

November 27, 2012

MEMORANDUM TO: The Board of Directors

FROM: Richard J. Osterman, Jr. 
Acting General Counsel

SUBJECT: Quadrennial Civil Penalty Inflation Adjustment Final Rule

PROPOSAL

The Legal Division recommends that the Board of Directors approve, for publication in the *Federal Register*, a final rule amending 12 C.F.R. Part 308, which would adjust for inflation the maximum allowable amounts of various civil money penalties (CMPs) that the FDIC is authorized to assess for violations of the Federal Deposit Insurance Act (FDI Act) and a number of other Federal statutes. The inflation adjustments would have prospective application only and (with one exception for flood insurance-related penalties) would apply to violations that occur after December 31, 2012, the effective date of the final rule following publication in the *Federal Register*.

Staff recommends that the Board authorize the issuance of this final rule to implement the required adjustments. It should be noted that the rule will incorporate the maximum allowable CMPs against State-chartered savings associations for which the FDIC, pursuant to the Dodd-Frank Act, is now the primary Federal supervisor, as well as State nonmember banks and other insured depository institutions. In addition, the CMP amounts listed in the rule are the amounts that the FDIC is authorized, but not required, to assess.

BACKGROUND

The Debt Collection Improvement Act of 1996 (DCIA) amended section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. § 2461 note), to require each Federal agency once every four years to adjust each CMP that is within the jurisdiction of the agency, by the inflation adjustment formula in section 5(b) of the Inflation Adjustment Act. The FDIC last adjusted the maximum possible amounts of the various CMPs in 2008.

To satisfy the requirements of the DCIA, staff recommends that the FDIC amend those sections of Part 308 (Rules of Practice and Procedure) of its regulations that prescribe the maximum amount of CMPs authorized under various statutes. The Inflation Adjustment Act requires that each CMP amount be increased by the “cost of living” adjustment, which is defined as the percentage by which the urban Consumer Price Index (CPI-U), compiled by the Bureau of Labor Statistics of the Department of Labor, for the month of June of the calendar year preceding the adjustment exceeds the CPI for the month of June of the calendar year in which the amount of the CMP was last set or adjusted pursuant to law.

The Act also provides, however, that a particular CMP will not be increased for inflation or cost-of-living when the results of a rounding process failed to reach a specified level of increase. The amount of each CMP that the FDIC has jurisdiction to impose has been adjusted according to the prescribed formula, including the provisions on rounding. Most of the maximum prescribed CMP amounts will not increase due to the rounding rules. An example of the difference due to the rounding rules would be the maximum authorized CMPs under Section 8(i) of the FDI Act, which are the type of CMP the FDIC most frequently assesses. The current maximum amounts for Tier One and Tier Two CMPs under Section 8(i), \$7,500 per day and \$37,500 per day, respectively, will not increase. The maximum permissible amount of Section 8(i) Tier Three CMP will increase from \$1,375,000 per day to \$1,425,000 per day, a 3.6 percent increase.

One notably larger increase is to the maximum amount of CMP authorized for flood insurance violations under the Flood Disaster Protection Act (*See* increase for allowable CMP under 42 U.S.C. 4012a(f)). As explained in the Federal Register preamble, this is due not to inflation but to a Congressional amendment to the underlying statute earlier this year, and the effective date of the increase preceded the issuance of the rule now under consideration.

FDIC staff has coordinated the interpretation of the calculations contained in the final rule with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the National Credit Union Administration, each of which is publishing its own final rule. The Administrative Procedure Act allows an agency, for good cause, to issue a final rule without prior notice and comment when they are unnecessary or impracticable. The Inflation Adjustment Act requires the FDIC to amend its rules, provides the specific adjustments to be made, and leaves the FDIC no discretion in calculating the amount of those adjustments. The amendments, therefore, are ministerial, technical, and noncontroversial, and staff believes there is good cause to proceed without notice and comment, as the other FBAs (and the FDIC in previous cycles) have done.

RECOMMENDATION

Staff recommends that the FDIC adopt the final rule adjusting for inflation the CMPs under its jurisdiction.

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