

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 747**

**RIN: 3133-AE59**

**Civil Monetary Penalty Inflation Adjustment**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** On June 21, 2016, the NCUA Board (Board) published an interim final rule amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation. This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This final rule confirms those amendments while making a clarification regarding the prospective effect of the 2015 legislation.

**DATES:** The effective date of July 21, 2016 for the interim final rule is confirmed as final without change.

**FOR FURTHER INFORMATION CONTACT:** Ian Marenga, Senior Trial Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

**II. Regulatory Procedures**

**I. Background**

**A. June 2016 Interim Final Rule**

The Debt Collection Improvement Act of 1996<sup>1</sup> (DCIA) amended the Federal Civil Penalties Inflation Adjustment Act of 1990<sup>2</sup> (FCPIA Act) to require every federal agency to enact regulations that adjust each CMP provided by law under its jurisdiction by the rate of inflation at least once every four years. In November 2015, Congress further amended the CMP inflation requirements in the Bipartisan Budget Act of 2015,<sup>3</sup> which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).<sup>4</sup> This legislation provides for an initial “catch-up” adjustment of CMPs in 2016, followed by annual adjustments.

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<sup>1</sup> Pub. L. 104-134, § 31001(s), 110 Stat. 1321-373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.

<sup>2</sup> Pub. L. 101-410, 104 Stat. 890 (Oct. 5, 1990), also codified at 28 U.S.C. 2461 note.

<sup>3</sup> Pub. L. 114-74, 129 Stat. 584 (Nov. 2, 2015).

<sup>4</sup> 129 Stat. 599.

The catch-up adjustment re-sets CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculating inflation with reference to the year when each CMP was enacted or last modified by Congress. For 2017 and subsequent years, the Board will be required to adjust maximum levels to account for annual inflation.<sup>5</sup>

On June 21, 2016, in compliance with the 2015 amendments, the Board published an interim final rule with a request for comments in the Federal Register.<sup>6</sup> In calculating the adjustments, the Board reviewed and applied government-wide guidance issued by the Office of Management and Budget (OMB).<sup>7</sup> In accordance with the procedures and calculations prescribed by the 2015 amendments and OMB's guidance, the Board adjusted the maximum level of each of the CMPs that NCUA has authority to assess. NCUA is not, however, required to assess at the new maximum levels and retains discretion to assess at lower levels, as it has done historically.<sup>8</sup>

The interim final rule became effective on July 21, 2016. The Board received no comments on the rule.

#### B. Prospective Effect of Adjustments

Although the Board received no comments on the interim final rule, it wishes to clarify its intended use of adjusted maximums for violations that occurred prior to the adjustment. As described in the interim final rule, the 2015 amendments provide that increased maximum CMP

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<sup>5</sup> Pub. L. 114-74, 129 Stat. 584 (Nov. 2, 2015).

<sup>6</sup> 81 FR 40152 (June 21, 2016).

<sup>7</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M-16-06, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2016).

<sup>8</sup> 81 FR 40152, 40156 (June 21, 2016).

amounts apply to penalties assessed after the adjustments take effect, including those for which the associated violation occurred before the adjustment became effective.<sup>9</sup> The Board adopted this provision in the interim final rule consistent with the statute.<sup>10</sup>

The Board has observed that agencies have appeared to vary in their adoption of this provision. Some agencies' interim final rules provide that the adjusted maximums apply only to violations occurring after November 2, 2015, when the 2015 amendments became law.<sup>11</sup> Other agencies' rules, like the NCUA's interim final rule, do not specify whether the adjusted maximums would apply to violations that occurred before the 2015 amendments were enacted.<sup>12</sup> To avoid confusion, the Board clarifies that it interprets the 2015 amendments as applying only prospectively. If NCUA assesses CMPs at the maximum level, it would not apply the new maximums to violations that occurred before the statute was amended on November 2, 2015. As noted above, nothing in the 2015 amendments or the final rule requires application of maximum-level CMPs. Further, as explained in the interim final rule, NCUA generally must consider mitigating factors, including financial resources, in assessing a CMP.<sup>13</sup>

Apart from this clarification, the Board adopts the interim final rule as final without changes.

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<sup>9</sup> Public Law 114-74, 129 Stat. 600 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.

<sup>10</sup> 81 FR 40152, 40156 (June 21, 2016).

<sup>11</sup> See, e.g., Dep't of Justice, Civil Monetary Penalties Inflation Adjustment, 81 FR 42491, 42499 (June 30, 2016).

<sup>12</sup> See, e.g., Dep't of Defense, Civil Monetary Penalty Inflation Adjustment, 81 FR 33389, 33390 (May 26, 2016).

<sup>13</sup> 81 FR 40152, 40156 (June 21, 2016).

## **II. Regulatory Procedures**

Section III of the Supplementary Information in the June 2016 interim final rule sets forth the Board’s analyses under the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act of 1995, the Small Business Enforcement Fairness Act, Executive Order 13132, and the Treasury and General Government Appropriations Act. See 81 FR 40156-40157. Because the final rule confirms the interim final rule and does not alter the substance of the analyses and determinations accompanying the interim final rule, the Board continues to rely on those analyses and determinations for purposes of this rulemaking. The Board notes that OMB determined that the interim final rule is not a “major rule” within the meaning of the Small Business Enforcement Fairness Act.

### **List of Subjects in 12 CFR Part 747**

Credit unions, Civil monetary penalties.

By the National Credit Union Administration Board on October 27, 2016.

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Gerard S. Poliquin  
Secretary of the Board

For the reasons stated above, the interim final rule amending 12 CFR Part 747, published at 81 FR 40152 (June 21, 2016), is adopted as a final rule without change.