

DOJ to Double FCA Civil Penalties

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On June 30, 2016, the Department of Justice released its interim final rule, which makes inflationary adjustments to civil monetary penalties under its jurisdiction, including those authorized by the federal False Claims Act, 31 U.S.C. § 3729(a), as mandated by last November's [Bipartisan Budget Act of 2015](#).

Key Takeaways

- The minimum penalty amount will now be \$10,781 per claim; the maximum penalty \$21,563 per claim
- These amounts will become effective August 1, 2016, but will apply only to violations occurring after November 2, 2015

[As we predicted in May](#), DOJ's proposed rule, which is based on the Bureau of Labor Statistics' Consumer Price Index for October 2015, increases the minimum and maximum per claim penalties for false claims under § 3729 to a staggering \$10,781.40 and \$21,562.80, respectively.

The DOJ's adjusted penalty amounts, which become effective August 1, 2016, apply only to civil penalties that are assessed after August 1 and whose associated violations occurred after November 2, 2015, when the 2015 Amendments were enacted. Violations occurring on or before November 2, 2015, and assessments made prior to August 1, 2016, whose associated violations occurred after November 2, 2015, are still subject to the current penalty amounts set forth in DOJ's existing regulations. Importantly, DOJ and other federal agencies may, after the initial "catch-up" adjustment, make automatic annual adjustments without any formal rulemaking process evaluating the need for additional increases, opening up the possibility of challenges under the Administrative Procedures Act ("APA").

The potential impact on civil fraud defendants of DOJ's doubled penalty amounts is difficult to overstate. In health care cases, which frequently involve the submission of thousands and thousands of claims for payment, the effects could be immense. Even if the individual claims for payment are relatively small, FCA penalties, which are assessed on a per-claim basis, can add up, and add up quickly. The result is often a penalty amount that is grossly disproportionate to the amount of actual, proven damages to the government. Consequently, these changes to the per-claim penalty ranges

should amplify efforts by defense counsel to mount Eighth Amendment challenges to the constitutionality of False Claims Act penalties, particularly where the penalty amounts far surpass actual economic harm and bear little or no relation to the degree of the defendant's culpability or wrongdoing.

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