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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Fifty-seventh Plenary Session. The appended recommendations address reforms to 28 U.S.C. 1500, third-party programs to assess regulatory compliance, and inflation adjustment for civil penalties.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2012–6, Emily Bremer; for Recommendation 2012–7, David Pritzker; for Recommendation 2012–8, Stephanie J. Tatham. For all three recommendations the address and phone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *http://www.acus.gov.*

At its Fifty-seventh Plenary Session, held December 6–7, 2012, the Assembly of the Conference adopted three recommendations. Recommendation 2012–6, ''Reform of 28 U.S.C. Section 1500,'' urges Congress to repeal Section 1500, which divests the U.S. Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances, later-filed actions would be stayed. The Administrative Conference Member from the Department of Justice filed a separate statement noting the Department's disagreement with the recommendation, which is printed following the recommendation.

Recommendation 2012–7 addresses issues that arise when agencies develop programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements. In some areas of regulation, Congress has directed agencies to develop a third-party program; in others, regulatory agencies have developed programs under existing statutory authority. The recommendation sets forth guidance for federal agencies that are establishing, or considering establishing, such programs.

Recommendation 2012–8, ''Inflation Adjustment Act,'' addresses agency adjustments to civil monetary penalties under the Federal Civil Penalties Inflation Adjustment Act, codified as amended at 28 U.S.C. 2461 note. The recommendation urges Congress to change the current statutory framework by which agencies periodically adjust their penalties to address three provisions that result in penalty adjustments that may not track the actual rate of inflation. It also advises agencies to adjust their penalties for inflation as required by the law.

The Appendix (below) sets forth the full texts of these three recommendations. The Conference will transmit them to affected agencies and to appropriate committees of the United States Congress. The recommendations are not binding, so the relevant agencies, the Congress, and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: *http://www.acus.gov/events/57th-plenary-session/.* A video of the Plenary Session is available at the same web address, and a transcript of the Plenary Session will be posted once it is available.

Dated: January 10, 2013.

Paul R. Verkuil,

Chairman.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2012–6

Reform of 28 U.S.C. 1500

Adopted December 6, 2012

The Administrative Conference of the United States has long had an interest in ensuring appropriate judicial review of Government actions and in considering related questions regarding jurisdiction and forum. For example, the Conference's seminal Recommendation 69–1 recommended amendment of the Administrative Procedure Act—subsequently enacted by Congress—to waive sovereign immunity and thereby permit citizens ''to challenge in courts the legality of acts of governmental administrators.'' [1] Recommendation 68–7 encouraged Congress to revise the general ''federal question'' provision in Title 28 of the U.S. Code in order to eliminate the jurisdictional-amount requirement for district court actions seeking review of federal administrative actions.[2] The Conference has also recommended ways to improve procedures in suits involving the federal government.[3]

Building upon the principles underlying such Recommendations, the Conference addresses another bar to judicial review which deprives some litigants of their rights—28 U.S.C. 1500 (Section 1500). Section 1500 prohibits consideration by the United States Court of Federal Claims of otherwise cognizable claims while the plaintiff has litigation against the United States or an officer thereof ''pending in any other court'' and arising from substantially the same operative facts.[4]

[1] Administrative Conference of the United States, Recommendation 69–1, ''Statutory Reform of the Sovereign Immunity Doctrine,'' 1 ACUS 23 (1969).

[2] Administrative Conference of the United States, Recommendation 68–7, ''Elimination of Jurisdictional Amount Requirement in Judicial Review,'' 1 ACUS 22 (1968).

[3] *E.g.,* Administrative Conference of the United States, Recommendation 80–5, *Eliminating or Simplifying the ''Race to the Courthouse'' in Appeals From Agency Action,* 45 FR 84954 (Dec. 24, 1980); Administrative Conference of the United States, Recommendation 82–3, *Federal Venue Provisions Applicable to Suits Against the United States,* 47 FR 30706 (June 18, 1982).

[4] Section 1500 of Title 28 of the United States Code reads in full:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when

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With its origins in the Reconstruction era, the statutory predecessor to Section 1500 arose against the backdrop of a proliferating number of suits, in multiple fora, by residents of the Confederacy who sought compensation from the United States for property (typically, cotton) seized during the Civil War.[5] To curb this duplicative litigation, Congress enacted legislation divesting the Court of Claims (the trial court predecessor to the Court of Federal Claims) of jurisdiction when a plaintiff had a related action against the United States or an officer thereof pending in another court. This legislation was reenacted several times, most recently in 1948 as Section 1500 of the Judicial Code, and the provision's jurisdictional limitation has remained essentially unchanged.[6] Though the ''cotton claimants'' are long gone, Section 1500's restrictions on the jurisdiction of the Court of Federal Claims remain.

Application of Section 1500 in the context of modern-day federal court jurisdiction and complex litigation, however, causes serious problems for courts and litigants alike. Plaintiffs confront difficult questions of forum selection and timing when the same set of operative facts arguably gives rise to two or more claims against the United States—for which Congress has otherwise waived sovereign immunity—but the Court of Federal Claims has exclusive jurisdiction over one or more claims, and another federal court has exclusive jurisdiction over the other claims. Does a claim sound properly in contract (within the exclusive jurisdiction of the Court of Federal Claims) or in tort (within the exclusive jurisdiction of district courts)? Where the answer is not clear or could be both, the choice of any other court for an initial filing could result in dismissal of a claimant's subsequent suit in the Court of Federal Claims under Section 1500. When a plaintiff prosecutes a challenge to agency action in district court based on the Administrative Procedure Act (which may necessarily precede pursuit of any monetary relief for the same claim in the Court of Federal Claims) appellate proceedings on his or her Administrative Procedure Act litigation could well carry past the Court of Federal Claims' six-year statute of limitations. Thus, in conjunction with the statute of limitations, Section 1500 may foreclose full recovery for plaintiffs prosecuting meritorious claims in good faith.

Section 1500 affects a wide variety of plaintiffs with many different kinds of claims. Federal employees, property owners, businesses, local governments, and Indian tribes may be affected. The statute may present intractable jurisdictional conundrums for sophisticated litigants and *pro se* plaintiffs alike. Examples of the diverse parties and claims affected include:

- A federal employee's claims under the Equal Pay Act were transferred to and dismissed by the Court of Federal Claims for lack of jurisdiction because the Title VII claims with which the action was filed in district court were considered ''pending'' under Section 1500, even though the district court already had entered summary judgment on all non-transferred claims.[7]
- Characterizing the result as ''neither fair nor rational,'' the Court of Federal Claims dismissed a Fifth Amendment-based takings claim filed *pro se* by property owners and that had been transferred from a district court tort action, despite finding that the uncertain legal distinction between tort and takings actions made plaintiffs' confusion about the appropriate forum ''understandable.''[8]
- A government contractor's bid protest action was rejected by the Court of Federal Claims as jurisdictionally lacking because the plaintiff had previously sued in district court under the Administrative Procedure Act—even though the district court had already dismissed on the ground that the plaintiff's exclusive remedy was in the Court of Federal Claims.[9]
- A local government sued by the United States over taxation of certain federal office buildings counterclaimed for the taxes it believed it was owed. The counterclaims were transferred to the Court of Federal Claims—and dismissed under Section 1500.[10]
- An Indian tribe suing in the Court of Federal Claims for breach of trust had its claims dismissed under Section 1500 because it had filed a related action in the district court on the same day.[11]

Because of the barrier it imposes on some plaintiffs pursuing cognizable claims against the United States, Section 1500 has been strongly criticized by litigants, courts, and legal scholars as overly harsh, anachronistic, unfair, and in need of reform.[12]

On the other hand, some of the aims attributed to Section 1500 have modern relevance. In *United States* v. *Tohono O'odham Nation,* the Supreme Court held that Section 1500 applies to any claim filed in the Court of Federal Claims that shares substantially the same operative facts as a claim pending in another court.[13] The decision thus reversed Federal Circuit precedent that allowed the Court of Federal Claims to retain jurisdiction over a claim under Section 1500 if a plaintiff sought different relief in the Court of Federal Claims than it sought in another forum. This had the effect of expanding the range of cases to which Section 1500 could be found to apply. The Supreme Court faulted the Federal Circuit for saying that it ''could not identify 'any purpose that § 1500 serves today.' ''[14] The Court remarked that ''the statute's purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today.''[15]

In *Tohono,* the Supreme Court also observed that ''[i]f indeed the statute leads to incomplete relief'' or causes undue hardship for plaintiffs, citizens are ''free to direct their complaints to Congress.''[16] After careful consideration and consultation with affected parties over eighteen months, including the Department of Justice, the Conference accepts the Court's invitation to approach Congress. While Section 1500's purpose as articulated in *Tohono* has legitimate aspects, the Conference's research reveals that the statute is an undesirably blunt tool for reducing the duplicative burdens that may arise from simultaneous litigation. Federal courts have both the authority and the competence to use measures such as stays, transfers, and the doctrine of preclusion to prevent double recoveries and ease the burdens of simultaneous litigation on the Government without unfairly depriving plaintiffs of the opportunity to pursue all potentially meritorious claims against the United States.[17] Replacing Section 1500 with a context-specific judicial management tool for simultaneous litigation in different fora would also better serve Congress's various waivers of sovereign immunity.

Accordingly, the Administrative Conference recommends that Congress repeal Section 1500. The Conference further recommends that Congress replace Section 1500 with a provision that permits plaintiffs to bring congressionally authorized suits arising from the same set of operative facts in the Court of Federal Claims and other federal courts at the same time, but also contains a presumptive stay mechanism to mitigate any burden on the courts or parties from simultaneous litigation.[18] As a general

the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. 1500 (2012). *See also United States* v. *Tohono O'odham Nation,* 131 S. Ct. 1723, 1731 (2011) (''Two suits are for or in respect to the same claim, precluding jurisdiction in the [Court of Federal Claims], if they are based on substantially the same operative facts, regardless of the relief sought in each suit.'').

[5] *See, e.g., Keene Corp.* v. *United States,* 508 U.S. 200, 206 (1993).

[6] *Id.*

[7] *Griffin* v. *United States,* 590 F.3d 1291 (Fed. Cir. 2009).

[8] *Vaizburd* v. *United States,* 46 Fed. Cl. 309, 311–12 (Fed. Cl. 2000).

[9] *Vero Technical Support* v. *United States,* 94 Fed. Cl. 784 (Fed. Cl. 2010).

[10] *United States* v. *County of Cook,* 170 F.3d 1084, 1091–92 (Fed. Cir. 1994).

[11] *Passamaquoddy Tribe* v. *United States,* 82 Fed. Cl. 256 (Fed. Cl. 2008). Notably, if the plaintiff tribe had filed its district court action one day later, it would have been permitted to proceed simultaneously in both the Court of Federal Claims and district court under Federal Circuit precedent. *See Tecon Engineers, Inc.* v. *United States,* 170 Ct. Cl. 389 (Ct. Cl. 1965).

[12] Emily S. Bremer & Jonathan R. Siegel, *The Need to Reform 28 U.S.C. § 1500* (2012) (report to the Administrative Conference of the U.S.) (collecting criticism of Section 1500), *available at www.acus.gov.*

[13] *Tohono,* 131 S. Ct. at 1731.

[14] *Id.* at 1729.

[15] *Id.* at 1730.

[16] *Id.* at 1731.

[17] *E.g.,* 28 U.S.C. 1631; *see also Court of Federal Claims Technical and Procedural Improvements Act, Hearing on S. 2521 Before the S. Comm. on the Judiciary,* 102nd Cong. 59 (Apr. 29, 1992) (statement of Hon. Loren Smith, Chief Judge, U.S. Claims Court) (observing that repeal of Section 1500 would save ''wasteful litigation over non-merits issues'' and that the ''Court can stay duplicative litigation, if the matter is being addressed in another forum, or proceed with the case, if the matter appears to be stalled in the other forum'').

[18] This position comports with that of the Judicial Conference of the United States in 1995, which dropped its historical opposition to the repeal of

rule, the later-filed action should be the subject of the presumptive stay. Nonetheless, the Administrative Conference recognizes that a stay presumption may not be appropriate in all situations. In the absence of other compelling considerations, the presumption of a stay should not apply where the parties agree that the later-filed action should proceed.

In various situations, the interests of justice may override the presumption favoring a stay in the later-filed action. Such a situation might exist, for example, where a decision in the first-filed action is dependent on the outcome of a later-filed action, or where the later-filed action requires factual discovery from witnesses who might not be available in the future. Alternatively, a plaintiff might have a strong interest in obtaining prompt resolution in the Court of Federal Claims of a claim for just compensation stemming from an agency decision, even though the ultimate validity of the decision remains at issue in an earlier-filed district court action. These examples are not intended to be exhaustive.

The Administrative Conference also recommends that repeal of the current Section 1500 apply to claims pending at the time the Recommendation is enacted.[19] Elimination of Section 1500's jurisdictional bar for current litigants would directly serve their fairness interests, without substantially impairing the Government's reliance interests or disrupting the orderly progress of any pending litigation. A specific pronouncement by Congress on this important issue would also avoid unnecessary litigation over the application of the repeal legislation.

Recommendation

1. Congress should repeal 28 U.S.C. 1500 (2012).

2. Congress should enact a new statute as follows:

28 U.S.C. Section 1500.

Presumption of Stay. Whenever a civil action is pending in the United States Court of Federal Claims, or on appeal from the Court of Federal Claims, and the plaintiff or his assignee also has pending in any other court (as defined in section 610 of this title) any claim against the United States or an agency or officer thereof involving substantially the same operative facts, the court presiding over the later-filed action shall stay the action, in whole or in part, until the first action is no longer pending. If such actions or appeals were filed on the same day, regardless of the time of day, the United States Court of Federal Claims action shall be treated as having been filed first. This provision shall not apply if the parties otherwise agree or if the stay is not or ceases to be in the interest of justice.

3. The public law that enacts the provision in paragraph two should contain the following additional provision:

EFFECTIVE DATE—[The presumptive stay provision] shall apply to all claims pending on or after the date of its enactment, unless the later-filed action is pending in a court of appeals or the Supreme Court. No claim in a case pending on or after the date of enactment of this Act shall be subject to the jurisdictional bar previously imposed by former Section 1500 of Title 28, United States Code prior to the enactment of this Act.

Separate Statement of Government Member Elana Tyrangiel, Acting Assistant Attorney General, U.S. Department of Justice

The preamble to the Administrative Conference of the United States (ACUS) Recommendation entitled ''Reform of 28 U.S.C. Section 1500'' states: ''After careful consideration and consultation with affected parties over eighteen months, including the Department of Justice, the Conference accepts the Court's invitation to approach Congress [to recommend replacing the existing Section 1500 with a substitute provision formulated by ACUS].'' The Department of Justice writes separately to make clear that it did not support adoption of the recommendation, and that the Department believes ACUS's proposed statutory substitute has serious flaws.

Administrative Conference Recommendation 2012–7

Agency Use of Third-Party Programs To Assess Regulatory Compliance

Adopted December 6, 2012

Federal agencies in diverse areas have developed third-party programs to assess whether regulated entities are in compliance with regulatory standards and other requirements. Through these programs, third parties assess the safety of imported food, children's products, medical devices, cell phones and other telecommunications equipment, and electrical equipment used in workplaces. Third parties also ensure that products labeled as organic, energy-efficient, and water-efficient meet applicable federal standards. In these regulatory third-party programs, regulated entities generally contract with and pay third parties to carry out product testing, facility inspections, and other regulatory compliance assessment activities in the place of regulatory agencies. Regulatory agencies then adopt new roles in coordinating and overseeing these third-parties.[1]

In some areas of regulation, Congress has directed federal agencies to develop a third-party program; in others, regulatory agencies have developed programs under existing statutory authority. A third-party program is just one of many regulatory approaches that Congress and agencies may adopt.[2] Regulatory objectives may, for example, be adequately met by requiring regulated entities to self-assess and report their compliance (sometimes referred to as ''first-party certification''). Also, statutory restrictions on information disclosure or other legal restrictions may preclude an agency from using third parties to conduct inspections and other compliance assessment activities. Some compliance assessment activities may be inherently governmental, and thus require performance by government personnel.[3]

Several broad reasons support the growing use of third-party programs in federal regulation. In many areas, federal regulatory agencies are faced with assuring the compliance of an increasing number of entities and products without a corresponding growth in agency resources. Third-party programs may leverage private resources and expertise in ways that make regulation more effective and less costly. In comparison with other regulatory approaches, third-party programs may also enable more frequent compliance assessment and more complete and reliable compliance data. Because agencies can authorize third parties located in other countries to undertake assessment activities, third-party programs may be particularly effective when regulated products or processes are international in scope.

Regulatory third-party programs raise a host of important questions. Because third-party programs represent a partial privatization of the public function of implementing and enforcing regulatory law, they are a form of ''public-private governance,'' in which private actors play roles that are traditionally viewed as governmental in nature.[4] While third-party programs may increase regulatory compliance or otherwise improve the performance of regulated entities and products, these programs also pose risks.[5] If they are not well-conceived and well-operated, they may both undermine the achievement of regulatory goals and impose unnecessary costs on agencies and regulated entities.

Frequently, regulatory third-party programs use the practices and terminology

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Section 1500 so long as such repeal was ''accompanied by a provision for stay or transfer of duplicative claims.'' Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States 83 (Sept. 19, 1995).

[19] Application of new procedural legislation to pending cases is not uncommon in the law. *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 274 (1994) (noting that the Court has ''regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.'')

[1] Agencies may use third parties in connection with regulatory, procurement, and federal assistance programs. This recommendation addresses use of third parties in regulatory programs.

[2] The Administrative Conference has addressed various approaches in prior recommendations. *See, e.g.,* Recommendation 94–1, The Use of Audited Self-Regulation as a Regulatory Technique, 59 FR 44,701 (Aug. 30, 1994); Recommendation 89–1, Peer Review and Sanctions in the Medicare Program, 54 FR 28,965 (Jul. 10, 1989); Recommendation 78–4, Federal Agency Interaction with Private Standard-Setting Organizations, 44 FR 1357 (Jan. 5, 1979).

[3] Office of Mgmt. & Budget, OMB Circular No. A–76 (Revised May 29, 2003).

[4] *See* William J. Novak, *Public-Private Governance: A Historical Introduction,* in Government by Contract: Outsourcing and American Democracy (Freeman and Minow, eds., Harvard University Press, 2009); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion,* 116 Harv. L. Rev. 1229, 1230 (2002–2003); Jody Freeman, *Extending Public Law Norms through Privatization,* 116 Harv. L. Rev. 1285, 1286–87 (2002–2003); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law, in Recrafting the Rule of Law: The Limits of Legal Order* 331 (David Dyzenhaus ed., Hart, 1999).

[5] *See* Lesley K. McAllister, *Regulation by Third-Party Verification,* 53 B.C. L. Rev. 1 (2012).

of a conformity assessment framework that has been developed by international private-sector standards organizations. ''Conformity assessment'' is defined in international standards as the ''demonstration that specified requirements relating to a product, process, system, person, or body are fulfilled.''[6] International standards also set forth how the organizations that conduct conformity assessment—''conformity assessment bodies,'' which are usually private organizations—should operate. International standards have been developed for various types of conformity assessment bodies, including testing bodies, certification bodies, and inspection bodies.

Recognizing the assessment of regulatory compliance as a form of conformity assessment, many federal agencies that have established third-party programs have relied on conformity assessment standards and bodies. Agencies may require, for example, that third parties that certify conformity with regulatory requirements operate in accordance with the international standards for certification bodies. Federal agencies may also require that the third parties be accredited by accreditation bodies that operate in accordance with international accreditation standards. Accreditation bodies are established in many countries, and they may be either private or governmental.

Agencies that establish third-party programs generally cannot or do not delegate their regulatory authority to conformity assessment bodies. Rather, agencies authorize conformity assessment bodies to perform certain technical tasks to assess conformity, and regulatory agencies rely on these assessments in their own enforcement of regulatory requirements. The goal is to leverage private expertise and resources to serve regulatory objectives. Because the regulatory agency must remain ultimately responsible for achieving regulatory objectives, it is vital to provide public oversight of third-party assessment activities.

A key resource for agencies considering a regulatory third-party program is the National Institute of Standards and Technology (NIST), which has the responsibility under the National Technology Transfer and Advancement Act of 1995 to coordinate government conformity assessment activities with similar activities of private-sector entities, with the goal of avoiding unnecessary duplication and complexity. Following Office of Management and Budget (OMB) Circular A–119, NIST published guidance in 2000 for federal agencies on conformity assessment activities.[7] NIST: (1) provides advice, solutions, and program support for development of technical standards and conformity assessment programs to support agency missions; and (2) develops and conducts customized standards-related workshops and educational events for government.

Recognizing the growing use of third parties and the issues it raises, the Administrative Conference makes this recommendation to assist federal agencies in determining whether and how to establish third-party programs to assess regulatory compliance. The recommendation first suggests that, when considering a third-party program, agencies should consult relevant governmental and nongovernmental resources. Next, agencies should compare the advantages and disadvantages of a third-party approach to a more traditional approach of direct governmental compliance assessment. Also, if an agency is considering a program in which regulated entities could choose whether to contract with a third party for regulatory compliance assessment, it should first determine that regulated entities will have sufficient incentives to choose to contract with a third party.

The recommendation then sets forth considerations for agencies after they have decided to establish a third-party program. An agency should design conformity assessment programs to be proportional to the risks associated with regulatory noncompliance. When regulatory noncompliance implies serious risk to public health, safety, or other important values, third-party program rules should guarantee a high degree of rigor and independence. When possible, the agency should incorporate existing conformity assessment standards, which may avoid unnecessary duplication and create efficiencies for both agencies and regulated entities. The agency should also ensure appropriate government and public access to information about program operation. Finally, the agency should undertake appropriate oversight activities to ensure that the third-party program fulfills its regulatory purpose.

Recommendation

A. Considerations for a Federal Agency When Deciding Whether To Develop a Third-Party Program To Assess Regulatory Compliance

1. *Resources.* When considering whether to develop a third-party program to assess regulatory compliance, the agency should consult governmental and non-governmental resources relating to third-party conformity assessment, as appropriate. These include, but are not limited to, the National Institute of Standards and Technology (NIST); private conformity assessment standards, particularly the standards of the International Organization for Standardization (ISO); and conformity assessment bodies, for practical input on feasibility and the impacts on the regulated entities.

2. *Compare Regulatory Approaches.* The agency should compare a third-party approach with direct governmental assessment of compliance. In choosing between them, the agency should evaluate the advantages and disadvantages of these approaches, with consideration of:

(a) whether third-party conformity assessment is likely to be effective in practice and as a technical matter for the applicable regulatory standards and context;

(b) the costs and potential delay that may result from developing and establishing a third-party program;

(c) the capacity of the agency to perform effective oversight and its related costs;

(d) the potential for the agency to achieve efficiencies through reducing its direct compliance assessment costs and resource needs;

(e) the costs to regulated entities of paying third parties to perform conformity assessment activities, which are likely to be of particular concern to small businesses;

(f) the potential for development of a well-functioning market in third-party conformity assessment services; and

(g) the benefits that may accrue to regulated entities by, for example, receiving regulatory approval to market their products more quickly or simultaneously satisfying the regulatory requirements of other agencies to which they are subject, including state agencies or agencies in other countries. (*See* Administrative Conference of the United States, Recommendation 2011–6, International Regulatory Cooperation, 77 FR 2257, 2259 (Jan. 17, 2012); Exec. Order 13,609 (May 1, 2012); Exec. Order 13,563 (Jan. 18, 2011)).

3. *Evaluate Incentives.* If an agency is contemplating a third-party program in which regulated entities would have the choice of either contracting with third parties or being assessed directly by the agency, the agency should evaluate whether sufficient incentives exist or can be created to attract the participation of regulated entities in the third-party program. Incentives for regulated entities to utilize third parties may include:

(a) exemption from a governmental fee that would otherwise be applicable; or

(b) the ability to satisfy the regulatory requirements of multiple jurisdictions through a single third-party conformity assessment engagement.

B. Considerations for a Federal Agency When Establishing a Third-Party Program to Assess Regulatory Compliance

4. *Proportionality to the Risk.* An agency that has decided to establish a third-party program to assess regulatory compliance, or is directed by statute or other provision of law to do so, should design its conformity assessment program to be proportional to the risks associated with regulatory noncompliance. When the risks are high, a conformity assessment program should be characterized by high degrees of rigor and independence. When the risks associated with noncompliance are lower, the regulatory objective may be achievable with less rigor and independence. Types of rules that may be established by the agency to help ensure rigor and independence include:

(a) accreditation rules that set high standards of competence for the accreditation of third parties;

(b) selection rules that pertain to how regulated entities select third parties, requiring, for example, that third parties disclose conflicts of interests or that regulated entities contract with a different third party after a specified number of assessments;

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[6] American National Standards Institute (ANSI), National Conformity Assessment Principles for the United States, 3, *available at http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Brochures/NCAP%20second%20edition.pdf.*

[7] OMB Circular A–119 Revised §§ 8, 13(e) (Feb. 10, 1998); NIST, Guidance on Federal Conformity Assessment Activities, 65 FR 48,894 (Aug. 10, 2000).

(c) performance rules that require third parties to perform a rigorous set of assessment activities; and

(d) reporting rules that require third parties to provide sufficient information to the agency and the public about the process and outcomes of assessment activities.

5. *Use of Existing Conformity Assessment Standards.* The agency should consider relying on existing conformity assessment standards, particularly international standards that set forth requirements for conformity assessment and accreditation bodies. Incorporating existing standards may reduce costs for the agency and for the regulated entities. To evaluate the suitability of using existing standards, the agency should take into account the following considerations:

(a) When an agency incorporates existing conformity assessment standards into its program requirements, important concerns may arise about the public availability of those standards due to the costs of obtaining copyrighted materials. When an agency considers incorporating copyrighted material by reference, the agency should be cognizant of issues relating to incorporation by reference. (*See* Administrative Conference of the United States, Recommendation 2011–5, Incorporation by Reference, 77 FR 2257 (Jan. 17, 2012));

(b) An agency that anticipates the use of conformity assessment bodies in other countries may particularly benefit by recognizing accreditation bodies that operate in accordance with international standards rather than the agency itself accrediting conformity assessment bodies;

(c) When an agency incorporates existing standards into its requirements for third parties, it can supplement those standards with program-specific rules. An agency may require, for example, that in addition to being accredited to an international standard, a conformity assessment body must satisfy accreditation rules specific to the third-party program; and

(d) Agencies should also be aware that existing conformity assessment standards may include confidentiality provisions that apply to information collected during the assessment. Agencies should consider when disclosure to agencies and/or the public is necessary and when confidentiality may be justified. Program-specific reporting rules, as discussed in section 6 below, may be necessary to enable appropriate governmental or public access to such information.

6. *Access to Information.* The agency should ensure that both the government and the public will have appropriate access to information about program operations. An agency's development of third-party program rules and guidance should include notice and an opportunity for public participation. Also, the agency should provide information to the public about the roles and identities of the third parties associated with a regulatory program. Finally, the agency should establish reporting rules that require third parties to provide information to the agency based on the following considerations:

(a) The reporting rules should facilitate transparency. Information about the compliance of regulated entities should be available from the agency to the public, comparable to what would be available in the absence of a third-party program. Agencies may also be able to provide additional compliance information to the public that was not available before the third-party program;

(b) The reporting rules should facilitate appropriate agency oversight. For example, conformity assessment bodies can be required to report to the agency potential conflicts of interest before performing a conformity assessment, or provide the dates of their assessment activities so that the agency can conduct site visits;

(c) In certain circumstances, the agency might have reporting rules that require conformity assessment bodies to send assessment results directly to the agency; and

(d) The agency might require conformity assessment bodies and/or regulated entities to report electronically, which may facilitate the provision of information to the public.

7. *Agency Oversight.* The agency has a duty to exercise oversight to ensure that the third-party program is fulfilling its regulatory purpose. An agency should generally set forth how it intends to conduct such oversight. For example, it may annually audit a certain number of accreditations or conformity assessments, or carry out a market surveillance program to test regulated products off-the-shelf. In exercising oversight, the agency should also take into account the following considerations:

(a) Beyond conducting direct oversight, an agency can require third parties to conduct additional assessment activities that provide further information to the agency about program operation. For example, an agency may require accreditation bodies annually to audit a certain number of conformity assessments, or it may require conformity assessment bodies to conduct particular types of surveillance on products they assess;

(b) The agency should establish procedures for receiving and responding to public complaints regarding potential noncompliance or other aspects of program operation. The agency could, for example, require a third party that has assessed the conformity of a regulated product or entity to investigate a complaint of noncompliance. In any event, the agency should ensure that complaints are resolved in an appropriate and timely manner; and

(c) The agency should make clear the possible adverse actions that it may take against third parties that do not comply with program rules. A key adverse action is removing third parties from the program. Third parties may be removed temporarily through a suspension of accreditation, or permanently through a withdrawal of accreditation.

Administrative Conference Recommendation 2012–8

Inflation Adjustment Act

Adopted December 7, 2012

Civil monetary penalties are used by the Congress and federal agencies to enforce and promote compliance with federal laws and regulations by deterring violations. These laws and regulations serve vital public purposes such as ensuring workplace or transportation safety, preserving the environment, and protecting consumers from dangerous products. As the then Deputy Director of the Office of Management and Budget testified to Congress regarding an earlier version of the Federal Civil Penalties Inflation Adjustment Act of 1990 (''the Act'' or ''the Inflation Adjustment Act''), civil monetary penalties ''do more than recover funds and sanction wrongdoers. They often serve as an effective alternative to court prosecutions and provide added deterrence to would be wrongdoers intending to defraud or abuse government programs.'' [1]

This Recommendation and the supporting Report build upon important earlier Administrative Conference works on agency authority to adjust and impose civil monetary penalties or on inflation adjustment. For example, in Recommendation 84–7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government,* the Conference encouraged Congress to ''systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.'' [2] Recommendation 79–3, *Agency Assessment and Mitigation of Civil Money Penalties,* examined agency civil monetary penalty assessment and mitigation practices.[3]

Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 in recognition that ''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.'' [4] Congress sought to ''improve the collection by the Federal Government of civil monetary penalties'' given that ''inflation has weakened the deterrent effect of such penalties'' and that the government did not ''maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.'' [5] The 1990 statute required the President to report annually to Congress on federal civil monetary penalties covered by the law, and to calculate a cost-of-living adjustment for those penalties.[6] At the time,

[1] *Federal Civil Penalties Inflation Adjustment Act of 1987: Hearing on S.1014 Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Gov't Affairs,* 101st Cong. 41 (1988) (statement of Joseph Wright Jr., Deputy Director of the Office of Management and Budget) [hereinafter 1988 Senate Hearing].

[2] ACUS, Recommendation 84–7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government,* 49 FR 49840 (Dec. 24, 1984).

[3] ACUS, Recommendation 79–3, *Agency Assessment and Mitigation of Civil Money Penalties,* 44 FR 38824 (July 3, 1979).

[4] Public Law 101–410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. 2461 note § 2(a)).

[5] *Id.* § 2(b). *See also* 1988 Senate Hearing, *supra* note 1, at 3 (statement of Senator Levin) (discussing the need to increase penalties to account for inflation and improve deterrence and noting that civil monetary penalties collected were over $400 million per year).

[6] *Id.* §§ 4–5.

agencies did not have legal authority to adjust civil monetary penalties directly. Any such modification had to be made by the passage of new legislation. Due to the slow pace of amendments of agency organic statutes in recent years, substantial periods of time could elapse between specific statutory adjustments of civil monetary penalty amounts, and the deterrent effect of the penalties could be diminished by the effects of inflation in the interim period. Accordingly, Congress considered adoption of a freestanding provision that would establish a procedure through which regulatory agencies could modify the amounts of the penalties they may assess without further legislative action.

In 1996, Congress amended the Federal Civil Penalties Inflation Adjustment Act to authorize and require the agencies, with limited exceptions for four statutory programs, to adjust their civil monetary penalties for inflation.[7] However, the implementation data demonstrate that under the mechanisms adopted by Congress, the adjustments regulatory agencies are authorized to make have not allowed the penalties to keep pace with the rate of inflation that has been experienced.[8] The existing pattern of adjustments has several anomalous features that may not have been apparent to the members of Congress when they adopted the 1996 legislation. These results raise two questions: whether the current pattern of penalty adjustments carries out the purposes of the statute, and whether Congress should adopt a modified adjustment procedure under which future changes in penalties would more closely track the actual rate of inflation.

Three statutory provisions account for why the adjustments lag behind the actual inflation rate. First, the Inflation Adjustment Act imposes a ten percent cap on initial penalty adjustments.[9] That cap creates an ''inflation gap'' which reflects the sometimes considerable difference between penalties, as adjusted under the Act, and the levels that such penalties would reach if the first adjustment had been based on changes in the cost of living that had actually occurred. This gap, once established in the first capped adjustment, grows over time as subsequent adjustments are made and can never be closed under the current statutory scheme.[10]

Second, the Act directs federal agencies to use Consumer Price Index (''CPI'') data in ways that are out of sync with inflation. Because of the Act's definition of ''cost-of-living adjustment,'' agencies must use CPI data that are at least seven months old, and sometimes as much as 18 months old in their adjustments, depending on when the agency chooses to update its penalties.[11] Adjustment of penalties using out-dated data creates a phenomenon known as ''CPI lag.'' The legislative history of the Act suggests that the ''CPI lag'' may have resulted from changes introduced during the iterative legislative drafting process, rather than by conscious design.[12] As with the ''inflation gap'' issue, CPI-based adjustments prescribed by the Act result in chronic underadjustment of civil monetary penalties relative to actual inflation.[13]

Third, the Act's elaborate rounding rules effectively prevent a second inflation adjustment for some penalties until inflation has increased by a total of at least 45 percent.[14] In an apparent scrivener's error, the Act ties the rounding of civil monetary penalty increases to the amount of the underlying civil penalty, rather than the base amount of the increase.[15] Over time, the rounding mechanism has the effect of deferring increases for certain penalties, only to unleash dramatic penalty increases after a long latency period (in some instances greater than the actual increase in inflation). For example, at an inflation rate of 2.5 percent, the rounding provisions, coupled with the 10 percent initial cap, could prevent an agency from adjusting its penalties for inflation for 15 years or more.[16] As with nonadjustment or under-adjustment, over-adjustment may also alter the intended effect of civil monetary penalties.

The Department of Homeland Security's 2011 adjustment of a host of penalties for violations of the Immigration and Nationality Act offers an excellent illustration of how the Inflation Adjustment Act works in action and why Congress should consider revisiting the operation of these procedures.[17] These penalties relate to a number of serious legal violations, including: failure to depart the U.S. voluntarily, failure to comply with removal orders or to remove alien stowaways, failure to report an illegal landing or desertion of an alien crewmen or passenger, or failure to prevent the unauthorized landing of aliens.[18] The following table, which is based on the Department's 2011 inflation adjustment, displays:

- The current penalty amount;
- The raw amount by which each penalty would be increased if adjusted for actual inflation;
- The effect of the Inflation Adjustment Act's constraint on inflation adjustment through, for example, capping the penalty adjustment at a maximum of a ten percent increase;
- The amount of the penalty increase prescribed the Act; and
- The distortion created by the variance between the raw adjusted penalty and the adjustment prescribed by the Act.

Although aggregate data are not available, the following example illustrates that the distortions created by the Act are considerable, particularly when considered in relation to the size of the unadjusted penalty.

DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND NATIONALITY ACT CIVIL MONETARY PENALTIES INFLATION ADJUSTMENT (2011) [19]

[A] INA § Statute	[B] Current penalty	[C] Year last adjusted	[D] CPI factor (2011) (%)	[E] Raw increase (2011) [B × D]	[F] Rounder [Inflation Adjustment Act constraint]	[G] Rounded increase [Inflation Adjustment Act increase]	[H] Raw adjusted penalty* [B + E]	[I] Adjusted penalty [per IAA] [B + G]	[J] Inflation Adjustment Act distortion* [I–H]
INA § 231(g); 8 U.S.C. 1221(g).	$1,000.00	Enacted 2002	21.16	$211.60	10% statutory cap	$100.00	$1,211.60	$1,100.00	−$111.60
INA § 234; 8 U.S.C. 1224.	$2,200.00	1999	31.15	$685.30	$1,000.00 [rounder]	$1,000.00	$2,885.30	$3,200.00	+$314.70
INA § 243(c)(1)(A); 8 U.S.C. 1253(c)(1)(A).	$2,000.00	Enacted 1996	39.10	$782.00	10% statutory cap	$200.00	$2,782.00	$2,200.00	−$582.00

[7] Public Law 104–134, 110 Stat. 1321 (1996) (excluding penalties under the Internal Revenue Code, the Occupational Safety and Health Act, the Social Security Act, and the Tariff Act).

[8] James Ming Chen, *Inflation Based Adjustments in Federal Civil Monetary Penalties* (2012) (report to the Administrative Conference of the U.S.), *available* at *www.acus.gov* [hereinafter Chen Report]; *see also* United States General Accounting Office (GAO), GAO–03–409, Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law (2003).

[9] Public Law 104–134, § 31001(s)(1), 110 Stat. 1321, 1373 (1996).

[10] Chen Report, *supra* at III.A.

[11] Inflation Adjustment Act, *supra* note 4, § 5.

[12] *See* Chen Report, *supra* note 8, at II (providing an extensive discussion of the legislative history and the evolution of the Act's cost-of-living adjustment methodology).

[13] *Id.* at III.B.

[14] Inflation Adjustment Act, *supra* note 4, § 5(a); Chen Report, *supra* note 8, at III.C.

[15] Chen Report, *supra* note 8, at III.C.

[16] *Id.*

[17] *See* Department of Homeland Security, *Civil Monetary Penalties Inflation Adjustment,* 76 FR 74625, 74,627–28 (Dec. 1, 2011). It is important to note, however, that several penalties adjusted in 2011 had not previously been adjusted or had not been adjusted for many years. As a result, the distortions caused by the Inflation Adjustment Act may have been magnified.

[18] *Id.*

DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND NATIONALITY ACT CIVIL MONETARY PENALTIES INFLATION ADJUSTMENT (2011) [19]—Continued

[A] INA § Statute	[B] Current penalty	[C] Year last adjusted	[D] CPI factor (2011) (%)	[E] Raw increase (2011) [B × D]	[F] Rounder [Inflation Adjustment Act constraint]	[G] Rounded increase [Inflation Adjustment Act increase]	[H] Raw adjusted penalty* [B + E]	[I] Adjusted penalty [per IAA] [B + G]	[J] Inflation Adjustment Act distortion* [I–H]
INA § 243(c) (1)B); 8 U.S.C. 1253(c) (1)(B).	$5,000.00	Enacted 1996 ..	39.10	$1,955.00	10% statutory cap ..	$500.00	$6,955.00	$5,500.00	−$1,455.00

* * * * *

The issues with the Federal Civil Penalties Inflation Adjustment Act described above arise from its plain language, and federal regulatory agencies may not themselves adjust the penalty levels to track the inflation rate more closely. As the Government Accountability Office has found, some agencies have attempted to adjust civil monetary penalties in common-sense ways that better reflect the real economic impact of inflation.[20] However, these good faith efforts objectively did not comply with the plain language of the Inflation Adjustment Act. They also subjected agencies to the risk of legal challenges to penalty adjustments.

Review of **Federal Register** notices also shows that several agencies have failed to comply with the statutory requirement to review and, if necessary, adjust penalties at least once every four years.[21] Regular penalty adjustments ensure the continued deterrent effect of civil monetary penalties. This is especially important where maximum penalties are imposed by agencies to punish the worst offenders. It is essential to enforcement policy that the penalties have their intended deterrent effect and are not simply viewed as a cost of doing business.

The Administrative Conference therefore recommends that Congress reexamine the procedures set forth in the Inflation Adjustment Act and make such changes to the Act as are appropriate. The Recommendation also advises agencies to comply with the letter of the law, by applying the rounding adjustment based on the size of the penalty, rather than the size of the increase, and by making adjustments every four years. Agencies should be mindful of the financial or other adverse consequences of failing to adjust civil monetary penalties regularly, in compliance with the Inflation Adjustment Act, or of failing to comply with the adjustment provisions currently set forth in the Act.[22]

The current Recommendation is intentionally circumscribed in scope. The underlying research commissioned by the Conference examined only the existing statutory process for inflation adjustments under the Inflation Adjustment Act. The Recommendation does not address other potential issues involving the current process, including: The appropriateness of the Act's existing exemption for civil monetary penalties under four statutes or whether additional agency programs should be exempt; the effectiveness of self-enforcement by federal agencies; obligations for reporting compliance; the lack of a central authority for administering the Act; alternative metrics for measuring inflation; or alternative forms of civil monetary penalties (*e.g.,* percentages rather than fixed values). These important issues warrant thoughtful consideration and may lead to future Conference recommendations.

Recommendation

A. Recommendation to Congress

1. Congress should change the current statutory framework by which agencies must make periodic inflation adjustments to civil monetary penalties set forth in the Federal Civil Penalties Inflation Adjustment Act, codified as amended at 28 U.S.C. 2461 note (2012), as appropriate in light of the distortions resulting from:

(a) The ''inflation gap'' created by a ten percent cap on the initial penalty adjustment, which grows over time and can never be closed under the current statutory provision.

(b) The ''CPI lag'' that results from the statute's definition of the term ''cost-of-living adjustment,'' which directs agencies to base their adjustments on CPI data that are at least seven months old and may be as much as 18 months old, and thus lag behind the actual inflation rate.

(c) The rounding rules that tie rounding of increases to the size of the penalty, rather than the size of the increase, and that may result in significant periods of nonadjustment of civil monetary penalties followed by abrupt and substantial increases.

B. Recommendation to Agencies

2. Federal agencies subject to the Inflation Adjustment Act should review and, if necessary, adjust their civil monetary penalties for inflation at least once every four years, as required by the Act. Agencies should review their implementation procedures and practices to ensure that inflation adjustments comply with the plain language of the Act, and particularly its rounding provisions.

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[19] This table presents a subset of four penalties from the table of penalty adjustments contained in the 2011 **Federal Register** notice from the Department of Homeland Security, *id.,* together with two additional columns ([H] and [J], denoted by a *) from the Chen Report, *supra* note 8, at IV.C.

[20] *E.g.,* GAO, GAO–02–1084R, Compliance with the Inflation Adjustment Act (2002) (reporting that the Farm Credit Administration had rounded its penalty increase by the size of the increase rather than the penalty size); GAO, GAO–02–1085R, DEPARTMENT OF COMMERCE: COMPLIANCE WITH THE INFLATION ADJUSTMENT ACT (2002) (reporting that the Department of Commerce had rounded its penalty increase by the size of the increase rather than the penalty size).

[21] *E.g.,* Department of Agriculture, *Department of Agriculture Civil Monetary Penalties Adjustment,* 75 FR 17555 (Apr. 7, 2010) (remedying erroneous exclusion of some civil monetary penalties from earlier rounds of adjustments); Department of Transportation, *Civil Penalties,* 75 FR 5244 (Feb. 2, 2010) (reporting last inflation adjustment six years ago, rather than four years ago as the Act's quadrennial interval prescribes).

[22] *See supra* notes 20 and 21.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 9, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–