

By Email

Matthew T. Martens

August 15, 2016

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Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File Number S7-11-16, Adjustments to Civil Monetary Penalty Amounts

Dear Mr. Fields:

We write concerning the proposed retroactive effect of the SEC's adjustments to its civil monetary penalty amounts that took effect by interim rule on August 1, 2016.

The release announcing the SEC's penalty increases states: "The adjustments set forth in the amendment apply to all penalties imposed after the effective date of this interim final rule, including to penalties imposed for violations that occur before the effective date of the amendment." 81 FR 43043. To the extent the SEC intends by this language to apply the penalty increases to violations that occur before November 2, 2015, we respectfully submit that such retroactive application of the penalty increases is beyond the agency's authority.

The statute authorizing these penalty increases became law on November 2, 2015. The statute directed agencies to adopt "catch up" penalty increases effective no later than August 1, 2016. The statute further provided that penalty increases could apply to violations predating the regulation increasing the penalty. The statute says nothing about whether the penalties apply to violations predating the November 2, 2015, passage of the statute directing those increases.

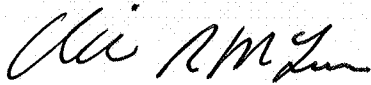
The statutory silence on the latter question is critical given the presumption that a statute does not apply retroactively to conduct prior to the passage of the statute unless the statutory language "requires this result." *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (holding that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988))). Indeed, the Supreme Court has observed that it has never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id.* at 284.

As set forth in the attached chart, you will see that most other agencies – including the U.S. Department of Justice – are not applying their penalty increases to violations occurring prior to November 2, 2015. That these agencies are not applying their penalty increases in that way demonstrates that the statute does not "require th[e] result" the SEC is proposing. Accordingly,

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we would urge the SEC to revise its position and restrict the application of its penalty increases to violations that occur after November 2, 2015.

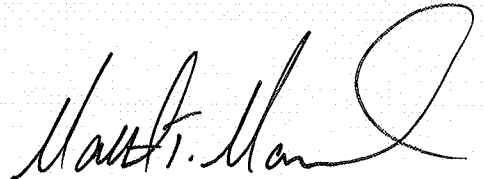
Best regards,



William McLucas



Harry Weiss



Matthew Martens

Enclosure

**Attachment**

<b>Agency</b>	<b>Pre-2015 Act Retroactivity?</b>	<b>Date Rule Published</b>	<b>Rule Language</b>
Federal Trade Commission (FTC)	Unclear	06/30/2016	The increased penalties “apply only to penalties assessed after August 1, 2016, including those penalties whose associated violation predated August 1, 2016.” <sup>i</sup>
Board of Governors of the Federal Reserve	Yes	07/20/2016	“The Board will apply these adjusted maximum penalty levels to any penalties assessed on or after August 1, 2016.” <sup>ii</sup>
Office of the Comptroller of the Currency (OCC)	Unclear	07/01/2016	“The maximum amount of each civil money penalty . . . applies to penalties assessed on or after August 1, 2016.” <sup>iii</sup>
Federal Deposit Insurance Corporation (FDIC)	Unclear	06/29/2016	“The increased amounts apply to penalties that may be assessed on or after August 1, 2016 . . .” <sup>iv</sup>
National Credit Union Administration (NCUA)	Unclear	06/21/2016	“The adjusted amounts . . . apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations predate the increase.” <sup>v</sup>
Consumer Financial Protection Bureau (CFPB)	Yes	06/14/2016	“The adjustments . . . shall apply to civil penalties assessed after July 14, 2016, regardless of when the violation for which the penalty is assessed occurred.” <sup>vi</sup>
Department of Defense (DOD)	Unclear	05/26/2016	Applies to penalties, “including those whose associated violation predated such increase, which are assessed after the date the

			increase takes effect (i.e., July 1, 2016). <sup>”vii</sup>
Department of Energy (DOE)	Unclear	06/28/2016	Applies to penalties assessed after the date the increase takes effect, “including those whose associated violation predated such increase . . . <sup>”viii</sup>
Department of Energy (DOE)/Federal Energy Regulatory Commission (FERC)	Yes	07/06/2016	Applies to any “civil monetary penalty applicable at the time of assessment of a civil penalty, regardless of the date on which the violation occurred.” <sup>”ix</sup>
Commodity Futures Trading Commission (CFTC)	Unclear, but in any event only for actions initiated after Aug. 1, 2016		Applies to penalties “assessed after the date the increase takes effect,” “including those whose associated violation predated such increase,” but “the new penalty amounts may be applied only in Commission administrative or civil injunctive enforcement proceedings that are <i>initiated on or after the effective date of this amendment, August 1, 2016.</i> ” <sup>”x</sup>
Department of Justice (DOJ)	No	06/30/2016	Applies to penalties “assessed after August 1, 2016, whose associated violations occurred after November 2, 2015 . . . <sup>”xi</sup>
Treasury Department/FinCEN	No	06/30/2016	“applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015” <sup>”xii</sup>
Treasury Department/Office of Foreign Assets Control (OFAC)	No	07/01/2016	“The adjusted civil penalty amounts . . . are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred

			after November 2, 2015, . . . ” <sup>xiii</sup>
Department of Labor (DOL)	No	07/01/2016	“The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violation occurred after November 2, 2015, . . . ” <sup>xiv</sup>
Department of Homeland Security (DHS)	No	07/01/2016	“The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violation occurred after November 2, 2015, . . . ” <sup>xv</sup>
Environmental Protection Agency (EPA)	No	07/01/2016	The increased penalties “will apply to all statutory civil penalties assessed on or after August 1, 2016, for violations that occurred after November 2, 2015 . . . ” <sup>xvi</sup>
Department of Education	No	08/01/2016	”[T]he adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015 . . . ” <sup>xvii</sup>
Department of Transportation (DOT)/Federal Aviation Administration (FAA)	No	07/05/2016	Applies to “violations occurring on or after August 1, 2016” <sup>xviii</sup>
Federal Housing Finance Agency (FHFA)	No	07/01/2016	Applies to penalties assessed “for violations occurring after August 1, 2016.” <sup>xix</sup>
Department of Housing and Urban Development (HUD)	No	06/15/2016	“These new penalties apply to violations occurring after August 16, 2016.” <sup>xx</sup>

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i	81 FR 42,476.
ii	81 FR 47,006.
iii	81 FR 43,021.
iv	81 FR 42,235.
v	81 FR 40,152.
vi	81 FR 38,569.
vii	81 FR 33,389.
viii	81 FR 41,790.
ix	81 FR 43,937.
x	81 FR 41,435.
xi	81 FR 42,491.
xii	81 FR 42,503.
xiii	81 FR 43,070.
xiv	81 FR 43,429.
xv	81 FR 42,983.
xvi	81 FR 43,091.
xvii	81 FR 50,321.
xviii	81 FR 43,463.
xix	81 FR 43,028.
xx	81 FR 38,931.