

CLIENT ALERT

EPA Fines Increase. Again.

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On January 15, 2018, EPA increased the civil monetary penalty amounts for all of the statutes within the Agency's purview. The [2018 Civil Monetary Penalty Inflation Adjustment Rule \(the 2018 Rule\)](#) implemented the new statutory minimum and maximum penalties. Persons found liable for violations of EPA-administered statutes may now face increased civil monetary penalties. However, the statutory maximum penalties listed in the 2018 Rule do not necessarily reflect the actual penalties that violators will see in individual enforcement cases.

Background

On November 2, 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The 2015 Act required all federal agencies to adjust their statutory minimum and maximum civil monetary penalties for inflation once in 2016 and then annually thereafter.

Under the 2015 Act, EPA implemented new statutory minimum and maximum civil monetary penalties on [August 1, 2016](#) and [January 15, 2017](#). Additionally, EPA issued implementing guidance in [2016](#) (the 2016 Guidance) and again in [2017](#) (the 2017 Guidance). The 2016 and 2017 Guidance documents describe how to calculate civil monetary penalties under EPA's different statute-specific enforcement response policies (ERPs) in light of the increased statutory maximum penalties.

Generally, under the 2016 and 2017 Guidance documents, you determine civil monetary penalties by applying the ERP identified by EPA and multiplying the resulting penalty by an inflation adjustment factor (multiplier) listed in the 2016 Guidance. Prior to the 2015 Act, EPA last [adjusted its penalties in 2013](#) and, before that, [in 2008](#). On those earlier occasions, however, EPA adopted complicated inflation-adjustment multipliers that varied according to when a given ERP was either issued or amended and when the violation in question occurred.

The Second Annual Rule and Implementing Guidance Document

The 2018 Rule is EPA's second annual inflation rule under the 2015 Act. Like its 2016 and 2017 predecessors, the 2018 Rule adjusts the statutory minimum and maximum civil monetary penalties for all statutes administered by EPA. Although there are cases in which the statutory maximum penalty is relevant, violators typically pay less than the maximum penalty under the statute-specific ERPs that apply in individual enforcement cases.

On January 11, 2018, as in 2016 and 2017, EPA issued guidance on the Agency's implementation of the new statutory maximum penalties (the 2018 Guidance). The 2018 Guidance explains how to calculate civil monetary penalties under the different statute-specific ERPs. Specifically, the 2018 Guidance amends all current ERPs to account for inflation by providing ERP-specific multipliers.

EPA's 2018 Guidance helpfully identifies the currently applicable ERPs and amendments in an attached table of multipliers. The Agency thereby eliminates the laborious task of consulting the various amendments to different ERPs, except when a violation occurred before November 3, 2015.

EPA's 2017 Guidance adopted the inflation adjustment factors (multipliers) from the 2016 Guidance due to low inflation following issuance of the 2016 Guidance. Similarly, EPA expects low inflation during 2018. For this reason, the 2018 Guidance says that EPA does not foresee adjusting the ERPs for inflation again until 2020.

Calculating Penalties

To calculate the gravity-based civil monetary penalty for violations of any EPA statute, you start by determining when the violations occurred: before December 6, 2013, from December 6, 2013 to November 2, 2015, or after November 2, 2015. The base penalty for a violation is subject to a different inflation adjustment factor (multiplier) depending on when the violation occurred. Therefore, you should separately calculate the penalty for violations occurring during each date range.

Next, you consult the ERP listed in the table attached to the 2018 Guidance¹ for the applicable EPA statute and the relevant type of violation, and you determine the gravity-based penalty in accordance with the ERP. Keep together the penalties for violations that occurred during the same period of time and keep separate the penalties for violations that took place during different time periods.

Then, you multiply the gravity-based penalty dictated by the ERP by the inflation-adjustment factor (multiple) listed in the table in the 2018, 2013, or 2008 Guidance, as appropriate. Lastly, you add up the inflation-adjusted penalties calculated under the applicable EPA guidance documents to determine the total gravity-based civil monetary penalty. Only then are other penalty adjustments considered, for example, any economic benefit of noncompliance or the inability to pay.

After performing the calculations above, violators are rarely affected by statutory maximum penalties, demonstrating the importance of the Guidance documents.

¹ EPA has amended several ERPs within the past five years. Prior versions of amended ERPs may still be relevant for older violations. For violations occurring before November 3, 2015, alternative ERPs may be used, because the 2008 and 2013 Guidance documents do not require the use of specific ERPs and allow for different versions.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Michael Boucher

Partner – Washington, D.C.

Phone: +1 202.624.2787

Email: mboucher@crowell.com

Amy Symonds

Counsel – Washington, D.C.

Phone: +1 202.624.2536

Email: asymonds@crowell.com