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Mr. Robert Hinchman
Senior Counsel
Office of Legal Policy
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: Interim Final Rule on Civil Monetary Penalties Inflation Adjustment, Docket No. OAG 148

Dear Mr. Hinchman:

This letter regarding the Department of Justice's recent interim final rule adjusting certain civil monetary penalties (*Civil Monetary Penalties Inflation Adjustment*, 81 Fed. Reg. 42,491 (June 30, 2016) (Docket No. OAG 148)) is being submitted on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce and is dedicated to making our nation's overall civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region.

The interim final rule increases various civil monetary penalties pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, referred to in the Department's rulemaking as the "2015 Amendments." *See* 81 Fed. Reg. at 42, 492 (citing Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599). The Department's rule nearly *doubles* the potential penalties for a violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729(a), from the existing range of $5,500-$11,000 to a new range of $10,781-$21,563. 81 Fed. Reg. at 42,494, tbl. A.

For the reasons set forth below, that calculation is incorrect. Properly understood and applied to the FCA, the 2015 Amendments call for a much smaller initial inflation adjustment. The correct, inflation-adjusted range should be $6,051-$12,102. The Department's higher calculation is contrary to the 2015 Amendments. It will also severely exacerbate the existing irrationality of FCA penalties, which are grossly disproportionate to any actual harm, and in a significant number of applications may violate the Constitution. If not corrected, the levels established in the interim final rule will result in yet more unfairness and constitutional violations.

Background

An important function of both the Chamber and ILR is to represent the interests of their members before Congress, the judiciary, and the executive branch on matters of significant concern to the business community. The proper scope and interpretation of the FCA is one such matter; indeed, the FCA is the single most important statute governing civil monetary penalties for many of the Chamber's members that do business with the federal government or participate in federal programs. The Chamber and ILR therefore comment from time to time on FCA matters before all branches of the federal government. A representative, for example, testified before Congress during the legislative process that preceded the most recent legislation concerning FCA penalties. *See The False Claims Correction Act (S.2014): Hearing before the S. Comm. on the Judiciary*, 110th Cong. 23-25 (2008) (statement of John Boese) ("*2008 FCA Hearing*").

The 2015 Amendments

As the Department explains in the preamble to the interim final rule, the 2015 Amendments altered the Inflation Adjustment Act, 28 U.S.C. § 2461 note, enacted in 1990, to require annual inflation adjustments based on the Consumer Price Index ("CPI") for certain civil monetary penalties. 81 Fed. Reg. at 42,492. Congress previously amended the Inflation Adjustment Act in 1996 to require similar adjustments, but less frequently and subject to a substantially different set of rules for rounding and capping the adjustments. *See id.* (citing the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 31001(s)(1), also known as the Debt Collection Improvement Act of 1996, or "Improvement Act").

The 2015 Amendments also require a one-time initial inflation adjustment that must be calculated differently from the future annual inflation adjustments. 81 Fed. Reg. at 42,492. Going forward, annual inflation adjustments will be based on comparing year-to-year CPI changes. For the initial adjustment, however, the 2015 Amendments require agencies to compare the CPI for October 2015 with the CPI for October in the year in which the penalty was last "established or adjusted under a provision of law other than" the Inflation Adjustment Act. 2015 Amendments, Pub. L. No. 114-74, § 701(b)(2), 129 Stat. 600. The purpose of that limitation is to require that the initial inflation adjustment reach back to the last time Congress considered and set the monetary penalty in question, to ensure that going forward the penalty will be commensurate in today's dollars with the level Congress most recently deemed appropriate.

Application To The FCA

The interim final rule premises its calculation on the proposition that FCA penalties were last "established or adjusted" within the meaning of the 2015 Amendments in the False Claims Amendments Act of 1986. *See* 81 Fed. Reg. at 42,494 tbl. A. Respectfully, we disagree. Congress last "established or adjusted" FCA penalties in the Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617. The initial inflation adjustment mandated by the 2015 Amendments should be based on a comparison to the CPI in October 2009, when Congress last established the penalty range, not October 1986. This approach, consistent with the 2015 Amendments, results in a far more reasonable adjustment than the one embodied in the interim final rule.

The False Claims Amendments Act of 1986 set FCA penalties at $5,000-$10,000. *See* Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153. The Department adjusted that range by regulation in 1999, to $5,500-$11,000—an increase of 10% over the level Congress had set 13 years earlier. *Civil Monetary Penalties Inflation Adjustment*, 64 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999). That regulatory change was made under the Inflation Adjustment Act, as amended, *see id.* at 47,100, and therefore the Department is correct in the interim final rule that this regulatory adjustment does not count for purposes of the initial adjustment required by the 2015 Amendments. As noted, the 2015 Amendments require agencies to look back to the year in which a penalty was last "established or adjusted" under some provision of law *other than* the Inflation Adjustment Act.

But Congress also revisited the appropriate level of FCA penalties in 2009, in a statutory enactment that the Department has overlooked. That year, Congress enacted FERA to address several judicial decisions construing the FCA. A draft version of the bill would have re-enacted the prior statute's penalty level of $5,000-$10,000. During the legislative process, however, the Department expressed concern that, by re-enacting the prior penalty language, Congress might have been misunderstood as overriding the Department's 1999 inflation adjustments. *See 2008 Hearing*, 110th Cong. 62 (appendix to statement of Principal Deputy Assistant Attorney General Brian Benczkowski) (explaining that "the penalty range has been modified by other Acts of Congress to account for inflation" and recommending that "the legislation clarify that it is not intended to override these subsequent modifications"). In response to the Department's concern, Congress revised the bill to incorporate the Department's suggested language and to make clear that FCA penalties should be established at the 1996 inflation-adjusted level, not reduced to $5,000-$10,000. *See* S. Rep. No. 110-507, at 33 (2008) (revised language); *see also* S. Rep. No. 111-10, at 10 n.2 (2009) (legislative history of FCA amendments in FERA).

As finally enacted, FERA amended § 3729(a) of the FCA to provide for a civil penalty of "not less than $5,000 and not more than $10,000, *as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 140-410)*." FERA § 4(a)(1), 123 Stat. at 1622 (emphasis added). Thus, in 2009, Congress set *by a new statute* the FCA penalty range at $5,500-$11,000, a level that had previously been established by regulation under the Inflation Adjustment Act, but from that point forward was established by FERA.

The interim final rule ignores that legislative action, proceeding as if Congress had not "established or adjusted" FCA penalties since 1986. But one of the "most basic interpretive canons" in federal law is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). In 2009, Congress made a principled decision—in direct response to concerns expressed by the Department of Justice—to amend the FCA to add language that incorporated by statute the adjusted penalty levels. That statutory action "established" the penalty level in 2009, and reflected a Congressional judgment that $5,550-$11,000 was the appropriate level in 2009 dollars.

Therefore, for purposes of the 2015 Amendments, FCA penalties were last "established or adjusted" by FERA in 2009.

Initial Adjustment Based on 2009

Recognizing 2009 as the correct base year for the initial inflation adjustment for FCA penalties under the 2015 Amendments produces a considerably more rational adjustment, one that establishes penalties going forward at levels inflation-adjusted to match the level Congress deemed appropriate in 2009. According to the White House Office of Management and Budget, the "multiplier" for initial adjustments under the 2015 Amendments for penalties last "established or adjusted" in 2009 is 1.10020. *See* Shaun Donovan, OMB Director, *Memorandum Regarding Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*, at 6 tbl. A (Feb. 24, 2016). Applying the multiplier of 1.10020 to the FCA penalties as established or adjusted in FERA, the resulting range should be $6,051 to $12,102.

Broader FCA Context

For the foregoing reasons, the 2015 Amendments require the Department to calculate the initial inflation adjustment for FCA penalties on the basis of Congress's action in 2009, rather than 1986. Doing so would also be sensible in the broader framework of the FCA.

The FCA plays an important role in deterring and remedying fraud in government programs. But the statute also incentivizes a host of baseless litigation by private relators, enticed by the prospect of using the FCA's penalty provisions to coerce enormous settlements. The statutory penalties—the penalties that the interim final rule adjusts—are mandatory for any violation of the FCA, no matter how minor, and they are imposed "per claim" *in addition* to potentially treble damages. *See* 31 U.S.C. § 3729(a). A court has no discretion to award less than the minimum penalties, even when (as they frequently do) they lack any rational relationship to the government's injury, the defendant's benefit, or the wrongfulness of the conduct at issue. Because the statutory penalties apply "per claim," deemed by courts to be a term of art under the FCA, *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 411 (2005), a single allegedly false statement may result in thousands or even millions of separate "claims" that multiply the mandatory minimum penalties to levels that are literally absurd in many cases. The potential for ruinous mandatory penalties may compel settlement of any claim that can survive a motion to dismiss, however unfounded, particularly because the statute enables plaintiffs' lawyers to pursue claims despite the government's considered judgment that the claims lack merit.

Against that backdrop, as many observers have recognized, the *current* FCA penalties of $5,500-$11,000 mandate untenable outcomes and encourage private relators to bring weak or unfounded claims that innocent defendants then feel compelled to settle. *See, e.g.*, John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999) ("great pressure on defendants to settle even meritless suits"); Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. Ann. Surv. Am. L. 241, 275 (2004) (medical providers may have "little choice but to settle," given "the potential for astronomical liability"). The doubling of penalties under the interim rule will substantially aggravate this problem.

That is a problem that the United States should not take lightly and, indeed, should strive to avoid. Doubling FCA penalties will not only exacerbate the potential for private relators to achieve extortionate settlements, but it risks dramatically increasing the costs of doing business with the government—the cost of providing goods and services to support the government's many missions and the cost of accepting grants to further the government's policy objectives. Those costs ultimately are visited back on the government itself, either in increased costs or in greater reluctance by private actors to support the government through contracts or grants. Recovering appropriate compensation for genuine fraud of course is extremely important. But the potential for excessive mandatory civil monetary penalties, which are imposed in addition to treble damages, has the unintended consequence (through extortionate settlements) of irrationally penalizing lawful, appropriate, and productive activity that the government needs and/or wishes to encourage. For those reasons, the adjustment we believe is called for under the 2015 Amendments—to the level in 2016 dollars that Congress deemed appropriate in 2009—is a better policy outcome for the United States than the far more punitive levels established in the interim rule.

FCA penalties also pose significant constitutional concerns under the Eighth Amendment's prohibition against excessive fines and may violate constitutional due process protections. The penalties are unquestionably "'punitive in nature,'" as the Supreme Court recently confirmed. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016). As such, the Eighth Amendment forbids imposition of FCA penalties that are "grossly disproportional to the gravity" of the conduct at issue. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (due process forbids "grossly excessive or arbitrary punishments"). The existing mandatory minimum FCA penalties, applied on a per claim basis, can quickly reach levels grossly disproportional to a given violation. In several instances, the Department appears to have recognized as much in voluntarily seeking a penalty less than the statutory minimum to avoid a constitutional challenge. *See, e.g.*, *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 400-401 (4th Cir. 2013) (government and relator proposed to accept less than half the statutory minimum penalty award after constitutional challenge).

Doubling FCA penalties to levels in 2016 dollars that far exceed the penalties Congress deemed appropriate in 2009 will worsen these existing problems. We urge you to reconsider your calculation under the 2015 Amendments of the initial inflation adjustment for FCA penalties.

Thank you for your consideration.

Sincerely,

Lisa A. Rickard

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