

51536
EB

SERVICE DATE—JANUARY 13, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 716 (Sub-No. 8)

CIVIL MONETARY PENALTIES—2023 ADJUSTMENT

Decided: January 9, 2023

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (Board) is issuing a final rule to implement the annual inflationary adjustment to its civil monetary penalties, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective January 13, 2023.

FOR FURTHER INFORMATION CONTACT: Nathaniel Bawcombe at (202) 245-0376. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), enacted as part of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599-601, requires agencies to adjust their civil penalties for inflation annually, beginning on July 1, 2016, and no later than January 15 of every year thereafter. In accordance with the 2015 Act, annual inflation adjustments are to be based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for October of the previous year and the October CPI-U of the year before that. Penalty level adjustments should be rounded to the nearest dollar.

II. Discussion

The statutory definition of civil monetary penalty covers various civil penalty provisions under the Rail (Part A); Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Part B); and Pipeline Carriers (Part C) provisions of the Interstate Commerce Act, as amended. The Board's civil (and criminal) penalty authority related to rail transportation appears at

49 U.S.C. §§ 11901-11908. The Board's penalty authority related to motor carriers, water carriers, brokers, and freight forwarders appears at 49 U.S.C. §§ 14901-14916. The Board's penalty authority related to pipeline carriers appears at 49 U.S.C. §§ 16101-16106.¹ The Board has regulations at 49 C.F.R. pt. 1022 that codify the method set forth in the 2015 Act for annually adjusting for inflation the civil monetary penalties within the Board's jurisdiction.

As set forth in this final rule, the Board is amending 49 C.F.R. part 1022 to make an annual inflation adjustment to the civil monetary penalties in conformance with the requirements of the 2015 Act. The adjusted penalties set forth in the rule will apply only to violations that occur after the effective date of this regulation.

In accordance with the 2015 Act, the annual adjustment adopted here is calculated by multiplying each current penalty by the cost-of-living adjustment factor of 1.07745, which reflects the percentage change between the October 2022 CPI-U (298.012) and the October 2021 CPI-U (276.589). The table at the end of this decision shows the statutory citation for each civil penalty, a description of the provision, the adjusted statutory civil penalty level for 2022, and the adjusted statutory civil penalty level for 2023.

III. Final Rule

The final rule set forth at the end of this decision is being issued without notice and comment pursuant to the rulemaking provision of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B), which does not require that process "when the agency for good cause finds" that public notice and comment are "unnecessary." Here, Congress has mandated that the agency make an annual inflation adjustment to its civil monetary penalties. The Board has no discretion to set alternative levels of adjusted civil monetary penalties, because the amount of the inflation adjustment must be calculated in accordance with the statutory formula. Given the absence of discretion, the Board has determined that there is good cause to promulgate this rule without soliciting public comment and to make this regulation effective immediately upon publication.

IV. Regulatory Flexibility Statement

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice and comment are not required under the APA for this rulemaking, the requirements of the RFA do not apply.

¹ The Board also has various criminal penalty authority, enforceable in a federal criminal court. Congress has not, however, authorized federal agencies to adjust statutorily prescribed criminal penalty provisions for inflation, and this rule does not address those provisions.

V. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. §§ 801-808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. § 804(2).

VI. Paperwork Reduction Act

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521.

VII. List of Subjects in 49 C.F.R. part 1022

Administrative practice and procedures, Brokers, Civil penalties, Freight forwarders, Motor carriers, Pipeline carriers, Rail carriers, Water carriers.

It is ordered:

1. The Board amends its rules as set forth in this decision. Notice of the final rule will be published in the Federal Register.

2. This decision is effective on its date of publication in the Federal Register.

By the Board, Board Members, Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER PRIMUS, concurring:

Today's decision faithfully carries out the mandate of the 2015 Act by adjusting the Board's civil penalties for inflation. I write separately, however, to express concern about the adequacy of the penalties afforded by statute. The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990 Act). The 1990 Act, in turn, relied on congressional findings that:

- (1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;
- (2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;
- (3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties . . .

104 Stat. at 890. Congress therefore stated that its purposes in enacting the 1990 Act included “maintain[ing] the deterrent effect of civil monetary penalties and promot[ing] compliance with the law.” Id.

I question whether the penalties that the Board is permitted by statute to impose are sufficient to provide the deterrent effect that Congress intended, as applied to Class I railroads. Consider, as an example, the default penalty of \$5,000 per violation, set forth in 49 U.S.C. § 11901(a). Inflation adjustments since 2012 have increased this penalty to the \$9,413 per violation stated in the Board’s decision today. See Civ. Monetary Penalty Inflation Adjustment Rule, EP 716, slip op. at 6 (STB served Oct. 22, 2012) (making an initial adjustment from \$5,000 to \$5,500). But the \$5,000 baseline from which the Board began its inflation adjustments in 2012 was established in a different century—not even the 20th century, but the 19th. In fact, that \$5,000 penalty per violation was enacted in the Interstate Commerce Act of 1887, which created the Board’s predecessor, the Interstate Commerce Commission, and established the first federal regulation of the nation’s railroads. Interstate Commerce Act, § 10, 24 Stat. 379, 382-83 (1887).

Needless to say, the value of \$5,000 has changed far more than these adjustments suggest. According to an online calculator offered by the Federal Reserve Bank of Minneapolis (which reaches back only to 1913, thus understating inflation compared to an 1887 value), the 2022 equivalent would have been almost \$150,000.¹ As a concrete example, real estate listings in 1887 offered houses in the District of Columbia for \$1,700 to \$7,800 (the latter a 12-room mansion). See For Sale—Houses, Wash. Post, May 22, 1887, at 3. These penalties are not even a slap on the wrist. Other independent federal agencies, by contrast, have civil penalty authority that is more commensurate with the times. See, e.g., FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023 (including penalties as high as \$1,426,319).²

Class I railroads, meanwhile, reported between \$388 million and \$7 billion in adjusted net railway operating income for 2021, the most recent year available. See R.R. Revenue Adequacy—2021 Determination, EP 552 (Sub-No. 26), App. B (STB served Sept. 6, 2022). The idea that \$9,413 per violation will deter entities of this size from “knowingly violating this part or an order of the Board under this part,” § 11901(a), is farfetched to say the least. Congress should act to restore the deterrent effect of these civil monetary penalties and promote compliance with the law.

¹ <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator>, last visited Jan. 9, 2023.

² <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023>, last visited Jan. 9, 2023.

Code of Federal Regulations

For the reasons set forth in the preamble, part 1022 of title 49, chapter X, of the Code of Federal Regulations is amended as follows:

PART 1022—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

1. The authority citation for part 1022 continues to read as follows:

Authority: 5 U.S.C. 551-557; 28 U.S.C. 2461 note; 49 U.S.C. 11901, 14901, 14903, 14904, 14905, 14906, 14907, 14908, 14910, 14915, 14916, 16101, 16103.

2. Revise § 1022.4(b) to read as follows:

§ 1022.4 Cost-of-living adjustments of civil monetary penalties.

(b) The cost-of-living adjustment required by the statute results in the following adjustments to the civil monetary penalties within the jurisdiction of the Board:

<u>U.S. Code Citation</u>	<u>Civil Monetary Penalty Description</u>	2022 - Penalty Amount	2023 - Adjusted Penalty Amount
-	-	EP 716_7 (2022)	EP 716_8 (2023)
	Rail Carrier		
49 U.S.C. 11901(a)	Unless otherwise specified, maximum penalty for each knowing violation under this part, and for each day	\$8,736	\$9,413
49 U.S.C. 11901(b)	For each violation under § 11124(a)(2) or (b)	\$874	\$942
49 U.S.C. 11901(b)	For each day violation continues	\$45	\$48
49 U.S.C. 11901(c)	Maximum penalty for each knowing violation under §§ 10901-10906	\$8,736	\$9,413
49 U.S.C. 11901(d)	For each violation under §§ 11123 or 11124(a)(1)	\$174-\$874	\$187-\$942
49 U.S.C. 11901(d)	For each day violation continues	\$87	\$94
49 U.S.C. 11901(e)(1), (4)	For each violation under §§ 11141-11145, for each day	\$874	\$942
49 U.S.C. 11901(e)(2), (4)	For each violation under § 11144(b)(1), for each day	\$174	\$187
49 U.S.C. 11901(e)(3)-(4)	For each violation of reporting requirements, for each day	\$174	\$187
	Motor and Water Carrier		
49 U.S.C. 14901(a)	Minimum penalty for each violation and for each day	\$1,195	\$1,288

49 U.S.C. 14901(a)	For each violation under §§ 13901 or 13902(c)	\$11,957	\$12,883
49 U.S.C. 14901(a)	For each violation related to transportation of passengers	\$29,893	\$32,208
49 U.S.C. 14901(b)	For each violation of the hazardous waste rules under § 3001 of the Solid Waste Disposal Act	\$23,915- \$47,829	\$25,767- \$51,534
49 U.S.C. 14901(d)(1)	Minimum penalty for each violation of household good regulations, and for each day	\$1,746	\$1,881
49 U.S.C. 14901(d)(2)	Minimum penalty for each instance of transportation of household goods if broker provides estimate without carrier agreement	\$17,473	\$18,826
49 U.S.C. 14901(d)(3)	Minimum penalty for each instance of transportation of household goods without being registered	\$43,678	\$47,061
49 U.S.C. 14901(e)	Minimum penalty for each violation of a transportation rule	\$3,494	\$3,765
49 U.S.C. 14901(e)	Minimum penalty for each additional violation	\$8,736	\$9,413
49 U.S.C. 14903(a)	Maximum penalty for undercharge or overcharge of tariff rate, for each violation	\$174,724	\$188,257
49 U.S.C. 14904(a)	For first violation, rebates at less than the rate in effect	\$349	\$376
49 U.S.C. 14904(a)	For all subsequent violations	\$438	\$472
49 U.S.C. 14904(b)(1)	Maximum penalty for first violation for undercharges by freight forwarders	\$874	\$942
49 U.S.C. 14904(b)(1)	Maximum penalty for subsequent violations	\$3,494	\$3,765
49 U.S.C. 14904(b)(2)	Maximum penalty for other first violations under § 13702	\$874	\$942
49 U.S.C. 14904(b)(2)	Maximum penalty for subsequent violations.	\$3,494	\$3,765
49 U.S.C. 14905(a)	Maximum penalty for each knowing violation of § 14103(a), and knowingly authorizing, consenting to, or permitting a violation of § 14103(a) or (b)	\$17,473	\$18,826
49 U.S.C. 14906	Minimum penalty for first attempt to evade regulation	\$2,392	\$2,577
49 U.S.C. 14906	Minimum amount for each subsequent attempt to evade regulation	\$5,978	\$6,441
49 U.S.C. 14907	Maximum penalty for recordkeeping/reporting violations	\$8,736	\$9,413
49 U.S.C. 14908(a)(2)	Maximum penalty for violation of § 14908(a)(1)	\$3,494	\$3,765
49 U.S.C. 14910	When another civil penalty is not specified under this part, for each violation, for each day	\$874	\$942

49 U.S.C. 14915(a)(1)-(2)	Minimum penalty for holding a household goods shipment hostage, for each day	\$13,885	\$14,960
49 U.S.C. 14916(c)(1)	Maximum penalty for each knowing violation under § 14916(a) for unlawful brokerage activities	\$11,957	\$12,883
	Pipeline Carrier		
49 U.S.C. 16101(a)	Maximum penalty for violation of this part, for each day	\$8,736	\$9,413
49 U.S.C. 16101(b)(1), (4)	For each recordkeeping violation under § 15722, each day	\$874	\$942
49 U.S.C. 16101(b)(2), (4)	For each inspection violation liable under § 15722, each day	\$174	\$187
49 U.S.C. 16101(b)(3)-(4)	For each reporting violation under § 15723, each day	\$174	\$187
49 U.S.C. 16103(a)	Maximum penalty for improper disclosure of information	\$1,746	\$1,881