

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

[Release Nos. 33–8530; 34–51136; IA–2348; IC–26748]

Adjustments to Civil Monetary Penalty Amounts

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: This rule implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. The Commission is adopting a rule adjusting for inflation the maximum amount of civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002.

EFFECTIVE DATE: February 14, 2005.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

This rule implements the Debt Collection Improvement Act of 1996 (“DCIA”).¹ The DCIA amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (“FCPIAA”) ² to require that each Federal agency adopt regulations at least once every four years, adjusting for inflation the maximum amount of the civil monetary penalties (“CMPs”) under the statutes administered by the agency.³

A civil monetary penalty (“CMP”) is defined in relevant part as any penalty, fine, or other sanction that: (1) Is for a specific amount, or has a maximum amount, as provided by Federal law; and (2) is assessed or enforced by an agency in an administrative proceeding or by a Federal court pursuant to Federal law.⁴ This definition covers the monetary penalty provisions contained in the statutes administered by the Commission. In addition, this definition encompasses the civil monetary penalties that may be imposed by the

Public Company Accounting Oversight Board (the “PCAOB”) in its disciplinary proceedings pursuant to 15 U.S.C. 7215(c)(4)(D).⁵

The DCIA requires that the penalties be adjusted by the cost-of-living adjustment set forth in section 5 of the FCPIAA.⁶ The cost-of-living adjustment is defined in the FCPIAA as the percentage by which the U.S. Department of Labor’s Consumer Price Index for all-urban consumers (“CPI–U”) ⁷ for the month of June for the year preceding the adjustment exceeds the CPI–U for the month of June for the year in which the amount of the penalty was last set or adjusted pursuant to law.⁸ The statute contains specific rules for rounding each increase based on the size of the penalty.⁹ Agencies do not have discretion whether to adjust a maximum CMP, or the methods used to determine the adjustment. Although the DCIA imposes a 10 percent maximum increase for each penalty for the first adjustment pursuant thereto, that limitation does not apply to the adjustments subsequently made.

The Commission administers four statutes that provide for civil monetary penalties: The Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act of 1940; and the Investment Advisers Act of 1940. In addition, the Sarbanes-Oxley Act of 2002 provides the PCAOB (over which the Commission has jurisdiction) authority to levy civil monetary penalties in its disciplinary proceedings.¹⁰ Penalties administered by the Commission were last adjusted by rules effective February 2, 2001.¹¹ The DCIA requires the civil monetary penalties to be adjusted for inflation at least once every four years. Therefore, the Commission is directed by statute to increase the maximum amount of each penalty by the appropriate formulated amount.

Accordingly, the Commission is adopting an amendment to 17 CFR part 201 to add section 201.1003 and Table III to Subpart E, increasing the amount

of each civil monetary penalty authorized by the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002. The adjustments set forth in the amendment apply to violations occurring after the effective date of the amendment.

II. Summary of the Calculation

To explain the inflation adjustment calculation for CMP amounts that were last adjusted in 2001, we will use the following example. Under the current provisions, the Commission may impose a maximum CMP of \$1,200,000 for certain insider trading violations by a controlling person. To determine the new CMP amounts under the amendment, first we determine the appropriate CPI–U for June of the calendar year preceding the year of adjustment. Because we are adjusting CMPs in 2005, we use the CPI–U for June of 2004, which was 189.7. We must also determine the CPI–U for June of the year the CMP was last adjusted for inflation. Because the Commission last adjusted this CMP in 2001, we use the CPI–U for June of 2001, which was 178.0.

Second, we calculate the cost-of-living adjustment or inflation factor. To do this we divide the CPI for June of 2004 (189.7) by the CPI for June of 2001 (178.0). Our result is 1.0657.

Third, we calculate the raw inflation adjustment. To do this, we multiply the maximum penalty amounts by the inflation factor. In our example, \$1,200,000 multiplied by the inflation factor of 1.0657 equals \$1,278,840.

Fourth, we round the raw inflation amounts according to the rounding rules in Section 5(a) of the FCPIAA. Since we round only the increased amount, we calculate the increased amount by subtracting the current maximum penalty amounts from the raw maximum inflation adjustments. Accordingly, the increased amount for the maximum penalty in our example is \$78,840 (*i.e.*, \$1,278,840 less \$1,200,000). Under the rounding rules, if the *penalty* is greater than \$200,000, we round the *increase* to the nearest multiple of \$25,000. Therefore, the maximum penalty increase in our example is \$75,000.

Fifth, we add the rounded increase to the maximum penalty amount last set or adjusted. In our example, \$1,200,000 plus \$75,000 yields a maximum

¹ Pub. L. 104–134, 110 Stat. 1321–373 (codified at 28 U.S.C. 2461 note).

² 28 U.S.C. 2461 note.

³ Increased CMPs apply only to violations that occur after the increase takes effect.

⁴ 28 U.S.C. 2461 note (3)(2).

⁵ The Commission may by order affirm, modify, remand, or set aside sanctions, including civil monetary penalties, imposed by the PCAOB. See section 107(c) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217. The Commission may enforce such orders in Federal district court pursuant to Section 21(e) of the Exchange Act. As a result, penalties assessed by the PCAOB in its disciplinary proceedings should be considered penalties “enforced” by the Commission for purposes of the Act.

⁶ 28 U.S.C. 2461 note (5).

⁷ 28 U.S.C. 2461 note (3)(3).

⁸ 28 U.S.C. 2461 note (5)(b).

⁹ 28 U.S.C. 2461 note (5)(a)(1)–(6).

¹⁰ 15 U.S.C. 7215(c)(4)(D).

¹¹ See 17 CFR 201.1002.

inflation adjustment penalty amount of \$1,275,000.¹²

III. Related Matters

A. Administrative Procedure Act—Immediate Effectiveness of Final Rule

Under the Administrative Procedure Act (“APA”), to issue a final rule without public notice and comment, an agency must find good cause that notice and comment are impractical, unnecessary, or contrary to public interest.¹³ Because the Commission is required by statute to adjust the civil monetary penalties within its jurisdiction by the cost-of-living adjustment formula set forth in section 5 of the FCPIAA, the Commission finds that good cause exists to dispense with public notice and comment pursuant to the notice and comment provisions of the APA.¹⁴ Specifically, the Commission finds that because the adjustment is mandated by Congress and does not involve the exercise of Commission discretion or any policy judgments, public notice and comment is unnecessary.¹⁵

Under the DCIA, agencies must make the required inflation adjustment to civil monetary penalties: (1) According to a very specific formula in the statute; and (2) within four years of the last inflation adjustment. Agencies have no discretion as to the amount of the adjustment and have limited discretion as to the timing of the adjustment, in that agencies are required to make the adjustment at least once every four years. The regulation discussed herein is ministerial, technical, and

noncontroversial. Furthermore, because the regulation concerns penalties for conduct that is already illegal under existing law, there is no need for affected parties to have thirty days prior to the effectiveness of the regulation and amendments during which to adjust their conduct. Accordingly, the Commission believes that there is good cause to make this regulation effective immediately upon publication.

B. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits that result from its rules. This regulation merely adjusts civil monetary penalties in accordance with inflation as required by the DCIA, and has no impact on disclosure or compliance costs. Furthermore, Congress, in mandating the inflationary adjustments, has already determined that any possible increase in costs is justified by the overall benefits of such adjustments.

The regulation is in the interest of the public and in furtherance of investor protection. The benefit provided by the inflationary adjustment to the maximum civil monetary penalties is that of maintaining the level of deterrence effectuated by the civil monetary penalties, and not allowing such deterrent effect to be diminished by inflation.

C. Paperwork Reduction Act

This rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 as amended.¹⁶

List of Subjects in 17 CFR Part 201

Administrative practice and procedure, Claims, Confidential business information, Lawyers, Securities.

Text of Amendment

■ For the reasons set forth in the preamble, part 201, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 201—RULES OF PRACTICE

Subpart E—Adjustment of Civil Monetary Penalties

■ 1. The authority citation for part 201, subpart E continues to read as follows:

Authority: Pub. L. 104–134, 110 Stat. 1321.

■ 2. Section 201.1003 and Table III to subpart E are added following Table II to subpart E to read as follows:

§ 201.1003 Adjustment of civil monetary penalties—2005.

As required by the Debt Collection Improvement Act of 1996, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002 are adjusted for inflation in accordance with Table III to this subpart. The adjustments set forth in Table III apply to violations occurring after February 14, 2005.

TABLE III TO SUBPART E.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last adjusted	Maximum penalty amount pursuant to last adjustment	Adjusted maximum penalty amount
Securities and Exchange Commission				
15 U.S.C. 77t(d)	For natural person	2001	\$6,500	\$6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses or risk of losses to others.	2001	120,000	130,000
	For any other person/substantial losses or risk of losses to others.	2001	600,000	650,000
15 U.S.C. 78ff(b)	Exchange Act/failure to file information documents, reports.	1996	110	110
15 U.S.C. 78ff(c)(1)(B)	Foreign Corrupt Practices—any issuer	1996	11,000	11,000

¹² The adjustments in Table III to subpart E of part 201 reflect that the operation of the statutorily mandated computation, together with rounding rules, does not result in any adjustment to certain penalties. These particular penalties will be subject to slightly different treatment when calculating the next adjustment. Under the statute, when we next adjust these particular penalties, we will be

required to use the CPI-U for June of the year when these particular penalties were “last adjusted,” rather than the CPI-U for 2005.

¹³ 5 U.S.C. 553(b).

¹⁴ 5 U.S.C. 553(b)(3)(B).

¹⁵ A regulatory flexibility analysis under the Regulatory Flexibility Act (“RFA”) is required only

when an agency must publish a general notice of proposed rulemaking for notice and comment. See 5 U.S.C. 603. As noted above, notice and comment are not required for this final rule. Therefore, the RFA does not apply.

¹⁶ 44 U.S.C. 3501 *et. seq.*

TABLE III TO SUBPART E.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last adjusted	Maximum penalty amount pursuant to last adjustment	Adjusted maximum penalty amount
15 U.S.C. 78ff(c)(2)(C)	Foreign Corrupt Practices—any agent or stockholder acting on behalf of issuer.	1996	11,000	11,000
15 U.S.C. 78u–1(a)(3)	Insider Trading—controlling person	2001	1,200,000	1,275,000
15 U.S.C. 78u–2	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses to others/gains to self.	2001	120,000	130,000
	For any other person/substantial losses to others/gain to self.	2001	600,000	650,000
15 U.S.C. 78u(d)(3)	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses or risk of losses to others.	2001	120,000	130,000
	For any other person/substantial losses or risk of losses to others.	2001	600,000	650,000
15 U.S.C. 80a–9(d)	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses to others/gains to self.	2001	120,000	130,000
	For any other person/substantial losses to others/gain to self.	2001	600,000	650,000
15 U.S.C. 80a–41(e)	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses or risk of losses to others.	2001	120,000	130,000
	For any other person/substantial losses or risk of losses to others.	2001	600,000	650,000
15 U.S.C. 80b–3(i)	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses to others/gains to self.	2001	120,000	130,000
	For any other person/substantial losses to others/gain to self.	2001	600,000	650,000
15 U.S.C. 80b–9(e)	For natural person	2001	6,500	6,500
	For any other person	2001	60,000	65,000
	For natural person/fraud	2001	60,000	65,000
	For any other person/fraud	2001	300,000	325,000
	For natural person/substantial losses or risk of losses to others.	2001	120,000	130,000
	For any other person/substantial losses or risk of losses to others.	2001	600,000	650,000
15 U.S.C. 7215(c)(4)(D)(i)	For natural person	2002	100,000	110,000
	For any other person	2002	2,000,000	2,100,000
15 U.S.C. 7215(c)(4)(D)(ii)	For natural person	2002	750,000	800,000
	For any other person	2002	15,000,000	15,825,000

By the Commission.

Dated: February 4, 2005.

Margaret H. McFarland,*Deputy Secretary.*

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