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INTRODUCTION

Section 8(i)(2) of the Federal Deposit Insurance Act (FDI Act) authorizes the FDIC to issue civil money penalties (CMPs) against insured depository institutions (IDI) and institution-affiliated parties (IAPs).

CMPs are assessed to punish violators and to deter future violations. Penalties are based on the severity of a violation and the culpability of the involved party and can be assessed for each day actionable misconduct is outstanding. In determining the amount of CMPs to assess, the FDIC considers the gravity of the violation, the history of previous violations, the financial resources and good faith of the IDI or IAP, and other pertinent matters. Maximum penalty amounts are based on a three-tier system that is adjusted annually for inflation.¹

The FDIC may assess CMPs against any IDI or IAP for actions or inactions, such as:

- Violating a law or regulation,
- Violating a temporary or final order issued,
- Violating a written agreement between an IDI and the FDIC,
- Violating a condition imposed in writing by the FDIC in connection with the approval of an application,
- Recklessly engaging in an unsafe or unsound practice, and
- Breaching fiduciary duty.

For example, CMPs have been assessed for violations involving:

- Changes in bank control,
- Final cease and desist (C&D) orders,
- Section 23A of the Federal Reserve Act (loans to affiliates),
- Section 22(h) of the Federal Reserve Act (loans to directors, officers, and principal stockholders),
- Section 106(b) of the Bank Holding Company Act (tying arrangements – official family loans and linked correspondent accounts).

Violations

Violation is defined as “any action (alone or with another) for or towards causing, bringing about, participating in, counseling, or aiding or abetting a violation.” See 12 U.S.C. 1813(v). The definition is purposely broad and covers a range of misconduct.

¹ Refer to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Part 308 of the FDIC Rules and Regulations.

Institution-Affiliated Party

An IAP² is:

- Any director, officer, employee or controlling shareholder (other than a bank holding company or a savings and loan holding company) of an IDI;
- Any person who has filed or is required to file a change-in-control;
- Any shareholder, consultant, joint venture partner, or other person who participates in the IDI’s affairs; or
- Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in violations of law or regulation, breaches of fiduciary duty, or unsafe or unsound practices, which caused, or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the IDI.

Fiduciary Duty

Fiduciary duty requires one party to act in the best interest of another and generally involves accepting responsibility for managing and protecting the money or assets of another individual or entity. For example, bank officers and directors have a fiduciary duty to protect the bank’s assets, further the best interests of the bank, and not place their personal interests above those of the bank.

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ASSESSMENT OF CIVIL MONEY PENALTIES

Although relevant to the FDIC’s interests, the primary purpose for assessing CMPs is not to effect remedial action. Such action, in the form of restitution or other corrective measures, should be pursued separately.

In 1998, the FDIC adopted the *Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies* (Policy Statement). The Policy Statement specifies 13 factors (13 Factors) that regulatory agencies should consider in determining whether, and in what amount, CMPs should be assessed. The 13 Factors identified as relevant are:

1. Evidence that the violation, practice, or breach of fiduciary duty was intentional or committed with a disregard of the law or of the consequences to the IDI;
2. The duration and frequency of the violations, practices, or breaches of fiduciary duty;

² See Section 3(u) of the Federal Deposit Insurance Act for the complete definition of an IAP.

3. The continuation of the violations, practices, or breach of fiduciary duty after the respondent was notified or, alternatively, its immediate cessation and correction;
4. The failure to cooperate with the agency in effecting early resolution of the problem;
5. Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice, or breach of fiduciary duty;
6. Any threat of loss, actual loss, or other harm to the IDI, including harm to the public confidence in the IDI, and the degree of such harm;
7. Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty;
8. Evidence of any restitution paid by a participant of losses resulting from the violation, practice, or breach of fiduciary duty;
9. History of prior violation, practice, or breach of fiduciary duty, particularly where they are similar to the actions under consideration;
10. Previous criticism of the IDI or individual for similar actions;
11. Presence or absence of a compliance program and its effectiveness;
12. Tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty; and
13. The existence of agreements, commitments orders, or conditions imposed in writing intended to prevent the violation, practice, or breach of fiduciary duty.

A recommendation to assess CMPs should be initiated when one or more of the following criteria are present:

- The violation, practice, or breach causes substantial harm to depositors or to an IDI;
- The violation, practice, or breach is willful, flagrant, or otherwise evidences bad faith on the part of the bank or the IAP (e.g., repeated or multiple violations);
- The violation, practice, or breach directly or indirectly involves an IAP, associate, or related interest who receives material or substantial benefit from the activity;
- Weaknesses exist in the IDI's third-party oversight that causes harm to consumers or the institution;
- The IDI intentionally or repeatedly misreports or fails to report government monitoring information (such as Call Reports or Y-14s) relied upon by government agencies or, where required by law, fails to implement systems to ensure the reporting or accuracy of this data; or

³ The FDIC uses various matrices (e.g., Individual, Institution, and AML/CFT) to determine CMP amounts and to ensure consistent application of the 13 Factors outlined in the Policy Statement. See

- Previous supervisory means (e.g., Memorandum of Understanding or C&D order) have not been effective in eliminating or deterring a violation, practice, or breach.

Anti-Money Laundering/Countering the Financing of Terrorism Considerations

In addition to the criteria listed above, a recommendation for the assessment of a CMP against an IDI or IAP should be considered in Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) cases when one or more of the following criteria are present:

- A violation or practice potentially exposes the IDI to money laundering or other illicit financial activity or caused substantial harm to public confidence in the IDI;
- A violation or practice is willful, flagrant, or demonstrates bad faith on the part of an IDI or IAP (e.g., repeated or multiple violations);
- Previous AML/CFT formal or informal enforcement actions (e.g., Board Resolution, Memorandum of Understanding, or C&D) have been ineffective in eliminating or deterring a violation, pattern, or practice;
- The IDI has a violation of the AML/CFT Compliance Program and a history of noncompliance with laws and regulations; or
- The IDI fails to maintain a satisfactory AML/CFT Compliance Program, which may include uncorrected component (also referred to as pillar) violations.

Considerations Involving Restitution

When a violation, practice, or breach committed by an IAP results in personal financial or economic gain or financial loss to the bank and the statutory factors are met, restitution in lieu of or in addition to a CMP should be considered. If the bank suffered a loss, the willingness and promptness in making restitution should have a bearing on the amount of penalty recommended. Where an IAP is willing to consent to a restitution order, but lacks financial resources to reasonably pay both restitution and a CMP, the FDIC generally favors payment of restitution to the bank. Where restitution is not applicable and the IAP's profits or gains can be verified and traced to the IAP's misconduct, the FDIC favors assessing the total amount of the benefit. This amount is in addition to the recommended penalty amount derived from the applicable CMP matrix,³ as long as the total amount does not exceed the statutory maximum.

the Formal and Informal Enforcement Actions Manual, Chapter 9 – Restitution and Civil Money Penalties.

Penalty Tiers

The maximum penalty amounts for each CMP tier are detailed in Section 308.132 of the FDIC Rules and Regulations. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires the FDIC to annually adjust the maximum amount of each CMP within its jurisdiction. By January 15 of each calendar year, the FDIC will publish notice in the Federal Register of the maximum penalties that may be assessed after January 15. When recommending or assessing a CMP, staff should review the most recent notice to ensure that the CMP amount recommended or assessed reflects the most recent inflation adjusted CMP amounts.

Tier 1 – An IDI or IAP may be assessed Tier 1 level CMPs for a violation of law or regulation, a final or temporary order, a condition imposed in writing in connection with granting of an application or other request by an IDI, or any written agreement between an IDI and the FDIC.

Tier 2 – An IDI or IAP may be assessed Tier 2 level CMPs for a violation listed under Tier 1, or recklessly engaging in an unsafe or unsound practice or breach of fiduciary duty if the violation, practice, or breach is part of a pattern of misconduct, causes or is likely to cause more than minimal loss to the IDI, or results in a financial gain or otherwise benefits the IAP.

Tier 3 – An IDI or IAP may be assessed Tier 3 level CMPs for knowingly committing violations, practices, or breaches listed under Tier 1 or 2 CMPs and knowingly or recklessly causing substantial loss to an IDI or substantial financial gain or other benefit to an IAP.

Penalty Recommendations

To determine an appropriate penalty amount, each case must be considered on its own merits in light of applicable laws and factors discussed in the Policy Statement. In no case should the penalty amount assessed exceed the maximum amount allowed. In some cases, the amount suggested in applicable guidance may be so large as to be considered unreasonable, and the penalty should be tempered through judgment as to the seriousness of the violation.

In determining the amount of a CMP, the FDIC must consider the financial resources and good faith of the IDI or IAP, the gravity of the violation, the history of previous violations, and other matters as justice may require. An IDI's or IAP's lack of financial resources may result in a recommended CMP amount below that which would

otherwise appear appropriate. Consideration should also be given relative to whether the IDI or IAP cooperates throughout the proceedings, provides an explanation that does not show malice or intentional disregard, voluntarily makes restitution, and helps regulatory agencies or law enforcement in the investigation. A determination that the violation, practice, or breach was particularly egregious or that the IDI or IAP was directly involved in causing the violation or benefited from it should generally result in a larger recommended penalty.

Other Corrective Procedures

When the assessment of a CMP is not considered appropriate, corrective action may be sought by means of a supervisory letter sent by the regional office to the bank's board of directors. The letter should request adoption of a resolution indicating the directorate's intent to correct the violation, practice, or breach and advise the bank of the importance of implementing procedures to prevent future infractions. Supervisory letters may also recommend that the bank seek reimbursement for any loss. Supervisory letters may also be issued to IAPs. The IDI or IAP should be advised to notify the regional director when and how the violation, practice, or breach has been remedied. An insufficient response from the bank or IAP to the regional office on the issues covered in the supervisory letter may constitute grounds for recommending more severe enforcement action, including CMPs, related to the original violation, practice, or breach.

With regard to a violation of a final C&D order or an issued capital directive, a recommendation may be made, at the discretion of the regional director, for court enforcement under Section 8(i)(1) of the FDI Act, initiation of assessment of a CMP, as authorized, or both. The determination should be based on which recommendation appears to be most appropriate for the given situation, will most likely result in correction of deficiencies, and will achieve the FDIC's objectives.

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EXAMINATION PROCEDURES

Examiners should consider the following procedures when violations of laws or regulations are encountered and CMPs are contemplated:

- When violations are encountered, promptly consult with the field and regional offices.
- Complete a CMP matrix⁴ when violations, unsafe or unsound banking practices, or breaches of fiduciary duty are discovered and CMPs are considered.

⁴ The CMP matrices can be accessed through [Chapter 9](#) of the Formal and Informal Enforcement Actions Manual.

- If the FDIC is considering a CMP based on a violation, and the maximum Tier 1 CMP does not adequately reflect the seriousness of the misconduct, then examiners should discuss with regional counsel whether a Tier 2 or Tier 3 CMP may be appropriate and whether the Tier 2 or Tier 3 elements may be satisfied.
- Generally, comments in the Report of Examination (ROE) should not reference potential CMPs, the FDIC's power to impose CMPs, or the maximum dollar amount of CMPs that may be imposed.
- Fully discuss violations of law with management, but do not initiate discussions about CMPs or advise management in any way that CMPs will, or may, be recommended. If management raises any issue regarding CMPs:
 - Inform the board or management that violations of law may be subject to CMPs; and
 - Only discuss the general process and criteria used by the FDIC to determine whether to recommend CMPs.
- When CMPs against IAPs are contemplated, the home mailing address for all directors and, to the extent possible, any other individuals involved in a violation should be included in the Confidential Section of the ROE.
- When a violation involves financial gain to an insider or financial loss to the bank (in most instances, the insider's gain will be the bank's loss), attempt to determine a monetary value. If the amount cannot be quantified, estimate the amount and include it in the violation write-up in the ROE along with the method of calculation. If the monetary value cannot be estimated with any degree of confidence, state this and include the reason why.
- Consult with the regional office to determine the supporting evidence needed in connection with citing an apparent violation where a CMP is contemplated. Consult regional counsel regarding the determination of the apparent violation and sufficiency of evidence.⁵
- Copy evidence in support of a likely action, segregate it from regular workpapers, and retain it in conformance with established procedures for accessing, transporting, storing, and disposing of sensitive electronic and paper information.

Examiners should forward recommendations for assessing CMPs to the regional office. Examiners must not discuss or otherwise communicate CMP recommendation(s) or potential recommendation(s) to the IDI or any IAP.

⁵ In certain instances, the FDIC may pursue a CMP for a violation even if a CMP was not originally contemplated by the examiners.

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OTHER CONSIDERATIONS

State Reports of Examination

If a state ROE cites a violation for which prompt action appears warranted, the regional office should schedule a visitation. The assigned examiner should investigate the violation and, if appropriate, gather sufficient documentation to support a CMP recommendation and, if appropriate, request for restitution. If a flagrant violation does not appear to be involved, regional management may postpone an investigation until the next scheduled FDIC examination or visitation. The FDIC prefers to use FDIC findings of a violation to support a CMP recommendation or request for restitution, but may use a state ROE when appropriate.

Equal Access to Justice Act

Examiners involved in enforcement cases, including for CMPs or restitution, should be mindful that such actions are covered under the Equal Access to Justice Act and Part 308, Subpart P of the FDIC Rules and Regulations. The Act provides that certain parties who prevail in contested administrative or judicial proceedings against an agency of the federal government may be able to recover their litigation expenses from the agency if the position of the agency was not substantially justified. Examiners should use special care not to write-up or cite any practice or violation on inadequate grounds that will be the basis for charges. Examiners should also be mindful that Confidential Section comments in the ROE likely would be a matter of record at any required hearing. Comments and observations in the Confidential Section must be accurate and well-supported, which can help them to withstand cross-examination in a hearing.

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GENERAL GUIDELINES FOR USING THE CMP MATRICES

The CMP matrices contain factors that assist in determining whether it is appropriate to initiate a CMP assessment. Use of the matrices supports the appropriateness and amount of CMPs and the consistent application of the 13 Factors.

The Matrices and factors are provided solely as guides. They do not replace sound supervisory judgment or reduce the CMP process to a mathematical equation.

Examiners should complete the CMP Matrices based on the facts and circumstances of each particular case. Completed matrices must fully support and properly document all assigned scores in a recommendation memorandum. Generally, examiners should use the following guidelines in determining how many matrices to complete:

- One matrix should be used per person for all violations, reckless unsafe and unsound practices, or breaches of fiduciary duty. When there are multiple violations, practices, or breaches of duty addressed in one matrix, the highest severity level applicable to any of the violations, practices, or breaches of duty should be recorded for each factor on the matrix.

For example, if a single director approved a loan in violation of Regulation O and another loan in violation of state lending limitations, and engaged in reckless unsafe practices, only one matrix should be completed for that director, with the highest severity level applicable to either of the violations and any of the unsafe practices recorded for each matrix factor.