

December 13, 2007

MEMORANDUM TO: The Board of Directors

FROM: Bret D. Edwards  
Director, Division of Finance

Sara A. Kelsey  
General Counsel

SUBJECT: Late Assessment Penalties Delegations and Amendments

Recommendation

Staff recommends that the Board adopt the attached delegations of authority and amendments to provide for civil money penalties when an institution fails to timely pay its deposit insurance assessment pursuant to section 18(h) of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. § 1828(h). The FDIC updated its regulation covering late assessment penalty amounts following an increase in the statutory penalty amount pursuant to amendments made by the Federal Deposit Insurance Reform Act of 2005 (“Reform Act”). See *Penalty for Failure To Timely Pay Assessments*, 71 Fed. Reg. 65,711 (November 9, 2006). Although the former penalty provision was added to the FDI Act in 1950, express delegations of authority and internal procedures to impose the penalty when an institution is prepared to enter a stipulation have not been developed. Staff recommends delegating authority to impose such penalties to the Director of the Division of Finance (“DOF Director”), with the General Counsel’s concurrence, pursuant to section 18(h) of the FDI Act, in situations where a depository institution stipulates to such a penalty. Staff also recommends delegating authority to the DOF Director, with the General Counsel’s concurrence, to initiate the formal administrative hearing process to impose the penalty in situations where an institution declines to stipulate. The procedures that DOF would follow are appended for the Board’s reference.

Background

Section 2104 (c) of the Reform Act amended section 18(h) of the FDI Act, 12 U.S.C. § 1828(h).<sup>1</sup> On November 2, 2006, the Board amended the FDIC’s late assessment penalty rule, 12 C.F.R. § 308.132(c)(3)(v), to reflect the changes made by

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<sup>1</sup> See Federal Deposit Insurance Reform Act of 2005, section 2104(c), Public Law 109-171, 120 Stat. 9, 13.

Concur:

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Sandra L. Thompson  
Director, Division of Supervision and Consumer Protection

section 2104(c) of the Reform Act. Under the prior regulations, the late assessment penalty amount could not exceed \$110 per day for each day the violation continued.

Under the amended regulations, an institution that fails to timely pay an assessment of \$10,000 or more is subject to a penalty of not more than 1 percent of the late assessment amount due for each day that the assessment is unpaid. An institution that fails to timely pay an assessment of less than \$10,000 is subject to a penalty of not more than \$100 per day for each day that the assessment is unpaid.<sup>2</sup>

Assessment payments are considered timely if the FDIC is able to debit the account (Automated Clearinghouse or “ACH” account) designated by an institution for the full amount on the payment due date. If the ACH account is not adequately funded or the FDIC cannot debit the designated account for the full amount due on the payment date, the institution’s assessment payment will be late and will be subject to the penalties set forth in section 18(h).<sup>3</sup> An exception exists if the institution’s failure to pay results from a dispute with the FDIC over the amount of the assessment and the institution deposits satisfactory security with the FDIC.

The FDIC has the discretion to compromise, modify, or remit the penalty upon a finding that good cause prevented the timely payment of an assessment (e.g., when the failure to pay is due to matters outside the institution's control, such as a natural disaster).<sup>4</sup>

In its preamble to the final rule, the FDIC stated it would impose the penalty set out in section 18(h) in the same manner as civil money penalties issued pursuant to section 8(i) of the FDI Act, 12 U.S.C. § 1818(i), if the FDIC and the institution are unable to resolve the matter (that is, where good cause for the failure to timely pay does not exist and the applicable depository institution refuses to stipulate to the penalty). 71 Fed. Reg.

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<sup>2</sup> The FDIC can also initiate a termination of insurance proceeding, pursuant to section 8(a) of the FDI Act, 12 U.S.C. § 1818(a), when an institution withholds portions of its insurance assessments. *Doolin Security Savings Bank v. FDIC*, 53 F.3d 1395, 1408 (4<sup>th</sup> Cir. 1995).

<sup>3</sup> The amount due includes both the institution’s deposit insurance assessment and its Financing Corporation (“FICO”) assessment. Under 12 U.S.C. § 1441(f)(2), FICO, with the FDIC’s approval, assesses against each insured depository institution an assessment in the same manner as assessments are assessed against institutions by the FDIC under 12 U.S.C. § 1817. The 1999 Memorandum of Understanding (“MOU”) between the FDIC and FICO similarly states: “The FDIC shall collect FICO assessments in the same manner as assessments are collected by the FDIC from insured depository institutions pursuant to 12 U.S.C. § 1817.” MOU at ¶5 (Aug. 1999).

<sup>4</sup> For example, when Hurricane Katrina struck the Gulf Coast in 2005, it affected some institutions’ ability to pay their assessments in a timely manner.

65,711 (Nov. 9, 2006). In those instances, the FDIC will need to initiate the formal administrative hearing process following applicable FDIC regulations.<sup>5</sup>

In Financial Institution Letter 43-2007 (June 4, 2007), the FDIC provided insured institutions with notice that it would apply the penalty provisions in its amended regulations beginning with the assessment collection made on the June 29, 2007 payment date. To avoid late assessment penalties, institutions were urged to make sure that the ACH payment information supplied to the FDIC for assessment collections is up to date and that their designated ACH accounts are adequately funded prior to the payment date. A total of 26 institutions failed to pay their assessments on time in the June 2007 collection (with assessment amounts ranging from \$143.38 to \$1,370,671.03).

In the assessment collection made on the September 28, 2007 payment date, the FDIC invoiced a total of 8,609 insured institutions. Of these, 5,878 owed less than \$10,000 in combined FDIC and FICO assessments, ranging from a refund of \$16,588.28 to collection of \$9,997.37. If late, the institutions in this payment range would potentially be subject to a penalty of not more than \$100 per day for each day the assessment remains unpaid.

Of the 8,609 institutions invoiced in the September 2007 assessment collection, 2,731 owed assessments greater than \$10,000, ranging from \$10,009.97 to \$17,211,123.21. If late, these institutions would potentially be subject to a penalty of not more than 1 percent of the late assessment amount due for each day the assessment remains unpaid.

A total of 13 institutions failed to pay their assessments on time in the September 2007 collection (with assessment amounts ranging from \$45.88 to \$1,827,641.53). If the delegation of authority requested here is approved, DOF expects (absent a showing of good cause) to impose penalties on the two institutions that paid their assessments late in both the June and September collections.

### Delegations

Staff recommends delegating to the DOF Director the power – with the General Counsel’s concurrence - to impose the late assessment penalty in cases where an institution agrees to stipulate to an agreed upon penalty and to initiate the formal administrative hearing process to impose the penalty in situations where an institution declines to so stipulate. A delegation provides the most effective manner for the Director of DOF to reach an agreement with any applicable institution to resolve the matter, and such a delegation will make explicit who the Board authorizes to impose the penalty or initiate the hearing process. Although section 18(h) of the FDI Act has since 1950 provided for late payment penalties, the penalties have not been imposed, nor have internal procedures for imposing such penalties via stipulation been developed.

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<sup>5</sup> 12 C.F.R. § 308.1-308.41.

Based upon the FDIC's bylaws, the Director of DOF has the general authority to "administer regulations for the Corporation governing the payment of assessments by insured depository institutions in accordance with the provisions of the Federal Deposit Insurance Act."<sup>6</sup> However, this authority does not expressly encompass civil money penalties ("CMP"s), the amounts of which are ultimately credited to the Department of the Treasury, not to the Deposit Insurance Fund. Additionally, a delegation currently exists authorizing the Director of the Division of Supervision and Consumer Protection ("DSC") to impose CMPs related to compliance and enforcement matters. (Delegations of Authority Relating to Filings and Enforcement Matters.) The FDIC Bylaws are also more specific with respect to DSC's authority and include the initiation of administrative enforcement proceedings against depository institutions and their officers, directors, or other persons participating in the conduct of their affairs in accordance with the provisions of section 8 of the FDI Act. FDIC Bylaws, Section 4, Paragraph H.

A separate delegation of authority to the Director of DOF regarding late assessment penalties will make clear that DOF has authority regarding CMPs related to the late payment of assessments.

In addition to delegating authority to impose the late assessment penalty or initiate the formal administrative hearing process to the DOF Director, staff recommends a simultaneous conforming amendment to the existing DSC delegations to ensure consistency with DOF's penalty authority. Staff recommends amending the existing DSC delegation on Filings and Enforcement Matters to clarify that DSC's authority regarding civil money penalties does not include late assessment penalties.

Staff also recommends amending the existing Case Review Committee ("CRC") resolutions to provide that late assessment penalties are outside CRC jurisdiction, similar to the CRC exclusion for CMPs authorized under section 7(a)(1) for late or inaccurate Reports of Condition, CMPs authorized under section 8(i) for late or inaccurate filing of Home Mortgage Disclosure Act Loan Application Registers, and CMPs authorized under section 8(i) and under the Flood Disaster Protection Act for violations of flood insurance requirements. Staff believes late assessment penalties may be excepted from CRC review because those penalties will usually be governed by the statutory standards, will usually be for small amounts (most will be \$100 per day or less, although penalties for large institutions could be much greater), and because past experience shows that the fact patterns involved are likely to be routine.

For the Board's reference, an attached memorandum sets forth the internal procedures that staff from DOF, Legal, and DSC expect to follow when imposing a late assessment penalty or initiating the formal administrative hearing process. Under these procedures, DOF staff will initiate communication with any institution that fails to timely pay its assessment, requesting an explanation of the lateness and the steps to be taken to avoid future late payments. Where a penalty is to be sought, usually after a second late payment, DOF staff, with the concurrence of the Legal Division and notice to DSC and to

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<sup>6</sup> See Bylaws of the FDIC, Article VI, Paragraph (m).

the institution's primary regulator, will send the institution a 15-day letter. The institution will then have fifteen days to stipulate to the penalty, or request that the penalty be modified for good cause. The Director of DOF, with the General Counsel's concurrence and notice to both DSC and the institution's primary regulator, will then send a response to the institution either modifying the penalty or, if finding that good cause did not exist, allowing the institution another chance to stipulate to the penalty. Finally, if the institution refuses to stipulate, the DOF Director, with the General Counsel's concurrence, will have the delegated authority to initiate the formal administrative hearing process in order to impose the penalty.

The proposed DOF delegations also specify that DOF must provide to the Board a quarterly report summarizing all orders for the payment of civil money penalties for the late payment of assessments issued in each quarter.

### Conclusion

Adopting the attached delegations of authority to impose the late assessment penalty authorized under section 18(h) of the FDI Act will make explicit the authority of the Director of DOF, with the concurrence of the General Counsel, to impose civil money penalties upon insured institutions for the failure to timely pay assessments when the institution stipulates to the penalty and to initiate the formal hearing process when an institution declines to stipulate.

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