

December 19, 2016

**MEMORANDUM TO:** The Board of Directors

**FROM:** Charles Yi  
General Counsel

**SUBJECT:** Final Rule Adjusting Civil Money Penalties for Inflation

## PROPOSAL

The Legal Division recommends that the Board of Directors (Board) approve, for publication in the *Federal Register*, a final rule amending 12 C.F.R. Part 308. This final rule would adjust for inflation the maximum allowable amounts of various civil money penalties (CMPs) that the FDIC is authorized to assess under the Federal Deposit Insurance Act (FDI Act) and a number of other Federal statutes.<sup>1</sup> These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Adjustment Act),<sup>2</sup> and the proposed amendments are ministerial and technical.

## BACKGROUND

The 2015 Adjustment Act amended the Federal Civil Money Penalties Inflation Adjustment Act of 1990 (1990 Adjustment Act) and revised the process by which federal regulatory agencies with authority to impose CMPs, including the FDIC, must adjust applicable CMPs for inflation to retain the deterrent effect of those penalties.<sup>3</sup> Under the previous statutory process, the FDIC adjusted its CMP amounts every four years. In contrast, the 2015 Adjustment Act required the FDIC to adjust CMP levels with an initial catch-up adjustment through the publication of an interim final rule on or before July 1, 2016, and requires the FDIC to make subsequent annual adjustments for inflation on or before January 15 of each year, starting in 2017. As was required by the 2015 Adjustment Act, the FDIC Board approved an interim final rule amending Part 308

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<sup>1</sup> The adjusted numbers reflect the maximum amounts that the FDIC is authorized to assess under each applicable statute after January 15, 2017, for violations occurring on or after November 2, 2015. The FDIC, however, retains discretion to impose lesser penalties after consideration has been given to the financial resources and good faith of the institution or institution-affiliated party (IAP), the gravity of the violations, the history of previous violations by the institution or IAP, and such other matters as justice may require. See 12 U.S.C. § 1818(i)(2)(G) and *Interagency Policy Statement Regarding the Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies*, 63 FR 30,227 (June 3, 1998).

<sup>2</sup> Pub. L. 114-74, sec. 701, 129 Stat. 584.

<sup>3</sup> Pub. L. 101-410, 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. § 2461 note). The 1990 Adjustment Act defines “civil monetary penalty” as “any penalty, fine, or other sanction that—

- (A) (i) is for a specific monetary amount as provided by Federal law; or
- (ii) has a maximum amount provided for by Federal law; and
- (B) is assessed or enforced by an agency pursuant to Federal law; and
- (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts[.]”

Pub. L. 101-410, sec. 3(2), 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. § 2461 note).

of Title 12 of the Code of Federal Regulations to reflect the initial catch-up inflation adjustments at its June 21, 2016, meeting.<sup>4</sup>

In connection with the FDIC's first annual inflation adjustment under the 2015 Adjustment Act, the FDIC is required to follow guidance issued by the Office of Management and Budget (OMB Guidance).<sup>5</sup> These adjustments are to be based on the percent change (if any) between the Consumer Price Index for all Urban Consumers (CPI-U)<sup>6</sup> for October 2015 and October 2016.<sup>7</sup> Because the FDIC lacks discretion in making these statutorily mandated inflation adjustments, the FDIC is not required to complete a notice-and-comment process prior to publication of this final rule in the *Federal Register*.<sup>8</sup>

### *Implementing the Required Inflation Adjustment*

To satisfy the requirements of the 2015 Adjustment Act, FDIC staff has applied the required inflation adjustments to each CMP the FDIC is authorized to assess in accordance with the OMB Guidance. A table containing each adjusted CMP with the required inflationary multiplier is attached to this document as Exhibit A. In making these calculations, the FDIC consulted with staff from the Office of the Comptroller of the Currency, the Board of Governors for the Federal Reserve System, the National Credit Union Administration, and the Consumer Financial Protection Bureau to ensure that the FDIC's calculations and adjustments are consistent with those being proposed by other federal financial regulators.

### *Other Technical Changes to 12 C.F.R. Part 308*

The proposed final rule also corrects a typographical error in Section 308.132 by retitling Section 308.132(c)(1) and striking duplicative paragraphs which appear in both Section 308.132(c)(2)-(c)(3) and 308.132(d). These duplicative paragraphs were to have been moved from Section 308.132(c)(2)-(c)(3) to Section 308.132(d) as part of the FDIC's last adjustment rulemaking in July. However, this requested change was not reflected in the amended Section 308.132(c) published in the *Federal Register*.

## **RECOMMENDATION**

FDIC staff recommends that the Board adopt the final rule, which adjusts for inflation the CMPs that the FDIC is authorized to assess.

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<sup>4</sup> Resolution of the Board of Directors dated June 21, 2016, bearing Seal No. 083657.

<sup>5</sup> See OMB, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-17-11 (Dec. 16, 2016), available at [https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11\\_0.pdf](https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf).

<sup>6</sup> The CPI-U is compiled by the Bureau of Statistics of the Department of Labor.

<sup>7</sup> Pub. L. 114-74, sec. 701, 129 Stat. 584.

<sup>8</sup> *Id.* The 2015 Adjustment Act expressly provides that annual adjustments shall not be subject to section 553 of title 5 of the United States Code (the rulemaking provisions of the Administrative Procedure Act).

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## Exhibit A – Calculation of Inflation Adjustments

Statute or Regulation		Amount of Penalty (As Adjusted August 1, 2016) <sup>9</sup>	Multiplier	Adjusted Penalty (after rounding and comparison calculation) <sup>10</sup>
12 U.S.C. § 1464(v)	Tier 1	\$3,787 per day	1.01636	\$3,849 per day
	Tier 2	\$37,872 per day	1.01636	\$38,492 per day
	Tier 3	The lesser of \$1,893,610 or 1% of total assets, per day	1.01636	The lesser of \$1,924,589 or 1% of total assets, per day
12 U.S.C. 1467(d)		\$9,468 per day	1.01636	\$9,623 per day
12 U.S.C. § 1817(a) <sup>11</sup>	Tier 1	\$3,787 per day	1.01636	\$3,849 per day
	Tier 2	\$37,872 per day	1.01636	\$38,492 per day
	Tier 3	The lesser of \$1,893,610 or 1% of total assets, per day	1.01636	The lesser of \$1,924,589 or 1% of total assets, per day
12 U.S.C. § 1817(c)	Tier 1	\$3,462 per day	1.01636	\$3,519 per day
	Tier 2	\$34,620 per day	1.01636	\$35,186 per day
	Tier 3	The lesser of \$1,730,990 or 1% of total assets, per day	1.01636	The lesser of \$1,759,309 or 1% of total assets, per day
12 U.S.C.	Tier 1	\$9,468 per day	1.01636	\$9,623 per day

<sup>9</sup> The adjustments apply only to penalties with absolute dollar amounts; CMPs that are assessed based upon a fixed percentage of an institution's total assets are not subject to adjustment.

<sup>10</sup> The methodology for the adjustment calculations can be found at OMB, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-17-11, at 1 n.4 (Dec. 16, 2016) available at [https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11\\_0.pdf](https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf).

<sup>11</sup> Twelve U.S.C. § 1817(a) provides the maximum CMP amounts for the late filing of Call Reports. In 1991, however, the FDIC issued regulations that further subdivided these amounts based upon the size of the institution and the lateness of the filing. See 56 Fed. Reg. 37,968, 37,992-93 (Aug. 9, 1991), codified at 12 C.F.R. § 308.132(c)(2)(i). Under the OMB Guidance, the revised penalty amounts will be adjusted as follows:

- First violation:
  - \$25 million or more assets 1-15 days late: from \$519 per day to \$527 per day.
  - \$25 million or more assets 16 or more days late: from \$1,039 per day to \$1,056 per day.
  - Under \$25 million assets 1-15 days late: from \$173 per day to \$176 per day.
  - Under \$25 million assets 16 or more days late: from \$346 per day to \$352 per day.
- Subsequent violations:
  - \$25 million or more assets 1 to 15 days late: from \$865 per day to \$879 per day.

\$25 million or more assets 16 or more days late: from \$1,731 per day to \$1,759 per day.

Statute or Regulation		Amount of Penalty (As Adjusted August 1, 2016) <sup>9</sup>	Multiplier	Adjusted Penalty (after rounding and comparison calculation) <sup>10</sup>
§ 1818(i)(2) <sup>12</sup>	Tier 2	\$47,340 per day	1.01636	\$48,114 per day
	Tier 3 (insured depository institution)	The lesser of \$1,893,610 or 1% of total assets, per day	1.01636	The lesser of \$1,924,589 or 1% of total assets, per day
	Tier 3 (other)	\$1,893,610 per day	1.01636	\$1,924,589 per day
12 U.S.C. § 1820(e)(4)		\$8,655 per day	1.01636	\$8,797 per day
12 U.S.C. § 1820(k)(6)		\$311,470 per violation	1.01636	\$316,566 per violation
12 U.S.C. § 1828(a)(3)		\$118 per day	1.01636	\$120 per day
12 U.S.C. § 1828(h)		1% of amount of assessment per day unless assessment is < \$10,000, then \$118 per day <sup>13</sup>	1.01636	1% of amount of assessment per day unless assessment is < \$10,000, then \$120 per day
12 U.S.C. § 1829b(j)		\$19,787 per violation	1.01636	\$20,111 per violation
12 U.S.C. § 1832(c)		\$2,750 per violation	1.01636	\$2,795 per violation
12 U.S.C. § 1884		\$275 per day	1.01636	\$279 per day

<sup>12</sup> The FDIC relies upon the penalty amounts set forth in section 8(i)(2) of the FDI Act (12 U.S.C. § 1818(i)(2)) when imposing CMPs for violations of various statutes, including: the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. §§ 1817(j) & 3349(b)), the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 *et seq.*), the Home Mortgage Disclosure Act (12 U.S.C. §§ 2804(b) and 12 C.F.R. 203.6); the International Banking Act of 1978 (12 U.S.C. § 3108(b)); the Expedited Funds Availability Act (12 U.S.C. § 4009(a)); the Truth in Savings Act (12 U.S.C. § 4309(a)); the Community Development and Financial Institution Banking Act (12 U.S.C. § 4717(b)); the Electronic Fund Transfer Act (15 U.S.C. § 1693o(a)); the Truth in Lending Act (15 U.S.C. § 1607(a)); the Fair Credit Reporting Act (15 U.S.C. § 1681s(b)); the Equal Credit Opportunity Act (15 U.S.C. § 1691c(a)); the Fair Debt Collection Practices Act (15 U.S.C. § 1692l(b)); the Electronic Funds Transfer Act (15 U.S.C. § 1693o(a)); and the Fair Housing Act (42 U.S.C. § 3601 *et seq.*).

<sup>13</sup> The \$118-per-day maximum CMP under 12 U.S.C. § 1828(h), for failure or refusal to pay any assessment, applies only when the assessment is less than \$10,000. When the amount of the assessment is \$10,000 or more, the maximum CMP under section 1828(h) is 1% of the amount of the assessment for each day that the failure or refusal continues.

<b>12 U.S.C. § 1972(2)(F)</b>	Tier 1	\$9,468 per day	1.01636	\$9,623 per day
	Tier 2	\$47,340 per day	1.01636	\$48,114 per day
	Tier 3 (insured depository institution)	The lesser of \$1,893,610 or 1% of total assets, per day	1.01636	The lesser of \$1,924,589 or 1% of total assets, per day
	Tier 3 (other)	\$1,893,610 per day	1.01636	\$1,924,589 per day
<b>12 U.S.C. § 3909(d)</b>		\$2,355 per day	1.01636	\$2,394 per day
<b>15 U.S.C. § 78u-2(b)</b>	Tier 1 (individuals)	\$8,908 per violation	1.01636	\$9,054 per violation
	Tier 1 (others)	\$89,078 per violation	1.01636	\$90,535 per violation
	Tier 2 (individuals)	\$89,078 per violation	1.01636	\$90,535 per violation
	Tier 2 (others)	\$445,390 per violation	1.01636	\$452,677 per violation
	Tier 3 (individuals)	\$178,156 per violation	1.01636	\$181,071 per violation
	Tier 3 (others)	\$890,780 per violation	1.01636	\$905,353 per violation
<b>15 U.S.C. § 1639e(k)</b>	First violation	\$10,875 per day	1.01636	\$11,053 per day
	Subsequent violations	\$21,749 per day	1.01636	\$22,105 per day
<b>31 U.S.C. § 3802</b>		\$10,781 per claim	1.01636	\$10,957 per claim
<b>42 U.S.C. § 4012a(f)</b>		\$2,056 per violation	1.01636	\$2,090 per violation