

December 12, 2017

**MEMORANDUM TO:** The Board of Directors

**FROM:** Charles Yi  
General Counsel 

**SUBJECT:** Delegation of Authority To Publish Annual Civil Money Penalty Inflation Adjustments

## PROPOSAL

The Legal Division recommends that the Board of Directors (Board) approve a resolution delegating authority to the Executive Secretary, or his or her designee, and the General Counsel, or his or her designee, to publish in the *Federal Register* annual inflation adjustments for certain figures contained in 12 C.F.R. Part 308. These annual adjustments are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Adjustment Act)<sup>1</sup> and impact 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>2</sup> Given that the FDIC lacks discretion in establishing the amount of such statutorily mandated adjustments, the publication of such adjustments constitutes a ministerial and technical duty.

## BACKGROUND

The Adjustment Act requires that all federal regulatory agencies with authority to impose CMPs, including the FDIC, adjust applicable CMPs for inflation to retain the deterrent effect of those penalties.<sup>3</sup> The annual adjustments mandated under the Adjustment Act are to be based on the percent change (if any) between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the date of the annual adjustment and the prior year's CPI-U for

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<sup>1</sup> Pub. L. 114-74, sec. 701, 129 Stat. 584 (Nov. 2, 2015).

<sup>2</sup> The adjusted numbers reflect the maximum amounts that the FDIC is authorized to assess under each applicable statute. The FDIC, however, may 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>3</sup> Pub. L. 114-74, sec. 701, 129 Stat. 584. CMPs are applicable if they constitute a “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).

the month of October.<sup>4</sup> When making these annual adjustments, the FDIC is required to follow guidance issued by the Office of Management and Budget (OMB Guidance).<sup>5</sup> OMB Guidance is to be issued annually on or before December 15, and the FDIC must publish adjusted CMP figures in the *Federal Register* on or before January 15 of each year following the publication of such OMB Guidance.<sup>6</sup>

Because the FDIC lacks discretion in making these statutorily mandated inflation adjustments, the FDIC is not required to seek notice-and-comment prior to publication of regulations in the *Federal Register* to implement these annual inflation adjustments.<sup>7</sup>

## RECOMMENDATION

To satisfy the requirements of the Adjustment Act, FDIC staff recommends that the Board adopt the Resolution, attached as Exhibit A, delegating to the Executive Secretary, or his or her designee, and the General Counsel, or his or her designee, authority to cause to be published in the *Federal Register* a regulation implementing the adjustments required under the Adjustment Act. Such a regulation will be substantially similar to that attached as Exhibit B. The delegation will authorize the Executive Secretary, or his or her designee, and General Counsel, or his or her designee, to publish this regulation in the *Federal Register* on or before January 15 of each year, beginning in 2018, and shall ensure that such a regulation be issued in conformity with applicable OMB Guidance and after efforts to consult 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.

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<sup>4</sup> Pub. L. 114-74, sec. 701, 129 Stat. 584. The CPI-U is compiled by the Bureau of Labor Statistics of the Department of Labor.

<sup>5</sup> See Pub. L. 114-74, sec. 701, 129 Stat. 584.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The 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).

### Anticipated Adjustments for the January 2018 Inflation Adjustments<sup>8</sup>

Statute or Regulation		Amount of Penalty (As Adjusted January 15, 2017) <sup>9</sup>	Multiplier	Adjusted Penalty (after rounding)
12 U.S.C. § 1464(v)	Tier 1	\$3,849 per day	[2%]	[\$3,926 per day]
	Tier 2	\$38,492 per day	[2%]	[\$39,262 per day]
	Tier 3	The lesser of \$1,924,589 or 1% of total assets, per day	[2%]	[The lesser of \$1,963,081 or 1% of total assets, per day]
12 U.S.C. 1467(d)		\$9,623 per day	[2%]	[\$9,815 per day]
12 U.S.C. § 1817(a) <sup>10</sup>	Tier 1	\$3,849 per day	[2%]	[\$3,926 per day]
	Tier 2	\$38,492 per day	[2%]	[\$39,262 per day]
	Tier 3	The lesser of \$1,924,589 or 1% of total assets, per day	[2%]	[The lesser of \$1,963,081 or 1% of total assets, per day]
12 U.S.C. § 1817(c)	Tier 1	\$3,519 per day	[2%]	[\$3,589 per day]
	Tier 2	\$35,186 per day	[2%]	[\$35,890 per day]
	Tier 3	The lesser of \$1,759,309 or 1% of total assets, per day	[2%]	[The lesser of \$1,794,495 or 1% of total assets, per day]
12 U.S.C.	Tier 1	\$9,623 per day	[2%]	[\$9,815 per day]

<sup>8</sup> The following table represents the adjustments anticipated by FDIC staff based upon the CPI-U, published by the Bureau of Labor Statistics of the Department of Labor on November 15, 2017. However, such figures cannot be finalized until this year's OMB Guidance is issued.

<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> 12 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 \$527 per day to [\$538 per day].
  - \$25 million or more assets 16 or more days late: from \$1,056 per day to [\$1,077 per day].
  - Under \$25 million assets 1-15 days late: from \$176 per day to [\$180 per day].
  - Under \$25 million assets 16 or more days late: from \$352 per day to [\$359 per day].
- Subsequent violations:
  - \$25 million or more assets 1 to 15 days late: from \$879 per day to [\$897 per day].
  - \$25 million or more assets 16 or more days late: from \$1,759 per day to [\$1,794 per day].

Statute or Regulation		Amount of Penalty (As Adjusted January 15, 2017) <sup>9</sup>	Multiplier	Adjusted Penalty (after rounding)
§ 1818(i)(2) <sup>11</sup>	Tier 2	\$48,114 per day	[2%]	[\$49,076 per day]
	Tier 3 (insured depository institution)	The lesser of \$1,924,589 or 1% of total assets, per day	[2%]	[The lesser of \$1,963,081 or 1% of total assets, per day]
	Tier 3 (other)	\$1,924,589 per day	[2%]	[\$1,963,081 per day]
12 U.S.C. § 1820(e)(4)		\$8,797 per day	[2%]	[\$8,973 per day]
12 U.S.C. § 1820(k)(6)		\$316,566 per violation	[2%]	[\$322,897 per violation]
12 U.S.C. § 1828(a)(3)		\$120 per day	[2%]	[\$122 per day]
12 U.S.C. § 1828(h)		1% of amount of assessment per day unless assessment is < \$10,000, then \$120 per day <sup>12</sup>	[2%]	[1% of amount of assessment per day unless assessment is < \$10,000, then \$122 per day]
12 U.S.C. § 1829b(j)		\$20,111 per violation	[2%]	[\$20,513 per violation]
12 U.S.C. § 1832(c)		\$2,795 per violation	[2%]	[\$2,851 per violation]
12 U.S.C. § 1884		\$279 per day	[2%]	[\$285 per day]

<sup>11</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>12</sup> The \$120-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	\$9,623 per day	[2%]	[\$9,815 per day]
	Tier 2	\$48,114 per day	[2%]	[\$49,076 per day]
	Tier 3 (insured depository institution)	The lesser of \$1,924,589 or 1% of total assets, per day	[2%]	[The lesser of \$1,963,081 or 1% of total assets, per day]
	Tier 3 (other)	\$1,924,589 per day	[2%]	[\$1,963,081 per day]
<b>12 U.S.C. § 3909(d)</b>		\$2,394 per day	[2%]	[\$2,442 per day]
<b>15 U.S.C. § 78u-2(b)</b>	Tier 1 (individuals)	\$9,054 per violation	[2%]	[\$9,235 per violation]
	Tier 1 (others)	\$90,535 per violation	[2%]	[\$92,346 per violation]
	Tier 2 (individuals)	\$90,535 per violation	[2%]	[\$92,346 per violation]
	Tier 2 (others)	\$452,677 per violation	[2%]	[\$461,731 per violation]
	Tier 3 (individuals)	\$181,071 per violation	[2%]	[\$184,692 per violation]
	Tier 3 (others)	\$905,353 per violation	[2%]	[\$923,460 per violation]
<b>15 U.S.C. § 1639e(k)</b>	First violation	\$11,053 per day	[2%]	[\$11,274 per day]
	Subsequent violations	\$22,105 per day	[2%]	[\$22,547 per day]
<b>31 U.S.C. § 3802</b>		\$10,957 per claim	[2%]	[\$11,176 per claim]
<b>42 U.S.C. § 4012a(f)</b>		\$2,090 per violation	[2%]	[\$2,132 per violation]