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

48 Three statutory provisions account for why the adjustments lag behind the actual  
49 inflation rate. First, the Inflation Adjustment Act imposes a ten percent cap on initial penalty  
50 adjustments.<sup>9</sup> That cap creates an “inflation gap” which reflects the sometimes considerable  
51 difference between penalties, as adjusted under the Act, and the levels that such penalties  
52 would reach if the first adjustment had been based on changes in the cost of living that had  
53 actually occurred. This gap, once established in the first capped adjustment, grows over time as

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<sup>7</sup> 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).

<sup>8</sup> 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](http://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).

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



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54 subsequent adjustments are made and can never be closed under the current statutory  
55 scheme.<sup>10</sup>

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

65 Third, the Act’s elaborate rounding rules effectively prevent a second inflation  
66 adjustment for some penalties until inflation has increased by a total of at least 45 percent.<sup>14</sup> In  
67 an apparent scrivener’s error, the Act ties the rounding of civil monetary penalty increases to  
68 the amount of the underlying civil penalty, rather than the base amount of the increase.<sup>15</sup> Over  
69 time, the rounding mechanism has the effect of deferring increases for certain penalties, only  
70 to unleash dramatic penalty increases after a long latency period (in some instances greater  
71 than the actual increase in inflation). For example, at an inflation rate of 2.5 percent, the  
72 rounding provisions, coupled with the 10 percent initial cap, could prevent an agency from

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<sup>10</sup> Chen Report, *id.* at III.A.

<sup>11</sup> Inflation Adjustment Act, *supra* note 4, § 5.

<sup>12</sup> 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).

<sup>13</sup> *Id.* at III.B.

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

<sup>15</sup> Chen Report, *supra* note 8, at III.C.



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73 adjusting its penalties for inflation for 15 years or more.<sup>16</sup> As with nonadjustment or under-  
74 adjustment, over-adjustment may also alter the intended effect of civil monetary penalties.

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

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

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<sup>16</sup> *Id.*

<sup>17</sup> 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.

<sup>18</sup> *Id.*



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

Department of Homeland Security, Immigration and ~~Naturalization-Nationality~~ Act  
 Civil Monetary Penalties Inflation Adjustment (2011)<sup>19</sup>

[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

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95 | The issues with the Federal Civil Penalties Inflation Adjustment Act described above  
 96 | arise from its plain language, and federal regulatory agencies may not themselves adjust the  
 97 | penalty levels to track the inflation rate more closely. As the Government Accountability Office  
 98 | has found, some agencies have attempted to adjust civil monetary penalties in common-sense

<sup>19</sup> 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.



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99 ways that better reflect the real economic impact of inflation.<sup>20</sup> However, these good faith  
100 efforts objectively did not comply with the plain language of the Inflation Adjustment Act. They  
101 also subjected agencies to the risk of legal challenges to penalty adjustments.

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

108 The Administrative Conference therefore recommends that Congress reexamine the  
109 procedures set forth in the Inflation Adjustment Act and consider whether changes to the Act  
110 are appropriate. The Recommendation also advises agencies to comply with the letter of the  
111 law, by applying the rounding adjustment based on the size of the penalty, rather than the size  
112 of the increase, and by making adjustments every four years. Agencies should be mindful of  
113 the financial or other adverse consequences of failing to adjust civil monetary penalties  
114 regularly, in compliance with the Inflation Adjustment Act, or of failing to comply with the  
115 adjustment provisions currently set forth in the Act.<sup>22</sup>

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<sup>20</sup> *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 Department of Commerce had rounded its penalty increase by the size of the increase rather than the penalty size).

<sup>21</sup> *E.g.*, Department of Agriculture, *Department of Agriculture Civil Monetary Penalties Adjustment*, 75 Fed. Reg. 17,555 (Apr. 7, 2010) (remedying 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).

<sup>22</sup> [See supra notes 20 and 21.](#)



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116           The current Recommendation is intentionally circumscribed in scope. The underlying  
117 research commissioned by the Conference examined only the existing statutory process for  
118 inflation adjustments under the Inflation Adjustment Act. The Recommendation does not  
119 address other potential issues involving the current process, including: the appropriateness of  
120 the Act’s existing exemption for civil monetary penalties under four statutes or whether  
121 additional agency programs should be exempt; the effectiveness of self-enforcement by federal  
122 agencies; obligations for reporting compliance; the lack of a central authority for administering  
123 the Act; alternative metrics for measuring inflation; or alternative forms of civil monetary  
124 penalties (*e.g.*, percentages rather than fixed values). These important issues warrant  
125 thoughtful consideration and may lead to future Conference recommendations.

### RECOMMENDATION

#### 126 **Part A. Recommendation to Congress**

127           1. Congress should consider whether changes to the current statutory framework by  
128 which agencies must make periodic inflation adjustments to civil monetary penalties set forth  
129 in the Federal Civil Penalties Inflation Adjustment Act, codified as amended at 28 U.S.C. § 2461  
130 note (2012), are appropriate in light of the following issues:

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

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





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

### 141 **Part B. Recommendation to Agencies**

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