

ALERTS

Higher Penalties In The Pipeline

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The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) recently published a new Policy Statement in the [Federal Register](#) that lays out a civil penalty framework, which became effective on October 17, 2016. The new framework authorizes PHMSA to assess higher penalties. In the Federal Register Notice, PHMSA champions the so-called deterrent, rather than punitive, benefit of the new penalty framework, stating that the new framework will “driv[e] down incident risk.” The agency further states that the new framework will increase the transparency of PHMSA penalty assessments.

PHMSA's new civil penalty framework is aimed at increasing both: 1) transparency for the regulated community, and 2) compliance among the regulated community. Here are four key components of the new policy statement:

Updates the September 5, 2012, “Civil Penalty Summary”

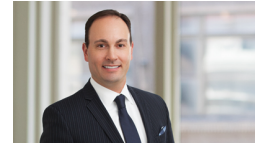
The new civil penalty framework applies to violations of the pipeline safety rules found in 49 C.F.R. §§190–199, promulgated pursuant to the Pipeline Safety Act of 2011. The new framework sets out nine “assessment considerations” that derive from the statutory assessment factors in 49 U.S.C. § 60122 and 49 C.F.R. § 190.225. PHMSA's published framework appears to be an update of the agency's Civil Penalty Summary, from Sept. 5, 2012, which lays out the same nine factors for consideration in assessing civil penalties in a similar chart. Specifically, PHMSA will consider: 1) the nature of the incident, 2) the circumstances of the incident, 3) the gravity of the incident, 4) the respondent's culpability for the incident, 5) the respondent's history of prior offenses, 6) the respondent's good faith relative to the incident, such as whether or not the operator acted reasonably or had a credible justification for its actions, 7) other matters as justice may requires, 8) the economic benefit to the respondent of non-compliance, and 9) the respondent's ability to pay and/or ability to continue operations.

For each of the considerations, PHMSA further provides examples of misconduct that warrant penalties, as well as a penalty range for each consideration the sum of which would constitute the total penalty. While a couple of the considerations offer potential penalty “credit” – for example, for self-reporting or inability-to-pay – the overall purpose of the new framework is aimed at increasing penalties, according to PHMSA.

Respondents Should Expect Overall Penalty Increases

While the new framework largely tracks the factors laid out in 49 U.S.C. §

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60122 and 49 C.F.R. § 190.225, the new Civil Penalty Summary makes some material changes to the prior Civil Penalty Summary. Some notable changes include increases to the penalty ranges relative to a number of factors:

- Nature
 - Increased penalty range from \$1,250-\$6,200 to \$1,728-\$8,640.
- Circumstances
 - Now offers potential credit to respondents.
 - Credit potential for self-reporting violations, for example.
 - Lowered the penalty maximum from \$18,700 to \$13,824.
- Gravity
 - Eliminated the \$150,000 penalty maximum in favor of an unlimited range on the gravity factor.
- Culpability
 - Established a new penalty for culpability up to \$2,056,320.
 - Increased potential credit from \$25,000 to \$25,920.
- History of Prior Offenses
 - Increased penalty maximum from \$12,500 to \$17,280.
- Good Faith
 - Increased credit available from \$12,500 to \$17,280.
- Other Matters as Justice May Require
 - Decreased credit available from \$37,500 to \$25,920.
 - Increased the penalty maximum from \$175,000 to \$2,056,320.

Finally, the new framework eliminates the “major consequences factor multipliers,” adds an “economic benefit” factor with a potential “variable addition,” and maintains the “ability to pay” factor as a “variable credit.”

Statutory Penalty Caps Increased for Inflation

The increased penalty ranges identified above are still subject to the statutory penalty caps for violations found in 49 U.S.C. § 60122(a)(1), which remain in place. Specifically, penalties for violations occurring after January 3, 2012, are capped at \$200,000 per day, with a maximum civil penalty for a related series of violations not to exceed \$2,000,000. To account for inflation, however, the cap on civil penalties for violations occurring on or after August 1, 2016 is increased to \$205,638 per day, not

to exceed \$2,056,380 for a related series of violations.

These adjustments were undertaken in accordance with the Bipartisan Budget Act of 2015, which required mandatory adjustments for all federal agencies' civil penalty amounts to account for inflation. The Act allowed a one-time catch up of up to 150% current penalty amounts.

The Bipartisan Budget Act also requires annual reviews of penalty amounts, beginning in January 2017.

Transparency and Increased Compliance With Pipeline Safety Rules

In addition to the above-mentioned “deterrent” purpose of the new civil penalty framework, PHMSA purportedly seeks to provide increased transparency to operators and respondents relative to penalty calculations. To that end, PHMSA's recent Policy Statement establishing the updated framework states that, upon request, PHMSA will provide: 1) a “more detailed” proposed civil penalty calculation to respondents, 2) the violation report, and 3) any other items in the case file, as defined in 49 C.F.R. § 190.209.

PHMSA notes that it retains “broad discretion” in evaluating the statutory and regulatory factors for assessing civil penalties. The new framework suggests, however, that PHMSA will begin assessing significantly higher civil penalties in accordance with the new framework in order to achieve the agency's objective of increased “compliance with the pipeline safety rules.”

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