

# CRS Report for Congress

## Adjustment of Civil Monetary Penalties for Inflation

February 11, 2008

Curtis W. Copeland  
Specialist in American National Government  
Government and Finance Division



Prepared for Members and  
Committees of Congress

# Adjustment of Civil Monetary Penalties for Inflation

## Summary

Civil monetary penalties are one way agencies enforce federal laws and regulations. The minimum and maximum size of civil penalties may be established administratively by federal agencies, or may be established in statute. Over time, inflation can reduce the original deterrent value of civil penalties. To prevent that from happening, in 1996, Congress amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (“Inflation Adjustment Act”) and required federal agencies to adjust their covered penalties for inflation by October 1996; and to examine their covered penalties at least once every four years thereafter and make any required penalty adjustments.

In 2003, the General Accounting Office (GAO, now the Government Accountability Office) said that several elements of the Inflation Adjustment Act had prevented federal agencies from fully adjusting their civil penalties for inflation: (1) a 10% cap on agencies’ initial penalty adjustments (even if the penalties would have to have been adjusted by hundreds of percent to maintain their original deterrent value); (2) the exemption of 238 penalties under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, and the Social Security Act from the Inflation Adjustment Act’s coverage; and (3) a rounding formula and other procedures in the act that can prevent agencies from adjusting their penalties for as much as 15 years. GAO recommended that Congress consider changing the Inflation Adjustment Act to address these issues, and also said Congress should consider giving one or more federal agencies the authority and responsibility to monitor the act’s implementation and provide guidance to the agencies. To date, Congress has taken no action on GAO’s recommendations. Proponents of the adjustment of civil penalties for inflation assert that, in addition to maintaining the penalties’ deterrent effects, the adjustments could increase federal revenues by hundreds of millions of dollars each year — all from individuals and organizations that GAO described as “the worst offenders of health, safety, environmental, and other statutes guilty of the most egregious violations of federal laws.” In 2007, GAO reported that if the fixed dollar amounts of just four civil tax penalties had been adjusted for inflation, the estimated potential increase in collections would have ranged from \$38 million to \$61 million per year from 2000 to 2005.

Given the reported inability of federal agencies to adjust all (or in some cases, any) of their civil penalty maximums for inflation under the Inflation Adjustment Act’s procedures, Congress currently appears to have at least three general types of legislative options: (1) maintain the status quo, (2) adjust certain civil penalty maximums through separate legislation, or (3) implement some or all of the recommendations in GAO’s 2003 report.

This report will be updated if any actions are taken to amend the Inflation Adjustment Act.

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# Adjustment of Civil Monetary Penalties for Inflation

## Introduction

Civil monetary penalties are one way agencies enforce federal laws and regulations. The maximum size of civil penalties may be established administratively by federal agencies, or may be established in statute. Large civil penalties can be assessed to punish the most serious violations, deter others from committing similar offenses, or both. Over time, however, inflation can reduce the original punitive and deterrent value of civil penalty maximums.

For example, in 1958, Congress established a \$1,000 maximum penalty for possession of a firearm discovered at a baggage security checkpoint. By 1996, in order to keep up with inflation as measured by the Consumer Price Index (CPI) and have the same punitive and deterrent value that it had in 1958, that penalty maximum would have to have been increased by more than 400% to \$5,277.<sup>1</sup> However, the penalty was unchanged as of 1996, so it had lost more than 80% of its value.

Until 1996, agencies generally did not have the authority to adjust civil penalty maximums that were established in statute. That year, Congress amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (hereafter, the “Inflation Adjustment Act”) and required federal agencies to adjust each of their covered civil penalties for inflation.<sup>2</sup> The stated purpose of the original Inflation Adjustment Act was “to establish a mechanism that shall (1) allow for regular adjustment for inflation of civil monetary penalties; (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and (3) improve the collection by the Federal Government of civil monetary penalties.” The 1990 act established a set of reporting requirements, but did not give agencies the authority to adjust their civil penalties for inflation. The 1996 amendments to the act established a relatively automatic penalty adjustment process — agencies were to make their first penalty adjustments within 180 days after enactment (i.e., by October 1996); and were required to examine and, if necessary, adjust their civil penalties for inflation at least once every four years thereafter. The amendments also specified how the adjustments were to be calculated.

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<sup>1</sup> The CPI is published monthly by the Bureau of Labor Statistics, and is the most widely used measure of inflation. There are actually several measures of the CPI. In this report, the CPI for all urban consumers is used. See [<http://www.bls.gov/cpi/>] for more information.

<sup>2</sup> The 1990 act was amended in 1996 by the Debt Collection Improvement Act, which added the requirement for agencies to adjust their civil penalties by regulation (P.L. 104-134, Sec. 31001(s)(1), 110 Stat. 1321-373). See 28 U.S.C. §2461 note.

However, a 2003 report by the General Accounting Office (GAO, now the Government Accountability Office) and information developed subsequently indicate that the penalty adjustment process established by the Inflation Adjustment Act in 1996 was not accomplishing the act's stated purpose.<sup>3</sup> This report provides information on the use of civil penalties as an enforcement procedure, the Inflation Adjustment Act's adjustment procedures, GAO's findings and recommendations, and the effects that the act has had on certain civil penalty maximums. The report concludes by discussing legislative options that Congress could consider.

## Civil Penalties as a Form of Regulatory Enforcement

In the enforcement of federal statutes and regulations, agencies can impose various forms of legal sanctions as a cost of non-compliance. Section 551(10) of the Administrative Procedure Act defines "sanctions" as including the "imposition of a penalty or fine."<sup>4</sup> GAO has concluded that civil penalties play a key role in regulatory enforcement "by deterring violators and by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage."<sup>5</sup>

News reports indicate that civil penalties are assessed with some regularity during the regulatory and statutory enforcement process. For example:

- In September 2007, the Department of Justice announced that Hunt Refining Company and Hunt Southland Refining Company had agreed to pay a \$400,000 civil penalty to settle alleged violations of the Clean Air Act.<sup>6</sup>
- In October 2007, the Consumer Product Safety Commission announced that TAP Enterprises Incorporated had agreed to pay a \$100,000 civil penalty for failing to report to the government in a timely manner about defective air compressors it imported and sold.<sup>7</sup>
- In November 2007, the Federal Trade Commission announced that six cases enforcing provisions of the National Do-Not-Call Registry resulted in about \$7.7 million in civil penalties.<sup>8</sup>

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<sup>3</sup> U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, Mar. 14, 2003.

<sup>4</sup> Other forms of "sanctions" listed in the Administrative Procedure Act include withholding of relief; destruction, taking, seizure, or withholding of property; and "prohibition, requirement, limitation, or other condition affecting the freedom of a person."

<sup>5</sup> U.S. General Accounting Office, *Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention*, GAO/RCED-96-23, Mar. 20, 1996, p. 12.

<sup>6</sup> Barney Tumey, "Hunt Refining Agrees to Pay \$49 Million to Settle Alleged Violations of Clean Air Act," *BNA Daily Report for Executives*, Oct. 1, 2007, p. A-7.

<sup>7</sup> "Air Compressor Importer Agrees to Pay \$100,000 Fine for Not Reporting Hazard," *BNA Daily Report for Executives*, Oct. 17, 2007, p. A-9.

<sup>8</sup> "Do-Not-Call Registry Enforcement Suits Net Nearly \$7.7 Million in Civil Penalties," *BNA* (continued...)

- Also in November 2007, Chevron Corporation agreed to pay a total of \$30 million to settle charges by the Departments of Justice and Treasury, the Securities and Exchange Commission, and the Manhattan District Attorney’s Office that it made improper payments to the former Iraqi government to obtain oil under the United Nations’ “Oil for Food” program.<sup>9</sup>
- In December 2007, a San Francisco investment firm agreed to pay a \$1.1 million civil penalty in response to a complaint filed by the Federal Trade Commission for failing to make appropriate and timely premerger notification filings under the Hart-Scott-Rodino Act.<sup>10</sup>
- Also in December 2007, in a settlement reached with EPA, a mining firm agreed to pay a \$177,000 civil penalty for an allegedly unreported hazardous chemical release at a mine in West Virginia.<sup>11</sup>

Agencies investigate possible violations of statutes and associated regulations, and determine the amount of any civil penalty to be sought based on a variety of factors, including the severity of an incident, whether the individual or organization involved has a previous history of violations, and the individual’s or organization’s ability to pay the fine. Civil penalty maximums are generally reserved for the most egregious cases (e.g., those involving willful intent to violate the law, fatalities, or both). GAO has criticized certain regulatory agencies for not using civil penalties more forcefully as part of their enforcement processes.<sup>12</sup>

During the Administration of President William J. Clinton, the National Performance Review (NPR) recommended that civil monetary penalties be adjusted for inflation.<sup>13</sup> Specifically, NPR recommended that a “catch-up” penalty adjustment be made to bring civil penalties up to date, and that the need for additional inflation

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<sup>8</sup> (...continued)

*Daily Report for Executives*,” Nov. 8, 2007, p. A-8.

<sup>9</sup> “Chevron to Pay \$30 Million to Settle Charges Over ‘Oil for Food’ Violations,” *BNA Daily Report for Executives*, Nov. 15, 2007, p. A-1.

<sup>10</sup> “Investment Fund Will Pay \$1.1 Million Civil Penalty for Noncompliance with §7A,” *BNA Daily Report for Executives*, Dec. 20, 2007, p. A-14.

<sup>11</sup> Bebe Raupé, “EPA, West Virginia Mining Firm Settle Over Unreported Anhydrous Ammonia Release,” *BNA Daily Report for Executives*, Dec. 19, 2007, p. A-7

<sup>12</sup> See, for example, U.S. General Accounting Office, *Pension Plans: Stronger Labor ERISA Enforcement Should Better Protect Plan Participants*, GAO/HEHS-94-157, Aug. 8, 1994; U.S. General Accounting Office, *Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards*, GAO/HEHS-99-46, Mar. 18, 1999; and U.S. General Accounting Office, *Pipeline Safety: The Office of Pipeline Safety Is Changing How It Oversees the Pipeline Industry*, GAO/RCED-00-128, May 15, 2000.

<sup>13</sup> National Performance Review, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (Washington: Sept. 7, 1993), recommendations DOJ13 and TREAS14.

adjustments be automatically reassessed every four years. NPR estimated that doing so would increase federal receipts by nearly \$200 million in the FY1994 through FY1999 period.

## **Procedures Established by the Inflation Adjustment Act**

As amended, the Inflation Adjustment Act requires agencies to follow specific procedures when making civil penalty adjustments. For example, Section 5 of the act defines a “cost-of-living adjustment” as the following:

the percentage (if any) for each civil monetary penalty by which (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

Therefore, if an agency made its first round of penalty adjustments in October 1996 and the penalty was last set or adjusted in October 1990, the agency was required to calculate the unrounded cost-of-living adjustment by comparing the June 1995 CPI with the CPI for June 1990. If the agency made its second round of penalty adjustments in October 2000 (four years after the first round), the agency was required to calculate the unrounded cost-of-living adjustment by comparing the June 1996 CPI with the CPI for June 1999.

The Inflation Adjustment Act also provides specific criteria for how agencies should round any penalty increase. Section 5 of the act says the following:

Any increase determined under this subsection shall be rounded to the nearest (1) multiple of \$10 in the case of penalties less than or equal to \$100; (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000; (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000; (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000; (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

For example, if a maximum civil penalty of \$5,000 was last set in 1990, and there had been 17% inflation from June 1990 through June 1995 (the relevant time frame for an adjustment in 1996), the unrounded increase would be \$850 (\$5,000 times 0.17). Because the \$5,000 penalty was greater than \$1,000 but less than \$10,000, the statute indicates that the \$850 increase should be rounded to the nearest multiple of \$1,000, which is \$1,000. Therefore, the adjusted penalty after rounding would be \$6,000.

However, Section 6 of the Inflation Adjustment Act states that the first penalty adjustment under these procedures “may not exceed 10 percent of such penalty.” Therefore, in the above example, the \$1,000 rounded increase would be limited to 10% of the \$5,000 penalty amount, or \$500. As a result, the adjusted penalty after the 10% cap would be \$5,500.

Finally, the Inflation Adjustment Act exempted all penalties under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, and the Social Security Act. The legislative history of the Inflation Adjustment Act does not explain why Congress exempted these penalties, established the 10% cap on initial adjustments, or required the use of the adjustment procedures delineated in the act.

## **GAO Recommends Changes to the Inflation Adjustment Act**

In a 2003 report on the implementation of the Inflation Adjustment Act, GAO said that several elements of the act had prevented federal agencies from fully adjusting their civil penalties for inflation.<sup>14</sup>

- The 10% cap on initial penalty adjustments severely limited agencies' ability to maintain the original deterrent value of certain penalties — particularly if the penalties had not been adjusted for decades and inflation had increased several hundred percent during that period. For example, the above-mentioned \$1,000 penalty for possession of a firearm in a baggage security area that was last set or adjusted in 1958 could only be increased in 1996 by \$100 to \$1,100 — more than \$4,000 less than the amount needed to fully account for inflation. Several agencies with penalties covered by the act told GAO that, because of the 10% cap, their penalties had lost effectiveness and their enforcement options had been limited.
- The act's exemption of all penalties under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, and the Social Security Act prevented the adjustment of a total of 238 civil penalties. GAO said that many of these exempted penalties had not been adjusted for decades, and more than half would have been at least 50% higher if fully adjusted for inflation.
- The act's requirements on how the penalty adjustments should be calculated and rounded prevented agencies from capturing all of the inflation that occurred between adjustments, and prevented agencies from increasing certain penalties until inflation had increased by 45% or more. Specifically, GAO said, the act requires agencies (1) to lose a year of inflation each time penalties are adjusted (because it requires use of the CPI from June of the previous year), and that lost year of inflation can never be recovered; and (2) to round based on the size of the *penalty* rather than the size of the *penalty increase*, thereby sometimes resulting in long periods of time between adjustments. Because of these two factors, at recent rates of inflation, GAO said agencies might not be able to adjust some of their penalties for 15 years or more. GAO reported that elimination

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<sup>14</sup> U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, Mar. 14, 2003.



of the CPI lag and rounding based on the size of the penalty increase would yield results that more closely track inflation. Agency officials frequently told GAO that these provisions in the act were unclear and produced undesirable effects, and each agency said that it supported changes to the act to allow more timely and accurate penalty adjustments.

GAO also reported that several other provisions in the Inflation Adjustment Act were unclear. For example, although the act clearly covers civil penalty maximums that are set in statute, it is not clear whether agencies are required to adjust penalties that are administratively set by the agencies. Also, GAO said it was not clear whether the term “last set or adjusted” refers to the date when an adjustment was last published in the *Federal Register*, or the date when the penalty adjustment took effect. Finally, GAO said it was unclear whether agencies’ second rounds of penalty adjustments were to be made within four years of the initial deadline (i.e., by October 2000) or within four years of the initial adjustments — whenever they occurred. (Some agencies still had not made their first rounds of adjustments when GAO issued its report in March 2003.)

Congress did not give any federal agency the authority or responsibility to monitor agencies’ compliance with the Inflation Adjustment Act or to provide guidance on how the act should be implemented. In contrast, other crosscutting regulatory reform statutes assign these tasks to a particular executive branch agency. For example, the Paperwork Reduction Act gives the Office of Management and Budget the authority and responsibility to approve agencies’ proposed information collections and to provide guidance to the agencies on how the act should be implemented.<sup>15</sup> The Regulatory Flexibility Act requires the Small Business Administration’s Chief Counsel for Advocacy to monitor and report at least annually on agencies’ compliance with the act.<sup>16</sup> GAO said that an oversight agency for the Inflation Adjustment Act could have taken a number of actions that might have improved the act’s implementation (e.g., developing a database that could automatically determine when penalties require adjustment and notify the agencies of their responsibilities under the act).

**GAO Recommendations.** As a result of these findings, GAO made several recommendations that it said could help ensure that agencies will keep their civil penalties in pace with inflation.

- First, GAO said that if Congress wants federal civil penalties to retain their original deterrent values, it should consider amending the Inflation Adjustment Act to require or permit agencies to make catch-up adjustments accounting for all of the inflation that occurred since Congress last set or adjusted those penalties.
- Second, GAO said that if Congress wants agencies to make timely and accurate adjustments of their civil penalties, Congress should

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<sup>15</sup> See 44 U.S.C. §3504.

<sup>16</sup> See 5 U.S.C. §612.

consider amending the calculation and rounding procedures in the act to be more consistent with changes in inflation.

- Third, GAO said that if Congress finds that currently exempted penalties should be adjusted, it could amend the statute to permit or require agencies to make the adjustments.
- Finally, to improve compliance with the statute, GAO said Congress could give one or more entities in the executive branch the authority and responsibility to monitor the act's implementation and provide guidance to agencies. Even if the other recommendations are not enacted, GAO said improving compliance with the existing act could prevent the loss of "millions of dollars in lost penalties from individuals and organizations that are the worst offenders of health, safety, environmental, and other statutes."<sup>17</sup>

As of the date of this report, Congress has not acted on GAO's recommendations.

## Effects of the Inflation Adjustment Act's Provisions

Because of the lack of consistent, governmentwide enforcement data and for other reasons, it is impossible to determine the extent to which the civil penalties that are imposed each year have been affected by the 10% cap on initial adjustments, the adjustment procedures, or the statutory exemptions in the Inflation Adjustment Act. However, the act's provisions appear to have had a clear impact on the penalty maximums that could be levied by certain agencies with regard to certain violations.

**10% Cap on Initial Adjustments.** For example, GAO reported that, because of the Inflation Adjustment Act's 10% cap on initial adjustments:

- an \$800,000 National Highway Traffic Safety Administration (NHTSA) penalty (for violations involving the failure to meet bumper testing criteria) that should have increased in 1996 by 275% to more than \$3 million to fully account for inflation was limited to an increase of \$80,000. Overall, NHTSA had 16 civil penalties whose initial adjustments were capped at 10%.
- a \$25,000 Environmental Protection Agency (EPA) penalty (for violation of the Toxic Substances Control Act) that should have increased in 1996 by nearly 170% to more than \$67,000 if fully adjusted for inflation was limited to an increase of \$2,500. Overall, EPA had 74 civil penalties whose initial adjustments were capped at 10%.
- penalties imposed by the Immigration and Naturalization Service pursuant to the Immigration Reform and Control Act of 1986 for

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<sup>17</sup> U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, Mar. 14, 2003, p. 37.

unlawful acts pertaining to the employment of illegal aliens were adjusted by 10% in 1999; if fully adjusted for inflation, the penalties would have increased by nearly 50%.<sup>18</sup>

The 10% cap is still in effect for newly established civil penalties, and for penalties that were not initially adjusted in 1996 as the Inflation Adjustment Act required. For example, in February 2007, the Minerals Management Service (MMS) within the Department of the Interior published a final rule adjusting a \$25,000 per day per violation civil penalty that had been authorized by the Oil Pollution Act of 1990.<sup>19</sup> However, because it was the first adjustment of the penalty, the amount of the increase was capped at 10%, raising the penalty to \$27,500. If not capped at 10%, the unrounded penalty would have increased to about \$39,000.

As noted previously, the inflation adjustments that are not made because of the 10% cap cannot be corrected through the act's procedures. In fact, the size of any "inflation gap" created by the 10% cap grows with each penalty adjustment. The Inflation Adjustment Act defines the term "cost of living adjustment" as the percentage by which the CPI for the year preceding the adjustment exceeds the CPI for the year in which the penalty was last set or adjusted. Therefore, agencies' adjustments under the statute can take into consideration only the amount of inflation since the previous adjustment. As a result, any inflation gap that is not captured because of the 10% cap becomes permanent, and because the capped penalties are smaller than they would have been without the 10% restriction, the size of subsequent adjustments using that smaller base are also smaller — resulting in a further widening of the inflation gap.

**Rounding Rules.** GAO also pointed out in its report that, under the act's rounding rules, all seven penalties that had been administered by the Pension Welfare Benefits Administration (now the Employee Benefits Security Administration) and that were adjusted for the first time under the act in 1997 could not be adjusted again until the CPI increased by 45.5%. Assuming a 2.5% annual rate of inflation (the average since the Inflation Adjustment Act was passed in 1996), the agency would not be able to increase any of these civil penalties under the act's procedures for 17 years — i.e., until 2014. Other agencies faced similar limitations.

- The Federal Aviation Administration (FAA) increased the \$1,000 penalty for possession of a firearm discovered at a baggage security checkpoint by \$100 in 1996 (which was the maximum allowed under the 10% cap). Under the rounding rules in the Inflation Adjustment Act, FAA would not be able to increase the penalty

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<sup>18</sup> U.S. Department of Justice, Immigration and Naturalization Service, "Civil Monetary Penalties Inflation Adjustment," 64 *Federal Register* 47099, Aug. 30, 1999. GAO noted this 10% adjustment in U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813, Aug. 31, 2005, p. 8.

<sup>19</sup> U.S. Department of the Interior, Minerals Management Service, "Oil and Gas and Sulphur Operations in the Outer Continental Shelf and Oil Spill Financial Responsibility for Offshore Facilities — Civil Penalties," 72 *Federal Register* 8897, Feb. 28, 2007.

again until inflation increased 45.5%, or 17 years (assuming 2.5% inflation per year, compounded annually).<sup>20</sup>

- The U.S. Coast Guard has a total of 27 civil penalties that cannot be increased under the act until inflation increases 45.5% since their last adjustment; for 32 other penalties, inflation must increase 22.8% before an adjustment is possible.
- EPA has two penalties that cannot be adjusted until inflation increases 45.5%, and 11 that cannot be adjusted until inflation goes up 22.8%.

On the other hand, GAO also said that, when the penalty adjustments finally do occur, the act can require agencies to adjust their penalties much more than the amount of inflation that occurred. In the previously mentioned examples, although the CPI must increase 45.5% since they were last set or adjusted before the agencies can make further adjustments, the adjustments that are ultimately provided under the act's rounding rules will be twice that amount — 90.9%.

The inability of agencies to adjust civil penalties for inflation may be having a deleterious effect on public policy in certain areas. For example, in August 2007, GAO reported that penalties for violating the Corporate Average Fuel Economy (CAFE) standards had not increased since 1997, when they were increased pursuant to the Inflation Adjustment Act's procedures by 10%, from \$5 to \$5.50 per vehicle for every 0.1 mile per gallon by which a manufacturer's fleet fell short of the CAFE standard. Since then, because of the rounding rules and other factors, NHTSA has been unable to adjust those penalties for inflation. Several experts told GAO that the penalties are not enough of a monetary incentive for manufacturers to comply with CAFE.<sup>21</sup>

**Exempted Penalties.** GAO also reported that many of the civil penalties in the statutes that had been exempted from coverage by the Inflation Adjustment Act had not been adjusted in years. For example, GAO said that eight penalties under the Internal Revenue Code had not been changed since 1954, and that as of June 2002, inflation had increased by 569%. Six penalties under the Occupational Safety and Health Act had not been adjusted since 1990, and they were 38% less than they would have been had they kept pace with inflation. One penalty under the Tariff Act of 1930 had not been adjusted since 1879, resulting in an inflation gap of more than 1,700%.

In August 2007, GAO reported that some civil tax penalties had been significantly eroded because of inflation. For example, a \$100 minimum penalty for

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<sup>20</sup> As noted later in this report, in November 2002, Congress increased the \$1,000 penalty to \$10,000 as part of the establishment of the Department of Homeland Security (P.L. 107-296, Sec. 1602).

<sup>21</sup> U.S. Government Accountability Office, *Vehicle Fuel Economy: Reforming Fuel Economy Standards Could Help Reduce Oil Consumption by Cars and Light Trucks, and Other Options Could Complement These Standards*, GAO-07-921, Aug. 2, 2007, p. 23.

failing to file a tax return that had not been adjusted since it was created in 1982 would have to be increased to \$214 just to have the same deterrent value. A penalty for failure to file a partnership return that was \$50 per partner per month when last adjusted in 1979 would have to be increased to \$145 per partner per month to maintain its original value. Overall, GAO said that if the fixed dollar amounts of civil tax penalties had been adjusted for inflation, the estimated potential increase in IRS collections would have ranged from \$38 million to \$61 million per year from 2000 to 2005. Therefore, GAO said “Congress should consider requiring IRS to periodically adjust for inflation, and round appropriately, the fixed dollar amounts of civil tax penalties to account for the decrease in real value over time.”<sup>22</sup>

## Recent Agency Efforts to Adjust Civil Penalties

Federal agencies are continuing to examine their civil penalties and, where possible, adjust them pursuant to the provisions of the Inflation Adjustment Act. In some cases, however, the act’s provisions have continued to prohibit penalty adjustments.

- In January 2007, the Farm Credit System Insurance Corporation published a notice regarding its review of its civil penalties under the Farm Credit Act, which were last adjusted in 2001. Although the CPI had increased 14% between June 2001 and June 2006, the agency said that the rounding rules in the Inflation Adjustment Act prevented it from adjusting those penalties for inflation.<sup>23</sup>
- In February 2007, the Department of Housing and Urban Development published a final rule adjusting 15 of its civil penalties for inflation. However, the department said it was unable to adjust several other penalties because of the calculation procedures stipulated in the Inflation Adjustment Act.<sup>24</sup>
- In September 2007, the Department of Transportation’s (DOT) Federal Railroad Administration examined its civil penalties and increased its ordinary maximum penalty under the Rail Safety Improvement Act from \$11,000 to \$16,000. However, because of the rounding rules in the Inflation Adjustment Act, the agency was not able to adjust the minimum penalty or the aggravated maximum penalty.<sup>25</sup>

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<sup>22</sup> U.S. Government Accountability Office, *Tax Compliance: Inflation Has Significantly Decreased the Real Value of Some Penalties*, GAO-07-1062, Aug. 23, 2007.

<sup>23</sup> U.S. Farm Credit System Insurance Corporation, “Adjusting Civil Money Penalties for Inflation,” *72 Federal Register* 1514, Jan. 12, 2007.

<sup>24</sup> U.S. Department of Housing and Urban Development, Office of the Secretary, “Inflation Adjustment of Civil Money Penalty Amounts,” *72 Federal Register* 5586, Feb. 6, 2007.

<sup>25</sup> U.S. Department of Transportation, Federal Railroad Administration, “Inflation Adjustment of Ordinary Maximum Civil Monetary Penalty for a Violation of a Federal (continued...) ”

- Also in September 2007, DOT's Federal Motor Carrier Safety Administration adjusted several of its civil penalties pursuant to the Inflation Adjustment Act's procedures. However, the agency said that "Because of the relatively low rate of inflation and the rounding formulas required by the Act, most penalties remain unchanged from their previous levels."<sup>26</sup>

## Congressional Options

Given the inability of federal agencies to adjust all (or in some cases, any) of their civil penalty maximums for inflation under the Inflation Adjustment Act's procedures, Congress appears to have at least three general types of legislative options: (1) maintaining the status quo, (2) adjusting certain civil penalty maximums through separate legislation, or (3) implementing some or all of the recommendations in GAO's 2003 report.

**Maintain Status Quo.** Congress could elect to take no action in this area for a variety of reasons. For example, Congress might view the statutory maximum civil penalties as having been originally set too high, and by taking no action Congress would allow inflation to erode the penalty amounts to what it then would consider to be more reasonable levels. Congress might also take into account the ability of some agencies to impose substantial penalties under current statutory provisions. For example, officials from some agencies told GAO that certain civil penalties could be compounded monthly, weekly, or daily, resulting in higher penalty maximums if needed. Similarly, officials at another agency said penalties could be assessed on a violation-by-violation basis, allowing the amount of the penalty imposed to rise to or even exceed the statutory maximums. Finally, officials at the Internal Revenue Service said that some of the agency's civil penalties contain formulas that implicitly account for inflation (e.g., by basing the penalty on a percentage of the tax due or the amount invested). For any or all of these reasons, the lack of adjustment of at least some of the agencies' civil penalty maximums might not be seen by Congress as problematic.

**Statute- or Agency-Specific Penalty Adjustment Legislation.** From time to time, Congress enacts legislation that adjusts statutory penalty maximums — which can have the effect of compensating for the effects of inflation on those penalties. For example, the USA PATRIOT Improvement and Reauthorization Act of 2005 (P.L. 109-177) amended the International Emergency Economic Powers Act and required that the penalties for two violations be increased from \$11,000 to \$50,000. The Department of Commerce later published a final rule making those

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<sup>25</sup> (...continued)

Railroad Safety Law or Federal Railroad Safety Regulation," *72 Federal Register* 51194, Sept. 6, 2007.

<sup>26</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration, "Civil Penalties Adjustments," *72 Federal Register* 55100, Sept. 28, 2007.

changes to its regulations.<sup>27</sup> In some cases, these statute- or agency-specific adjustments have been more than the amounts needed to maintain the deterrent power of the original penalties. For example, in November 2002, Congress increased the previously mentioned \$1,000 penalty for possession of a firearm at a baggage security checkpoint to \$10,000 as part of the establishment of the Department of Homeland Security (P.L. 107-296, Sec. 1602). If fully adjusted for inflation between 1958 (the year the penalty was established) and 2002, it would have increased to about \$6,200.

Legislation introduced in the 110<sup>th</sup> Congress would adjust certain civil penalties, or would give agencies more authority to adjust those penalties. For example:

- H.R. 3691, the SAFE Consumer Product Act, was introduced in September 2007, and would, among other things, eliminate the statutory maximum civil penalty of \$1,250,000 for a series of violations and allow the Consumer Product Safety Commission to determine the penalty maximum.
- H.R. 4626, the CFTC Reauthorization Act of 2007, was introduced in December 2007, and would, among other things, increase civil penalties that the Commodity Futures Trading Commission could impose for violations of the Commodity Exchange Act.

Congress has also established other procedures for the adjustment of certain civil penalties. For example, Section 107 of the Consumer Product Safety Improvement Act of 1990 (P.L. 101-608) established a five-year civil penalty inflation adjustment authority and process that, because it is statute-specific, supercedes the Inflation Adjustment Act's requirements.<sup>28</sup> Similarly, Section 8201 of the Oil Pollution Act of 1990 (P.L. 101-380, codified at 43 U.S.C. §1350) requires the Secretary of the Interior to adjust a \$20,000 civil penalty for inflation "at least every three years ... to reflect any increases in the Consumer Price Index." However, a \$25,000 civil penalty established by another section of the same act (Section 4303, codified at 33 U.S.C. §2716a) has no specific adjustment requirement, and therefore is covered by the Inflation Adjustment Act's provisions.<sup>29</sup>

**Amend the Inflation Adjustment Act.** Although Congress could continue to enact legislation adjusting particular civil penalties, or give particular agencies

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<sup>27</sup> U.S. Department of Commerce, Office of the Secretary, "Civil Monetary Penalties; Adjustments," 72 *Federal Register* 900, Jan. 9, 2007. In 2004, the Department of Commerce was unable to adjust the \$11,000 penalties for inflation. See U.S. Department of Commerce, Office of the Secretary, "Civil Monetary Penalties; Adjustment for Inflation," 69 *Federal Register* 74416, Dec. 14, 2004.

<sup>28</sup> Section 107 of the legislation amended Section 20(a) of the Consumer Product Safety Act (15 U.S.C. §2069(a)) and required the Consumer Product Safety Commission to adjust certain penalties for inflation every five years, and to use specific rounding methods.

<sup>29</sup> See U.S. Department of the Interior, Minerals Management Service, "Oil and Gas and Sulphur Operations in the Outer Continental Shelf and Oil Spill Financial Responsibility for Offshore Facilities — Civil Penalties," 72 *Federal Register* 8897, Feb. 28, 2007.

their own inflation adjustment procedures, if Congress's intention is simply to maintain the penalties' original punitive and deterrent power, this statute-by-statute or agency-by-agency approach would appear to be less efficient than just amending the Inflation Adjustment Act consistent with GAO's recommendations. On the other hand, though, if Congress's intention is to reassess its original decisions with regard to those penalties, then amendments to the Inflation Adjustment Act would not accomplish that purpose. Both approaches are also possible; Congress could amend the act to better enable agencies to keep pace with inflation while examining individual statutes for possible changes in the base penalties.

Amendments to the Inflation Adjustment Act could address all or only some of GAO's recommendations (e.g., requiring catch-up adjustments for penalties affected by the 10% cap and changing the rounding rules, but continuing to exempt certain penalties from the act's requirements). Congress could also continue to allow agency- or statute-specific procedures to take precedence over the procedures stipulated in the Inflation Adjustment Act, or Congress could amend the act in such a way that it would supersede the particularized adjustment procedures and schedules and put all civil penalties under the same adjustment process.