

October 24, 2018

MEMORANDUM TO: The Board of Directors

FROM: Charles Yi
General Counsel

SUBJECT: Final Rule to Revise the FDIC's
Regulations Concerning Inflation-Adjusted Maximum Civil
Money Penalty Amounts

PROPOSAL

The Legal Division recommends that the Board of Directors (Board) approve, for publication in the *Federal Register*, a final rule that amends Parts 308 and 327 of the FDIC's Rules and Regulations. The Legal Division provided the Board with a Notice of Proposed Rulemaking for this technical amendment in July of 2018, which the Board approved by notational vote on July 19, 2018. The Notice of Proposed Rulemaking was published on August 3, 2018. The FDIC solicited comments for 60 days, and no comments were received during that time.

As was explained in the Notice of Proposed Rulemaking, the final rule: (1) removes duplicative, descriptive regulatory language related to civil money penalty (CMP) amounts that restates existing statutory language regarding such CMPs; (2) codifies Congress's recent change to CMP inflation-adjustments in the FDIC's regulations; and (3) directs readers to an annually published notice in the *Federal Register*—rather than the Code of Federal Regulations (CFR)—for information regarding the maximum CMP amounts that can be assessed after inflation adjustments. These revisions are intended to simplify the CFR by removing unnecessary and redundant text and to make it easier for readers to locate the current, inflation-adjusted maximum CMP amounts by presenting these amounts in an annually published chart. Lastly, the final rule revises cross-references and corrects four errors currently located at section 308.132(d)(1) and (d)(3), and these corrections will be reflected in the annual *Federal Register* CMP notice. All of the amendments are ministerial and technical. No additional changes were made from the Notice of Proposed Rulemaking to the final rule.

BACKGROUND

The FDIC assesses CMPs under 12 U.S.C. 1818(i) and a variety of other statutes.¹ Congress has established maximum penalties that can be assessed under these statutes. Since 1990, Congress has required federal agencies with authority to impose CMPs to periodically adjust the maximum CMP amounts these agencies are authorized to impose.² In 2015, Congress passed the Federal

¹ See, e.g., 12 U.S.C. 1972(2)(F) (authorizing the FDIC to impose CMPs for violations of the Bank Holding Company Act of 1970 related to prohibited tying arrangements); 15 U.S.C. 78u-2 (authorizing the FDIC to impose CMPs for violations of certain provisions of the Securities Exchange Act of 1934); 42 U.S.C. 4012a(f) (authorizing the FDIC to impose CMPs for pattern or practice violations of the Flood Disaster Protection Act).

² See The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410.

Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Adjustment Act), which revised the process by which federal agencies adjust CMPs for inflation.³ Under the 2015 Adjustment Act, the FDIC is required to make annual adjustments to its maximum CMP amounts to account for inflation.⁴ The FDIC's 2018 adjustments were published on January 12, 2018.⁵

The 2015 Adjustment Act directs federal agencies to follow guidance issued by the OMB when calculating new maximum penalty amounts.⁶ The OMB issued guidance for the 2018 CMP adjustments on December 15, 2017.⁷ This OMB Guidance noted, "Some agencies have chosen to remove their specific penalty amounts from the CFR and have instead codified the statutory formula for inflation adjustments. Agencies must still publish their penalty adjustments in the *Federal Register*."⁸ On December 19, 2017, the Board delegated to the Executive Secretary and the General Counsel the authority to publish the annual inflation-adjustments in the *Federal Register*.⁹

Currently, 12 CFR sections 308.116(b) and 308.132(d) contain the maximum CMP amounts that may be assessed for violations of various statutes, along with lengthy descriptions of these statutes. The descriptive language contained in sections 308.116(b) and 308.132(d) merely restates the enabling statutory language, and does not provide substantive interpretation or guidance regarding the underlying statutes. The FDIC's current format for identifying inflation-adjusted CMP figures differs significantly from the formats published by other prudential regulators. The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), and the National Credit Union Association (NCUA) provide a simplified list in a tabular format, identifying each enabling statute and the associated maximum CMP amount, adjusted for inflation.¹⁰ This format reduces redundancy and provides an easy format for readers to locate applicable maximum CMP amounts.

THE FINAL RULE

The final rule removes the duplicative, descriptive regulatory language found in sections 308.116(b) and 308.132(d). The final rule, however, retains non-duplicative, interpretive language in section 308.116(a), (c) and (d) concerning violations of the Change in Bank Control Act. These regulations, which the FDIC implemented in 1991, address requests for a hearing, mitigating factors, and the consequences of a respondent's failure to answer.¹¹ The final rule

³ Pub. L. 114-74, sec. 701, 129 Stat. 584.

⁴ See 2015 Adjustment Act at sec. 701(b).

⁵ See 83 FR 1519.

⁶ See Pub. L. 114-74, sec. 701(b), 129 Stat. 584.

⁷ OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-18-03 (OMB Guidance), available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf>.

⁸ OMB Guidance at 4 (citing 81 FR 41438 (June 27, 2016) (Social Security Administration) (codified at 29 CFR 498.103(g))).

⁹ Board resolution number 084849.

¹⁰ See 12 CFR 19.240 (2018) and 83 FR 1657 (Jan. 12, 2018) (table containing the OCC's CMP adjustments); 12 CFR 263.65 (2018) (table containing the FRB's CMP adjustments); 12 CFR 747.1001 (2018) (table containing the NCUA's CMP adjustments).

¹¹ See 56 FR 37968, 37989 (Aug. 9, 1991).

keeps a revised version of the language concerning penalties for the late filing of Call Reports, currently located at section 308.132(d)(1) and (d)(3). In 1991, the FDIC issued regulations that subdivided the Tier One statutory maximum CMP amounts based upon the size of the institution and the nature of the violations.¹² These regulations are not mere restatements of existing statutory text but rather provide substantive regulatory interpretation. The final rule merges most of the language of current subsections 308.132(d)(1) and (d)(3) into a new section 308.132(e). This new subsection retains the substantive regulatory interpretations but directs readers to the *Federal Register* to determine the applicable maximum inflation-adjusted penalty amounts.

In place of the deleted regulatory text, the final rule codifies the statutory formula for inflation adjustments to the maximum CMP amounts and directs readers to a table, published annually in the *Federal Register*, containing the inflation-adjusted maximum CMP amounts. These changes are consistent with the OMB Guidance and the practices of other Federal regulators. Staff believes that these changes remove unnecessary and redundant language from the CFR and improve readability by presenting the maximum CMP amounts in a chart. The FDIC invited comments on all aspects of the final rule in a Notice of Proposed Rulemaking, dated August 3, 2018.¹³ Commenters were specifically encouraged to identify any technical issues raised by the final rule. The FDIC provided a 60-day comment period for the final rule, but the agency did not receive any comments.

The final rule corrects four errors currently located at section 308.132(d)(1) and (d)(3) concerning the maximum amount that generally will be assessed for violations of 12 U.S.C. §§ 1464(v) and 1817(a) regarding the late filing of Call Reports by certain small institutions. The current text contains the inadvertent overstatement of four fractions of an institution's total assets that are paired with correctly stated basis-point figures. The corrections in the final rule align the listed fractions of an institution's total assets with the listed basis-point calculations, and these corrections will be reflected in the annual *Federal Register* CMP notice.¹⁴

Lastly, the final rule revises cross-references found at sections 308.502(a)(6), 308.502(b)(4), 308.530, and 327.3(c) to reflect the revisions to section 308.132(d).

RECOMMENDATION

FDIC staff recommends that the Board approve the attached final rule for publication in the *Federal Register*.

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¹² See 56 FR 37968, 37992-93 (Aug. 9, 1991).

¹³ See 83 FR 38080, available at <https://www.gpo.gov/fdsys/pkg/FR-2018-08-03/pdf/2018-16548.pdf>.

¹⁴ For example, current section 308.132(d)(1)(i)(A) states, "the amount assessed shall be the greater of [an inflation-adjusted daily penalty] or 1/1,000th of the institution's total assets (1/10th of a basis point)" when it should read, "the amount assessed shall be the greater of [an inflation-adjusted daily penalty] or 1/100,000th of the institution's total assets (1/10th of a basis point)." (Emphasis added.)