

**[Billing Code 6750-01S]**

**FEDERAL TRADE COMMISSION**

**16 CFR Part 1**

**Adjustment of Civil Monetary Penalty Amounts**

**AGENCY:** Federal Trade Commission.

**ACTION:** Interim final rule.

**SUMMARY:** Pursuant to the Federal Civil Penalties Inflation Adjustment Act, as amended, the Federal Trade Commission (“FTC” or “Commission”) is increasing the maximum civil penalty amounts within its jurisdiction, as required by the Federal Civil Penalty Inflation Adjustment Act Improvements Act of 2015.

**DATES:** The interim final rule is effective August 1, 2016.

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**SUPPLEMENTARY INFORMATION:** The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“Adjustment Improvements Act” or “Act”)<sup>1</sup> requires federal agencies to implement a “catch-up adjustment” in 2016 to address inflation since the civil penalties within their jurisdiction were last set or adjusted by statute. The law mandates that agencies perform this adjustment through an interim final rulemaking and it sets forth a specific methodology to calculate the adjustment. Following this initial catch-up adjustment, the Adjustment Improvements Act directs agencies to adjust their civil penalties for inflation every January thereafter.

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<sup>1</sup> Pub. L. No. 114-74, sec. 701, 129 Stat. 599 (2015). The Act amends the Federal Civil Penalties Inflation Adjustment Act (“FCPIAA”), Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. 2461 note).

Commission Rule 1.98 sets forth the maximum civil penalty amounts for violations of laws enforced by the Commission that authorize civil penalties.<sup>2</sup> These amounts reflect earlier adjustments under the Federal Civil Penalties Inflation Adjustment Act which mandated a different methodology than the Adjustment Improvements Act.

When the Commission seeks civil penalties, it is mindful of the statutory criteria courts must apply when determining the amount of the civil penalty: “the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.”<sup>3</sup> Courts determining penalty amounts for violations of a final order under the FTC Act have similarly applied a multi-factor test that looks at the good or bad faith of the respondent; the injury to the public; the respondent’s ability to pay; the desire to eliminate the benefits derived from the violations; and the necessity of vindicating the Commission’s authority.<sup>4</sup> The Commission also has a civil penalty leniency program for small businesses that establishes criteria the Commission will consider when determining the propriety of a penalty waiver or reduction for small businesses that are not in compliance with the law.<sup>5</sup>

As required by the Act, the following adjusted amounts will take effect on August 1, 2016:

- Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1) (premerger filing notification violations under the Hart-Scott-Rodino (HSR) Improvements Act)—  
Increase from \$16,000 to \$40,000;

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<sup>2</sup> 16 CFR 1.98.

<sup>3</sup> 15 U.S.C. 45(m)(1)(C). This standard applies to penalties for violations of Commission rules addressing unfair or deceptive practices issued under section 18 of the FTC Act, and to violations of other statutes that provide for civil penalties by reference to section 18.

<sup>4</sup> United States v. Reader's Digest Ass'n, 662 F.2d 955, 967 (3d Cir. 1981).

<sup>5</sup> 62 FR 16809 (Apr. 8, 1997), <https://www.gpo.gov/fdsys/pkg/FR-1997-04-08/pdf/97-8941.pdf>.

- Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*) (violations of cease and desist orders issued under Clayton Act section 11(*b*))—Increase from \$8,500 to \$21,250;
- Section 5(*l*) of the FTC Act, 15 U.S.C. 45(*l*) (violations of final Commission orders issued under section 5(*b*) of the FTC Act)—Increase from \$16,000 to \$40,000;
- Section 5(*m*)(1)(A) of the FTC Act, 15 U.S.C. 45(*m*)(1)(A) (unfair or deceptive acts or practices)—Increase from \$16,000 to \$40,000;
- Section 5(*m*)(1)(B) of the FTC Act, 15 U.S.C. 45(*m*)(1)(B) (unfair or deceptive acts or practices)—Increase from \$16,000 to \$40,000;
- Section 10 of the FTC Act, 15 U.S.C. 50 (failure to file required reports)—Increase from \$210 to \$525;
- Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65 (failure by associations engaged solely in export trade to file required statements)—Increase from \$210 to \$525;
- Section 6(*b*) of the Wool Products Labeling Act, 15 U.S.C. 68d(*b*) (failure by wool manufacturers to maintain required records)—Increase from \$210 to \$525;
- Section 3(*e*) of the Fur Products Labeling Act, 15 U.S.C. 69a(*e*)(failure to maintain required records regarding fur products)—Increase from \$210 to \$525;
- Section 8(*d*)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(*d*)(2) (failure to maintain required records regarding fur products)—Increase from \$210 to \$525;
- Section 333(*a*) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(*a*) (knowing violations of EPCA § 332, including labeling violations)—Increase from \$210 to \$433;

- Section 525(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) (recycled oil labeling violations)—Increase from \$8,500 to \$21,250;
- Section 525(b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(b) (willful violations of recycled oil labeling requirements)—Increase from \$16,000 to \$40,000;
- Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2) (knowing violations of the Fair Credit Reporting Act)—Increase from \$3,500 to \$3,756;
- Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 21 U.S.C. 355 note (failure to comply with filing requirements)—Increase from \$12,100 to \$14,142; and
- Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304 (violations of prohibitions on market manipulation and provision of false information to federal agencies)—Increase from \$1,100,000 to \$1,138,330.

### **Calculation of inflation adjustments**

The Adjustment Improvements Act directs federal agencies to adjust the civil monetary penalties under their jurisdiction for inflation through an initial “catch-up” cost-of-living adjustment. This catch-up adjustment is defined as the percentage by which the U.S. Department of Labor’s Consumer Price Index for all-urban consumers (“CPI-U”) for the month of October 2015 exceeds the CPI-U for the month of October for the year in which the amount of the penalty was last set or adjusted pursuant to law, excluding prior adjustments under FCPIAA.<sup>6</sup>

The Adjustment Improvements Act also directs that these penalty level adjustments should be

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<sup>6</sup> 28 U.S.C. 2461 note (4)(b); Office of Management and Budget, M-16-06, Memorandum for the Heads of Executive Departments and Agencies, *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Feb. 24, 2016), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>. The OMB memorandum provides multipliers to adjust the penalty level based on the year the penalty was established or last adjusted pursuant to law.

rounded to the nearest dollar. The Act provides, however, that the amount of the catch-up increase for 2016 shall not exceed 150 percent of the amount of the civil penalty in effect on November 2, 2015.

Agencies do not have discretion over whether to make the initial catch-up adjustment for maximum civil penalty amounts absent a determination that the adjustment will have a negative economic impact or the social costs of the increase outweigh the benefits.<sup>7</sup> The Commission has determined that there is no basis to conclude that these inflationary adjustments of maximum civil penalty amounts will have such effects. Accordingly, the Commission is making these adjustments as mandated.

CALCULATION OF ADJUSTMENTS TO MAXIMUM CIVIL MONETARY PENALTIES

<i>Citation</i>	<i>Description</i>	<i>Baseline Penalty</i>	<i>Adjustment multiplier (Year)</i>	<i>Amount After Adjustment Multiplier Is Applied to Baseline Penalty</i>	<i>Current Penalty</i>	<i>Subject to Cap?</i>	<i>Adjusted Maximum</i>
16 CFR 1.98(a) 15 U.S.C. 18a(g)(1)	Premerger filing notification violations	\$10,000	4.10774 (1976) <sup>8</sup>	\$41,077	\$16,000	Yes	\$40,000
16 CFR 1.98(b) 15 U.S.C. 21(l)	Violations of Clayton Act cease and desist orders	\$5,000	8.08973 (1959) <sup>9</sup>	\$40,449	\$8,500	Yes	\$21,250
16 CFR 1.98(c) 15 U.S.C. 45(l)	Violations of FTC Act cease and desist orders	\$10,000	5.21575 (1973) <sup>10</sup>	\$52,158	\$16,000	Yes	\$40,000
16 CFR 1.98(d) 15 U.S.C. 45(m)(1)(A)	Unfair or deceptive acts or practices	\$10,000	4.33220 (1975) <sup>11</sup>	\$43,322	\$16,000	Yes	\$40,000
16 CFR 1.98(e) 15 U.S.C. 45(m)(1)(B)	Unfair or deceptive acts or practices	\$10,000	4.33220 (1975) <sup>12</sup>	\$43,322	\$16,000	Yes	\$40,000
16 CFR 1.98(f) 15 U.S.C. 50	Failure to file required reports	\$100	23.54832 (1914) <sup>13</sup>	\$2,355	\$210	Yes	\$525
1.98(g) 15 U.S.C. 65	Failure to file required statements	\$100	14.86488 (1918) <sup>14</sup>	\$1,487	\$210	Yes	\$525

<sup>7</sup> *Id.* note (4)(c).

<sup>8</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976).

<sup>9</sup> Pub. L. No. 86-107, 73 Stat. 243 (1959).

<sup>10</sup> Pub. L. No. 93-153, 87 Stat. 591 (1973).

<sup>11</sup> Pub. L. No. 93-637, 88 Stat. 2193 (1975).

<sup>12</sup> *Id.*

<sup>13</sup> Pub. L. No. 63-203, 38 Stat. 717 (1914).

<sup>14</sup> Pub. L. No. 65-126, 40 Stat. 517 (1918).

1.98(h) 15 U.S.C. 68d(b)	Failure to maintain required records	\$100	16.98843 (1940) <sup>15</sup>	\$1,699	\$210	Yes	\$525
1.98(i) 15 U.S.C. 69a(e)	Failure to maintain required records	\$100	9.07779 (1951) <sup>16</sup>	\$908	\$210	Yes	\$525
1.98(j) 15 U.S.C. 69f(d)(2)	Failure to maintain required records	\$100	9.07779 (1951) <sup>17</sup>	\$908	\$210	Yes	\$525
1.98(k) 42 U.S.C. 6303(a)	Knowing violations	\$100	4.33220 (1975) <sup>18</sup>	\$433	\$210	No	\$433
1.98(l) 42 U.S.C. 6395(a)	Recycled oil labeling violations	\$5,000	4.33220 (1975) <sup>19</sup>	\$21,661	\$8,500	Yes	\$21,250
1.98(l) 42 U.S.C. 6395(b)	Willful violations	\$10,000	4.33220 (1975) <sup>20</sup>	\$43,322	\$16,000	Yes	\$40,000
1.98(m) 15 U.S.C. 1681s(a)(2)	Knowing violations	\$2,500	1.50245 (1996) <sup>21</sup>	\$3,756	\$3,500	No	\$3,756
1.98(n) 21 U.S.C. 355 note	Non-compliance with filing requirements	\$11,000	1.28561 (2003) <sup>22</sup>	\$14,142	\$12,100	No	\$14,142
1.98(o) 42 U.S.C. 17304	Market manipulation or provision of false information to federal agencies	\$1,000,000	1.13833 (2007) <sup>23</sup>	\$1,138,330	\$1,100,000	No	\$1,138,330

### Effective Dates of New Penalties

The Adjustment Improvements Act applies to civil penalties assessed after the effective date of the applicable adjustment, including civil penalties whose associated violation predated the effective date.<sup>24</sup> The Act does not retrospectively change previously assessed or enforced civil penalties.

### Procedural Requirements

The Commission finds good cause for adopting this interim final rule without advance public notice or an opportunity for prior public comment. Advance opportunity for notice and

<sup>15</sup> Pub. L. No. 76-850, 54 Stat. 1128 (1940).

<sup>16</sup> Pub. L. No. 82-109, 65 Stat. 176 (1951).

<sup>17</sup> *Id.*

<sup>18</sup> Pub. L. No. 94-163, 89 Stat. 871 (1975).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>22</sup> Pub. L. No. 108-173, 117 Stat. 2066 (2003).

<sup>23</sup> Pub. L. No. 110-140, 121 Stat. 1724 (2007).

<sup>24</sup> Pub. L. No. 114-74, § 701(b)(3) (amending section 6 of the FCPIAA).

comment are not required “when the agency for good cause finds (and incorporates the findings and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C.

553(b)(3)(B). The Adjustment Improvements Act directs agencies to promulgate the required inflation adjustments through an interim final rulemaking by no later than July 1, 2016. Pursuant to this Congressional mandate, and because the Commission must adjust its civil penalties according to the statutory formula identified in the Adjustment Improvements Act, the Commission finds that good cause exists to forego prior public notice and comment under the APA. *Id.* These adjustments are mandated by statute and do not involve the exercise of Commission discretion or any policy judgments. Accordingly, the Commission finds that prior public notice and comment is unnecessary. For this reason, the requirements of the Regulatory Flexibility Act (“RFA”) also do not apply.<sup>25</sup> Finally, this rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 as amended. 44 U.S.C. 3501 *et seq.*

### **List of Subjects for 16 CFR Part 1**

Administrative practice and procedure, Penalties, Trade practices.

### **Text of Amendments**

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, chapter I, subchapter A, of the Code of Federal Regulations, as follows:

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<sup>25</sup> A regulatory flexibility analysis under the RFA is required only when an agency must publish a notice of proposed rulemaking for comment. *See* 5 U.S.C. 603.

## **PART 1 – GENERAL PROCEDURES**

1. Revise subpart L to read as follows:

### **SUBPART L—CIVIL PENALTY ADJUSTMENTS UNDER THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT OF 1990, AS AMENDED**

**Authority:** 28 U.S.C. 2461 note.

#### **§ 1.98 Adjustment of civil monetary penalty amounts.**

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission’s jurisdiction. The following maximum civil penalty amounts apply only to penalties assessed after August 1, 2016, including those penalties whose associated violation predated August 1, 2016.

- (a) Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)—\$40,000;
- (b) Section 11(l) of the Clayton Act, 15 U.S.C. 21(l)—\$21,250;
- (c) Section 5(l) of the FTC Act, 15 U.S.C. 45(l)—\$40,000;
- (d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)—\$40,000;
- (e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)—\$40,000;
- (f) Section 10 of the FTC Act, 15 U.S.C. 50—\$525;
- (g) Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65—\$525;
- (h) Section 6(b) of the Wool Products Labeling Act, 15 U.S.C. 68d(b)—\$525;
- (i) Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e)—\$525;
- (j) Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2)—\$525;
- (k) Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a)—\$433;
- (l) Sections 525(a) and (b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) and (b), respectively—\$21,250 and \$40,000, respectively;

(m) Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2)—\$3,756;

(n) Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 21 U.S.C. 355 note—\$14,142;

(o) Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304—\$1,138,330; and

(p) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission—refer to the amounts set forth in paragraphs (c), (d), (e) and (f) of this section, as applicable.

By direction of the Commission.

April Tabor  
Acting Secretary.