DEPARTMENT OF EDUCATION

34 CFR Part 36

RIN 1851–AA16

[DOCKET ID ED–2016–OQC–0051]

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Department of Education (Department) issues these final regulations to adjust the Department’s civil monetary penalties (CMPs) for inflation. An initial “catch-up” adjustment was required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act). These final regulations provide the 2017 annual inflation adjustments to the initial “catch-up” adjustments we made on August 1, 2016, through an interim final rule (IFR).

DATES: These regulations are effective April 20, 2017. The adjusted CMPs established by these regulations are applicable only to civil penalties assessed after April 20, 2017 whose associated violations occurred after November 2, 2015. For a description of the CMPs applicable under other circumstances, see the SUPPLEMENTARY INFORMATION section.


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SUPPLEMENTARY INFORMATION:

Background: The Inflation Adjustment Act (28 U.S.C. 2461 note) provides for the regular evaluation of CMPs to ensure that they continue to maintain their deterrent value. The Inflation Adjustment Act required that each agency issue regulations to adjust its CMPs beginning in 1996 and at least every four years thereafter. The Department published its most recent cost adjustment to each CMP in the Federal Register on October 2, 2012 (77 FR 60047), and those adjustments became effective on the date of publication.

The 2015 Act (section 701 of Pub. L. 114–74) amended the Inflation Adjustment Act to improve the effectiveness of CMPs and to maintain their deterrent effect. The 2015 Act requires agencies to: (1) Adjust the level of CMPs with an initial “catch-up” adjustment through an IFR; and (2) make subsequent annual adjustments for inflation. Catch-up adjustments are based on the percentage change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October in the year the penalty was last adjusted by a statute other than the Inflation Adjustment Act, and the October 2015 CPI–U. Annual inflation adjustments are based on the percentage change between the October CPI–U preceding the date of each statutory adjustment, and the prior year’s October CPI–U.1

The Department published an IFR with the initial “catch-up” penalty adjustment amounts on August 1, 2016 (81 FR 50321). These adjustments are currently in effect and apply to all CMPs covered by the Inflation Adjustment Act. We did not receive any public comments on this IFR.

A CMP is defined in the Inflation Adjustment Act as any penalty, fine, or other sanction that is (1) for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

The formula for the amount of a CMP inflation adjustment is prescribed by law, as explained in OMB Memorandum M–16–06 (February 24, 2016), and is not subject to the exercise of discretion by the Secretary of Education (Secretary). Under the 2015 Act, the Department was required to use, as the baseline for adjusting the CMPs in the IFR, the CMP amounts as they were most recently established or adjusted under a provision of law other than the Inflation Adjustment Act. In accordance with the 2015 Act, we did not use the amounts set out in 34 CFR part 36 in 2012 in the formula used in the IFR to adjust for inflation because those CMP amounts were updated pursuant to the Inflation Adjustment Act.2 Instead, the baselines we used in the IFR were the amounts set out most recently in each of the statutes that provide for civil penalties. Using these statutory CMPs, we determined which year those amounts were originally enacted by Congress (or the year the statutory amounts were last amended by the statute that established the penalty) and used the annual inflation adjustment multiplier corresponding to that year from Table A in OMB Memorandum M–16–06. We then rounded the number to the nearest dollar and checked, as required by the Inflation Adjustment Act, to see if that adjusted amount exceeded 150 percent of the CMP amount that was established under 34 CFR part 36, and in effect on November 2, 2015. If any of the amounts exceeded 150 percent, we were required to use the lesser amount (the 150 percent amount). All of the adjusted amounts were less than 150 percent so we did not have to replace any of the amounts we calculated using the multiplier from Table A of OMB Memorandum M–16–06 with the lesser amount.

In these final regulations, we adjust each CMP amount provided in the IFR by a factor of 1.01636, as directed by OMB Memorandum M–16–06. Effective Dates: The precise penalty amount that will apply to violations occurring before...
The Department’s Civil Monetary Penalties

The following analysis calculates new CMPs for penalty statutes in the order in which they appear in 34 CFR 36.2. The 2015 Act provides that any increase to an agency’s CMPs applies only to CMPs that are assessed after the effective date of the adjustments, including those whose associated violation predated such increase. These regulations are effective April 20, 2017. Therefore, the adjustments to the Department’s CMPs made by these final regulations apply only to violations that are assessed after April 20, 2017.


Current Regulations: The CMP for 20 U.S.C. 1015(c)(5) (Section 311(c)(5) of the Higher Education Act of 1965, as amended (HEA)), as last set out in statute in 1996 (Pub. L. 105–244, title I, § 101(a), Oct. 7, 1998, 112 Stat. 1602), is a fine of up to $25,000 for failure by an institution of higher education (IHE) to provide information on the cost of higher education to the Commissioner of Education Statistics. In the IFR, we increased this amount to $36,256.

New Regulations: The new penalty for this section is $36,849.

Reason: Using the multiplier of 1.01636 from OMB Memorandum M–17–11, the new penalty is calculated as follows: $30,200 × 1.01636 = $30,694.07, which makes the adjusted penalty $30,694, when rounded to the nearest dollar.

Statute: 20 U.S.C. 1082(g).

Current Regulations: The CMP for 20 U.S.C. 1082(g) (Section 432(g) of the HEA), as last set out in statute in 1986 (Pub. L. 99–498, title IV, § 402(a), Oct. 17, 1986, 100 Stat. 1401), provides for a fine of up to $25,000 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program. In the IFR, we increased this amount to $53,907.

New Regulations: The new penalty for this section is $54,789.

Reason: Using the multiplier of 1.01636 from OMB Memorandum M–17–11, the new penalty is calculated as follows: $53,907 × 1.01636 = $54,788.92, which makes the adjusted penalty $54,789, when rounded to the nearest dollar.

Statute: 31 U.S.C. 1352(c)(1) and (c)(2)(A).

Current Regulations: The CMP for 31 U.S.C. 1352(c)(1) and (c)(2)(A), as set out in statute in 1989, provide for a fine of $10,000 to $100,000 for recipients of Government grants, contracts, etc., that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts. In the IFR, we increased these amounts to $18,936 to $189,361.

New Regulations: The new penalties for these sections are $19,246 to $192,459.

Reason: Using the multiplier of 1.01636 from OMB Memorandum M–17–11, the new penalty is calculated as follows: $18,936 × 1.01636 = $19,245.79, which makes the adjusted penalty $19,246, when rounded to the nearest dollar. The new maximum penalty is calculated as follows: $189,361.00 × 1.01636 = $192,458.95, which case the statutory amount would apply.

However, we have been unable to identify an instance where a statutory amendment superseded the regulatory amount in this timeframe.
which makes the adjusted penalty
$192,459, when rounded to the nearest
dollar.

Statute: 31 U.S.C. 3802(a)(1) and (a)(2).

Current Regulations: The CMPs for 31
U.S.C. 3802(a)(1) and (a)(2), as set out in
statute in 1986 (Pub. L. 99–509, title VI,
§ 6103(a), Oct. 21, 1986, 100 Stat. 1937),
provide for a fine of up to $5,000 for
false claims and statements made to the
Government. In the IFR, we increased
this amount to $10,781.

New Regulations: The new penalty for
this section is $10,957.

Reason: Using the multiplier of
1.01636 from OMB Memorandum M–
17–11, the new penalty is calculated as
follows: $10,781 × 1.01636 =
$10,957.38, which makes the adjusted
penalty $10,957, when rounded to the
nearest dollar.

Executive Orders 12866, 13563, and
13771

Regulatory Impact Analysis

Under Executive Order 12866, the
Secretary must determine whether this
regulatory action is “significant” and,
therefore, subject to the requirements of
the Executive order and subject to
review by the Office of Management and
Budget (OMB). Section 3(f) of Executive
Order 12866 defines a significant
regulatory action as an action likely to
result in a rule that may—
(1) Have an annual effect on the
economy of $100 million or more, or,
adversely affect a sector of the economy;
productivity; competition; jobs; the
environment; public health or safety; or
State, local, or tribal governments or
communities in a material way (also
referred to as “economically significant”
regulations);
(2) Create serious inconsistency or
otherwise interfere with an action taken
or planned by another agency;
(3) MATERIALLY ALTER THE BUDGETARY IMPACTS OF ENTITLEMENT GRANTS, USER FEES, OR LOAN PROGRAMS OR THE RIGHTS AND OBLIGATIONS OF RECIPIENTS THEREOF; OR
(4) RAISE NOVEL LEGAL OR POLICY ISSUES ARISING OUT OF LEGAL MANDATES, THE PRESIDENT’S PRIORITIES, OR THE PRINCIPLES
STATUTORY MANDATE TO ADJUST CMPs FOR INFLATION. The regulations reflect
the statutory mandate to adjust CMPs
for inflation. The regulations reflect
administrative computations performed
by the Department as prescribed by the
statute, and the Secretary has no
discretion in determining the new
penalties.

The APA also generally requires that
regulations be published at least 30 days
before their effective date, unless the
agency has good cause to implement its
regulations sooner (5 U.S.C. 553(d)(3)).
Again, because these final regulations
merely implement non-discretionary
administrative computations, there is
good cause to make them effective on
the day they are published.

Regulatory Flexibility Act Certification

The Secretary certifies that these
regulations will not have a significant
economic impact on a substantial
number of small entities. The formula
for the amount of the inflation
adjustments is prescribed by statute and
is not subject to the Secretary’s
discretion. These CMPs are infrequently
imposed by the Secretary, and the

Because these final regulations are not
a significant regulatory action, they are
not subject to review by OMB under
section 3(f) of Executive Order 12866.

We have also reviewed these
regulations under Executive Order
13563, which supplements and
explicitly reaffirms the principles,
structures, and definitions governing
regulatory review established in
Executive Order 12866. To the extent
permitted by law, Executive Order
13563 requires that an agency—
(1) Propose or adopt regulations only
upon a reasoned determination that
their benefits justify their costs
(recognizing that some benefits and
costs are difficult to quantify);
(2) Tailor its regulations to impose the
least burden on society, consistent with
obtaining regulatory objectives and
taking into account, among other things,
and to the extent practicable, the costs
of cumulative regulations;
(3) In choosing among alternative
regulatory approaches, select those
approaches that maximize net benefits
(including potential economic,
environmental, public health and safety,
and other advantages; distributive
impacts; and equity);
(4) To the extent feasible, specify
performance objectives, rather than the
behavior or manner of compliance a
regulated entity must adopt; and
(5) Identify and assess available
alternatives to direct regulation,
including economic incentives—such as
user fees or marketable permits—to
encourage the desired behavior, or
providing information that enables the
public to make choices.

Executive Order 13563 also requires
an agency “to use the best available
techniques to quantify anticipated
present and future benefits and costs as
accurately as possible.” The Office of
Information and Regulatory Affairs of
OMB has emphasized that these
techniques may include “identifying
changing future compliance costs that
might result from technological
innovation or anticipated behavioral
changes.”

We are issuing these final regulations
required by statute. The Secretary has
no discretion to consider alternative
approaches as delineated in the
Executive Order. Based on this analysis
and the reasons stated in the preamble,
the Department believes that these final
regulations are consistent with the
principles in Executive Order 13563.

Under Executive Order 13771, if the
Department proposes for notice and
comment or otherwise promulgates a
new significant regulatory action under Executive Order 12866, it must identify two existing

regulations for elimination. For Fiscal
Year 2017, any new incremental costs
associated with the new regulation must
be fully offset by the elimination of
existing costs through the repeal of at
least two regulations. These final
regulations are not a significant
regulatory action. Therefore, the
requirements of Executive Order 13771
do not apply.

Waiver of Rulemaking and Delayed
Effective Date

Under the Administrative Procedure
Act (APA) (5 U.S.C. 553), the
Department generally offers interested
parties the opportunity to comment on
proposed regulations. However, the
APA provides that an agency is not
required to conduct notice-and-
comment rulemaking when the agency,
for good cause, finds that notice and
public comment thereon are
impracticable, unnecessary, or contrary
to the public interest (5 U.S.C. 553(b)(B)).
There is good cause to waive
rulemaking here as unnecessary.

Rulemaking is “unnecessary” in those
situations in which “the administrative
rule is a routine determination,
insignificant in nature and impact, and
inconsequential to the industry and to
the public.” Utility Solid Waste
Activities Group v. EPA, 236 F.3d 749,
755 (D.C. Cir. 2001), quoting U.S.
Department of Justice, Attorney
General’s Manual on the Administrative
Procedure Act 31 (1947) and South
Carolina v. Block, 558 F. Supp. 1004,

These regulations merely implement
the statutory mandate to adjust CMPs
for inflation. The regulations reflect
administrative computations performed
by the Department as prescribed by the
statute, and the Secretary has no
discretion in determining the new
penalties.

The APA also generally requires that
regulations be published at least 30 days
before their effective date, unless the
agency has good cause to implement its
regulations sooner (5 U.S.C. 553(d)(3)).
Again, because these final regulations
merely implement non-discretionary
administrative computations, there is
good cause to make them effective on
the day they are published.

Regulatory Flexibility Act Certification

The Secretary certifies that these
regulations will not have a significant
economic impact on a substantial
number of small entities. The formula
for the amount of the inflation
adjustments is prescribed by statute and
is not subject to the Secretary’s
discretion. These CMPs are infrequently
imposed by the Secretary, and the
regulations do not involve any special considerations that might affect the imposition of CMPs on small entities.

**Paperwork Reduction Act of 1995**

These regulations do not contain any information collection requirements.

**Intergovernmental Review**

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

**Assessment of Educational Impact**

Based on our own review, we have determined that these regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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**List of Subjects in 34 CFR Part 36**

Claims, Fraud, Penalties.

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**Table I, Section 36.2—Civil Monetary Penalty Inflation Adjustments**

<table>
<thead>
<tr>
<th>Statute</th>
<th>Description</th>
<th>New maximum (and minimum, if applicable) penalty amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 U.S.C. 1015(c)(5) (Section 131(c)(5) of the Higher Education Act of 1965 (HEA)).</td>
<td>Provides for a fine, as set by Congress in 1998, of up to $25,000 for failure by an institution of higher education (IHE) to provide information on the cost of higher education to the Commissioner of Education Statistics.</td>
<td>$36,849</td>
</tr>
<tr>
<td>20 U.S.C. 1022d(a)(3) (Section 205(a)(3) of the HEA)</td>
<td>Provides for a fine, as set by Congress in 2008, of up to $27,500 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs.</td>
<td>30,694</td>
</tr>
<tr>
<td>20 U.S.C. 1082(g) (Section 432(g) of the HEA)</td>
<td>Provides for a civil penalty, as set by Congress in 1986, of up to $25,000 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program.</td>
<td>54,789</td>
</tr>
<tr>
<td>20 U.S.C. 1094(c)(3)(B) (Section 487(c)(3)(B) of the HEA).</td>
<td>Provides for a civil penalty, as set by Congress in 1986, of up to $25,000 for an IHE’s violation of Title IV of the HEA, which authorizes various programs of student financial assistance.</td>
<td>54,789</td>
</tr>
<tr>
<td>20 U.S.C. 1228c(c)(2)(E) (Section 429 of the General Education Provisions Act).</td>
<td>Provides for a civil penalty, as set by Congress in 1994, of up to $1,000 for an educational organization’s failure to disclose certain information to minor students and their parents.</td>
<td>1,617</td>
</tr>
<tr>
<td>31 U.S.C. 1352(c)(1) and (c)(2)(A)</td>
<td>Provides for a civil penalty, as set by Congress in 1989, of $10,000 to $100,000 for recipients of Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.</td>
<td>19,246 to 192,459</td>
</tr>
<tr>
<td>31 U.S.C. 3802(a)(1) and (a)(2)</td>
<td>Provides for a civil penalty, as set by Congress in 1986, of up to $5,000 for false claims and statements made to the Government.</td>
<td>10,957</td>
</tr>
</tbody>
</table>

Dated: April 17, 2017.

Betsy DeVos, Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 36 of title 34 of the Code of Federal Regulations as follows:

**PART 36—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION**

1. The authority citation for part 36 continues to read as follows:

   **Authority:** 20 U.S.C. 1221e–3 and 3474; 28 U.S.C. 2461 note, as amended by § 701 of Pub. Law 114–74, unless otherwise noted.

2. Section 36.2 is amended by revising Table I to read as follows:

   **§ 36.2 Penalty adjustment.**

   * * * * *
I. Introduction

On November 23, 2016, the Copyright Royalty Judges (Judges) published a proposed rule in the Federal Register seeking comments on proposed amendments relating to an automated system, designated “eCRB.” The rules address electronic filing of documents and related matters such as the form and content of documents that are filed with the Judges. The Judges received comments from the following interested parties: The Commercial Television Claimants (CTV); Independent Producers Group and Multigroup Claimants (IPG); Joint Sports Claimants (JSC); the Music Community Participants (Music Community); the Performing Rights Organizations (Music PROs); the Program Suppliers; and the Settling Devotional Claimants (SDC). All interested parties supported the Judges’ decision to implement an electronic filing system and to adopt rules concerning the use of that system, though most recommended some changes to the proposed rules.

II. Comments on Proposed Rules and Judges’ Findings

The Judges address the comments on a section-by-section basis. The Judges will adopt without change those sections that no interested party commented on. Section 350.3(a)(1): Format—Caption and Description

The Music Community recommended that the proposed rule be modified so that filers would not be required to put a footer on the first page of a filed document, noting that the first page includes a caption that conveys the same information that would be in the footer. Comments of the Music Community Participants (Music Community Comments) at 9. The Judges find this recommendation to be reasonable and will adopt it in the final rule.

Commenter Music PROs recommended that the requirement for a footer be eliminated from the rules. In the view of the Music PROs, eCRB should be designed to add a footer automatically. Comments of Performing Rights Organizations (Music PRO Comments) at 2–3.

eCRB will add a stamp to the first page of each filed document that includes, inter alia, the date and time the document was filed. It will not add a footer to each page, however. While the Judges may revisit this design choice in a future revision of the system, filers will be required to add footers to their documents for the time being. The Judges note that the burden of adding footers to documents created in a word processing program is minimal. However, the Music PROs’ concern is well-taken that adding footers to some document exhibits (e.g., exhibits that are reproductions of paper documents) might not be technologically feasible. The Judges will adopt language limiting the application of the requirement for including footers on exhibits to the extent it is technologically feasible to do so using software available to the general public.

Section 350.3(a)(2): Format—Page Layout

The Music PROs object to this provision’s requirement that exhibits or attachments to documents reflect the docket number of the proceeding and that the pages are numbered appropriately, opining that “[m]ost if not all electronic filing systems automatically create a legend on each page of a filed document. . . .” Music PRO Comments at 3. eCRB will not create a legend on each page of a filed document. Consequently, the Judges will retain the requirement in the final rule. As discussed above, however, the Judges recognize that in certain instances (e.g., when attachments or exhibits are reproductions of paper documents) there may be technological impediments to adding footers to an attachment or exhibit. The Judges will,