INTRODUCTION

The Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRIRCA) gave the FDIC authority to prospectively assess civil money penalties (CMPs) against both banks and individuals. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) significantly increased the penalties for both banks and individuals and broadened the applicability of civil money penalties. Civil money penalties may be assessed for the violation of any law or regulation, any final order or temporary order issued, any condition imposed in writing by the appropriate Federal banking agency in connection with the approval of any application, and any written agreement between a depository institution and Federal banking agency. For example, civil money penalties may be assessed in the following instances:

1. Violations involving changes in control of banks. Refer to Section 7(j) of the FDI Act, Parts 303 and 308 of the FDIC Rules and Regulations, and the Applications Section of this Manual.
2. Violations involving participation by a convicted individual in the affairs of an insured depository institution. Refer to Section 19 of the FDI Act and the Applications Section of this Manual.
3. Violations of cease-and-desist orders that have become final. Refer to Section 8(i)(2) of the FDI Act, Part 308 of the FDIC Rules and Regulations, and the Formal Administrative Actions Section of this Manual.
4. Violations of Section 23A of the Federal Reserve Act (loans to affiliates). Refer to Section 18(j)(1) and 18(j)(3) of the FDI Act, Part 308 of the FDIC Rules and Regulations, and the Related Organizations Section of this Manual.
5. Violations of Section 22(h) of the Federal Reserve Act (loans to directors, officers, and principal stockholders). Refer to Section 18(j)(2) and 18(j)(3) of the FDI Act, Part 308 of the FDIC Rules and Regulations, and the Management Section of this Manual.
6. Violations of Section 106(b) of the Bank Holding Company Act (tying arrangements - official family loans and linked correspondent accounts). Refer to Section 106(b)(2)(F) of the Bank Holding Company Act Amendments of 1970, Part 308 of the FDIC Rules and Regulations, and the Related Organizations Section of this Manual.
7. Violations of Section 3907 of the International Lending Supervision Act of 1983 involving an issued Capital Directive. Refer to Sections 3907 and 3909 of ILSA, Part 325 of the FDIC Rules and Regulations, the Capital Section and the Formal Administrative Actions Section of this Manual.

VIOLATIONS

The previously mentioned statutes and regulations, with the exception of those relating to changes in bank control, define "violations" as including, but not limited to, "any action (alone or with another) for or towards causing, bringing about, participating in, counseling, or aiding or abetting a violation." The definition is exceptionally broad and will likely encompass any violation of the applicable statutes.

ASSESSMENT OF CIVIL MONEY PENALTIES

Civil money penalties are assessed not only to punish the violator according to the degree of culpability and severity of the violation, but also to deter future violations. Although relevant to the FDIC's interests, the primary purpose for utilizing civil money penalties is not to effect remedial action. Such action, in the form of restitution or other corrective measures, should be separately pursued.

In 1998, the FDIC adopted a revised interagency statement of policy regarding the assessment of civil money penalties. To facilitate evaluation of the gravity of such violation(s), the policy statement sets forth the following factors which must be considered in determining whether civil money penalties should be imposed:

1. Evidence that the violation or practice or breach of fiduciary duty was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution;
2. The duration and frequency of the violations, practices, or breaches of fiduciary duty;
3. The continuation of the violations, practices, or breach of fiduciary duty after the respondent was notified or, alternatively, its immediate cessation and correction;
4. The failure to cooperate with the agency in effecting early resolution of the problem;
5. Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty;
6. Any threat of loss, actual loss, or other harm to the institution, including harm to the public confidence in the institution, and the degree of such harm;
7. Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty;

8. Evidence of any restitution paid by a participant of losses resulting from the violation, practice, or breach of fiduciary duty;
9. History of prior violation, practice, or breach of fiduciary duty, particularly where they are similar to the actions under consideration;
10. Previous criticism of the institution or individual for similar actions;
11. Presence or absence of a compliance program and its effectiveness;
12. Tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty; and
13. The existence of agreements, commitments orders, or conditions imposed in writing intended to prevent the violation, practice, or breach of fiduciary duty.

FDIC policy provides that civil money penalty recommendations should only be initiated when the fineable violation is believed to meet the test of gravity as required by FIRIRCA including consideration of the 13 relevant factors found in the interagency statement of policy and the existence of any one of the following criteria:

1. The violation causes the bank to suffer a substantial financial loss;
2. The violation is willful, flagrant, or otherwise evidences bad faith on the part of the bank or individual(s) involved in the violation (including repeated and/or multiple violations, if applicable);
3. The violation directly or indirectly involves an insider, or an associate of an insider, who benefits from the transaction in a material or substantial way; or
4. Previous supervisory means (i.e., specific supervisory comment or correspondence, Memorandum of Understanding, previous civil money penalty assessment, or Cease-and-Desist Order) have not been effective in eliminating or deterring violations.

The aforementioned policy delineates the circumstances under which civil money penalty action may possibly be initiated, but is not intended to preclude consideration of any other matters relevant to a possible civil money penalty assessment. In addition, other fineable violations will be evaluated for recommendation of civil money penalties based on the 13 factors listed above. Where assessment of a civil money penalty is not considered appropriate in these cases, corrective action may be sought by means of a Supervisory Letter sent by the Regional Office to the bank's board of directors. The letter should request adoption of a resolution indicating the directorate's intent to correct the violation(s) and request that procedures be implemented to prevent future infractions. The bank should also be advised to notify the Regional Director when and how the violation(s) have been remedied. An insufficient response from the bank/individual to the Regional Office on the issues covered in the Supervisory Letter may constitute grounds for recommending initiation of civil money penalties.

With regard to a violation of a Cease-and-Desist Order which has become final or an issued Capital Directive, at the discretion of the Regional Director, a recommendation may be made (1) for court enforcement under Section 8(i)(1) of the FDI Act or (2) for initiation of assessment of a civil money penalty, as authorized. The determination should be based on which appears to be most appropriate for the given situation, will most likely result in correction of deficiencies giving rise to the penalty and will achieve the FDIC's objectives.

Penalties

It is the FDIC's policy that, whenever a violation committed by an individual results in personal financial or economic gain and/or financial loss to the bank, the amount involved shall be repaid as a portion of the penalty assessment or, preferably, through restitution to the bank if the bank suffered a loss. More specifically, an attempt should be made to have the individual make restitution to the injured bank for all losses suffered, or absent restitution, repay the personal gain or bank loss through the recommended assessment, plus pay a penalty over and above these amounts for violating the law. If the bank has suffered a loss, willingness and promptness in making restitution should have a bearing on the amount of penalty recommended. If the size of the bank's loss is such that restitution to the bank is desirable and there is no response to informal action, Section 8(b) action should be considered. If the size of the bank's loss is of little consequence in relation to the bank's financial resources, then the amount of loss should be incorporated into the recommended assessment.

Tiered penalty levels have been established. Tier 1 penalties of up to $5,500 per day may be assessed for most violations. If a party commits a violation, recklessly engages in an unsafe or unsound practice or breaches a fiduciary duty which is part of a pattern of misconduct, causes more than minimal loss to the institution or results in a pecuniary gain to such party, then the potential maximum penalty (Tier 2 penalty) increases to $27,500 per day. A Tier 3 penalty of the lessor of $1,100,000 or 1% of total assets may be assessed if a violation, unsafe or unsound practice, or breach of fiduciary duty is knowingly committed and causes a substantial loss to the institution or a substantial pecuniary gain to the violator.

Examiners should recommend a specific money penalty and, as stated in the policy statement, the financial or economic benefit received by the violator should be given significant consideration. In this regard, details of any such benefits must be adequately documented. Depending on the circumstances, the proposed penalty may be:

1. A multiple of the benefit when a strong deterrent on future actions is believed warranted;
2. A fraction when credible assurance of future compliance is received and, where applicable, restitution has been made; or
3. Simply the benefit itself.

To determine an appropriate penalty amount, each case must be considered on its own merits in light of the factors in the law and the policy statement. Consideration should be given to the maximum amount (which must not be exceeded) that can be assessed under the statutes; however, in many cases the amount is so large as to be considered unreasonable and the penalty should be tempered through judgment as to the seriousness of the violation. Prime factors to be considered are the amount of loss to the bank and/or gain to the individual charged, if any. Restitution to the bank of the amount lost should be determined and might be used in reducing the amount of the penalty that otherwise might be assessed. If restitution does not occur, the amount may be included as a portion of the penalty. The financial resources of the individual charged must also be weighed, which may cause a recommended penalty below that which would appear appropriate. Finally, the gravity of the violation and the involvement in the violation of the individual charged should be considered. A determination that the violation was particularly egregious and/or that the individual was directly involved in causing the violation or benefited from it would result in a larger recommended penalty than would a mere technical violation or one in which the individual was not directly involved.

Specific recommendations for assessment of penalties should be forwarded to the Regional Office and not communicated to the bank, its officers, or directors.

EXAMINATION PROCEDURES

The following procedures should be followed whenever fineable violations of laws or regulations are encountered:

1. When fineable violations, unsafe or unsound banking practices, or breaches of fiduciary duty of the type detailed in Section 8(i), 7(j) or 18(j) of the FDI Act are discovered and it is contemplated that CMPs may be an appropriate administrative action, examiners should complete the Civil Money Penalty Matrix. The CMP Matrix will aid the examiner in supporting the appropriateness and/or level of CMPs. The thirteen factors contained in the FFIEC policy statement regarding CMPs are built into the matrix and provide the bases for recommended actions or assessments. Although the CMP Matrix is generally most useful in Tier 1 penalty cases, it should be prepared whenever a penalty is being considered. The CMP Matrix is included at the end of this section.
2. When other fineable violations of statute (such as those detailed in Sections 7(a) and 7(c) of the FDI Act regarding late or inaccurate Reports of Condition and inaccurate certification statements or late payment of deposit insurance assessments) are encountered, the examiner should seek guidance from the Regional Office if the violation is severe and flagrant in nature.
3. Examination comments on the Violations of Laws and Regulations schedule generally should not contain references to the FDIC's power to impose civil money penalties or the maximum dollar amount of CMPs that may be imposed; comments of this nature should be included in only the most serious situations.
4. Reference on the Examination Conclusions and Comments schedule to apparent violations of laws and regulations depends on the seriousness of the situation and the examiner's intentions regarding recommendation of penalties and/or enforcement actions.
5. Examiners should fully discuss violations of law with management; however, discussion of the civil money penalty process should be limited. Unless the examiner intends to recommend the imposition of CMPs, there is minimal need to raise the issue with bank officers or directors. If the issue is raised, examiners may discuss the criteria used by the FDIC to determine whether to assess a penalty and the process involved.
6. The home mailing address for all directors and any other individuals involved in a fineable violation should be included in the Confidential Section of the examination report when it is contemplated that CMPs may be assessed.
7. When a violation involves financial gain to an insider and/or financial loss to the bank (in most instances, the insider's gain will be the bank's loss), the examiner should attempt to determine a monetary value. If management is cooperative, the amount should be determined with the assistance of bank personnel and indicated on the violations page. Otherwise, the examiner should estimate the amount and include it in the violation write-up along with the method of calculation. If the examiner cannot estimate the

monetary value with any degree of confidence, he/she should so state and include the reason why.

8. The Regional Office should be consulted to determine the supporting evidence needed in connection with scheduling a violation where a fine is contemplated. Regional Counsel should be consulted regarding determination of the violation and sufficiency of evidence.
9. Examiners should not discuss penalty matters relating to Section 8 matters; examiners may only confirm to bank management that CMPs may be assessed for noncompliance with terms of the order. This precaution is necessary because determination of noncompliance with a Section 8 Order is made by the Regional Director.
10. Evidence in support of a likely action should be copied and retained in field office files. This evidence should be segregated in a labeled envelope and kept apart from regular workpapers.

OTHER CONSIDERATIONS

If a fineable violation, for which prompt action appears warranted, is cited in a state report of examination, the Regional Office should schedule a visitation. The assigned examiner should be instructed to investigate the violation and, if appropriate, gather sufficient documentation to support a civil money penalty recommendation and/or request for restitution. If a flagrant violation does not appear to be involved, the Regional Director may postpone an investigation until the next scheduled FDIC examination or visitation. A state report of examination should generally not be utilized to support a civil money penalty recommendation or request for restitution, however, the Regional Director does have discretion to utilize it if it is deemed adequate.

Examiners involved in recommending civil money penalties should be mindful that such actions are covered under the Equal Access to Justice Act. The Act provides that certain parties who prevail in contested administrative or judicial proceedings against an agency of the Federal government may be able to recover their litigation expenses from the agency, if the position of the agency in the proceeding was not substantially justified. Examiners should use special care not to charge any practice or violation on inadequate grounds. Examiners should also be mindful that Confidential Section comments will be a matter of record at any required hearing. Comments and observations in the Confidential Section must be well supported and able to withstand cross-examination in a hearing.

GUIDELINES FOR USING THE CMP MATRIX

1. The CMP Matrix contains factors identified by the FFIEC as those which are relevant in determining the appropriateness of initiating a civil money penalty assessment. These factors, along with those statutorily provided, are also used in determining the assessed amount of a civil money penalty. However, these factors and this Matrix are provided solely as guides and do not replace sound supervisory judgment. As a general rule, it is recommended to use the following guidelines in determining how many matrices should be filled out:

   a. One Matrix per person for all violations, reckless unsafe and unsound practices or breaches of fiduciary duty; where there are several violations, practices, or breaches of duty included in one matrix, the highest severity level applicable to any of the violations, practices or breaches of duty should be recorded for each factor on the Matrix. Thus, if a single director approved a loan in violation of Regulation O, another loan in violation of State lending limitations, and engaged in reckless unsafe practices, only 1 Matrix should be completed for that director, with the highest severity level applicable to either of the violations and any of the unsafe practices recorded for each Matrix factor.

   b. One Matrix for a group of persons with similar culpability. Thus, if 6 directors approved a loan in violation of Regulation O, another loan in violation of State lending limitations, and engaged in reckless unsafe practices, and all were equally culpable, only 1 Matrix should be completed for the 6 directors. However, if 2 directors were more culpable than the other 4 directors, a separate Matrix should be completed for those 2 directors.

2. The Matrix generally applies to tier 1 penalties of up to $5,500 per day against institutions and institution-affiliated parties (IAP's) who engage in violations of law, regulations, final or temporary orders, formal agreements, and conditions imposed in writing in connection with the grant of any application or other request by the institution. The FDIC may also assess tier 2 penalties of up to $27,500 per day for the above violations, unsafe and unsound banking practices recklessly engaged in, and breaches of fiduciary duty, which are part of a pattern of misconduct, or cause or are likely to cause more than a minimal loss to the institution, or result in a pecuniary gain to the institution or individual. In addition, the FDIC may assess tier 3 penalties of up to $1.1 million per day for knowing violations, unsafe and unsound practices, and breaches of duty, which knowingly or recklessly cause a substantial loss to the institution, or a substantial pecuniary gain to the institution or individual. If the recommendation is to assess a penalty in excess of $5,500 per day, or if penalties for unsafe practices or breaches of duty are recommended, the examiner should consult with Regional Counsel to determine whether the criteria are met for a tier 2 or tier 3 penalty.

3. One may use the following definitions as a guide in using the Matrix:

   b. An ***Institution-affiliated party (IAP)*** is (1) any director, officer, employee or controlling shareholder (other than a bank holding company) of an insured depository institution, (2) any person who has filed or is required to file a change-in-control, (3) any shareholder, consultant, joint venture partner, or other person who participates in the institution's affairs, or (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in violations of law or regulation, breaches of fiduciary duty, or unsafe or unsound practices, which caused or are likely to cause more than a minimal financial loss to, or a significant adverse effect on, the institution.

   c. An ***unsafe and unsound practice*** is one in which there has been some conduct, whether act or omission, which is contrary to accepted standards of prudent banking operation, and which might result in exposure of the bank or its shareholders to abnormal risk or loss. An unsafe or unsound practice may be considered reckless if it evidences disregard of, or indifference to, the consequences of the practice, even though no harm may be intended.

   d. A ***fiduciary duty*** is a duty of great confidence and trust, which includes a high degree of good faith. For example, bank officers and directors have a fiduciary duty to protect the bank's assets, further the best interests of the bank, and not place their interests above those of the bank.

4. ***Pecuniary Gain or Other Benefit to IAP***: In assessing this factor, the monetary gain or other benefit may be to the IAP who committed the violation, recklessly engaged in an unsafe or unsound practice, or who

breached any fiduciary duty, or to any other IAP or their related interests.

5. ***Previous Administrative Action or Criticism***: Under severity level #1, the reference to "similar violation" could refer to prior criticisms for violations under the same statute or regulation, e.g., a previous violation of a Section 23A provision and currently a violation of a different 23A provision. This could also refer to violations similar in nature, e.g., a previous violation of state law regarding lending limit and currently a violation of the aggregate lending limit provision of Regulation O.

6. ***History***: Under severity level #2, the reference to "similar violation" has the same meaning as the reference to "similar violation" used in the ***Previous Administrative Action or Criticism*** factor explained above.

7. ***Loss***: In assessing this factor, "potential loss" refers to any time at which the bank was in danger of sustaining a loss. Accordingly, if the violation caused a possible loss in its first month, but posed no risk of loss in the second month, the bank experienced a potential loss which falls with this category.

8. ***Continuation***: The reference to "notification" in this factor includes notice of the violation, practice or breach by the FDIC, other regulatory agencies, external auditors, internal auditors or other parties whose responsibilities include providing the bank and/or its subsidiaries with information about its operations.

9. ***Concealment***: This factor pertains to the concealment of a violation, practice or breach from the FDIC, the bank's board of directors or internal and external auditors.

10. ***Impact***: In assessing this factor, it is appropriate to consider any possible negative impact or harm to the bank, other than loss.

11. ***Loss or Harm to Securities Holders or Consumers***: This factor only applies in cases involving violations of securities laws, rules, or regulations applicable to state nonmember banks (where securities holders incur loss or are otherwise harmed) or consumer banking laws, orders, agreements or conditions, unsafe or unsound practices, or breaches of duty.

12. ***Good Faith***: In assessing a person's good faith, the examiner should generally focus on facts and circumstances which occurred prior to notification of the violation, practice or breach by the FDIC, other regulatory agencies, external auditors, internal auditors or other parties whose responsibilities include providing the bank and/or its subsidiaries with information about its operations.

13. ***Full Cooperation***: In assessing this factor, the examiner should generally focus on facts and circumstances which occurred after notification of the violation, practice or breach by the FDIC, other regulatory agencies, external auditors, internal auditors or other parties whose responsibilities include providing the bank and/or its subsidiaries with information about its operations.

For additional information and guidance, please also refer to:

- The **Formal and Informal Action Procedures Manual**, and
- The Division of Supervision and Consumer Protection **Case Managers Procedures Manual**.

CMP Matrix

Boxes on the Matrix (including the empty boxes) should be used to reflect progressive levels of severity. As used in the Matrix, the term "violations" also refers to reckless unsafe and unsound practices and breaches of fiduciary duty.

	0	1	2	3	4	WGT.	POINTS
Intent	No		Should Have Known		Clear Intent	5	
Pecuniary Gain or Other Benefit to Institution Affiliated Party (IAP) or Related Interest	No			Indirect Benefit to IAP or Related Interest	Direct Benefit to IAP or Related Interest	4	
Previous Administrative Action or Criticism	None	Previous Criticism for Similar Violation	Violation or Criticism on Point Cited in Exam or Visit Report	MOU or Supervisory Letter on Point	8(a), C&D, Agreement, Condition in Writing or Prior Assessment on Point	3	
History	None	Unrelated Prior Violations	At least One Similar Violation	Several Similar Violations	Frequent Similar Violations	2	
Loss or Risk of Loss to Bank	No Loss and No Risk of Loss	No Loss or Minimal Risk	Minimal Loss or Moderate Risk		Substantial Actual or Potential Loss	6	
Number of Violations at Issue					Numerous Violations	2	
Duration of Violations Prior to Notification					Violations Outstanding for Long Time	2	
Continuation after Notification	Violation(s) Ceased Prior to Notification	Violation(s) Ceased Immediately Upon Notification		Violation(s) Continued for Period of Time After Notification	Violation(s) Still Continuing	3	
Concealment	None			Purposely Complicated Transaction to Make it Difficult to Uncover	Active Concealment	5	
Impact Other Than Loss	No Impact on Bank or Banking Industry		Substantial Impact on Bank. No Impact on Banking Industry	Moderate Impact on Banking Industry or on Public Perception of Banking Industry	Substantial Impact on Banking Industry or on Public Perception of Banking Industry	6	
Loss or Harm to Securities Holders or Consumers (Securities or Consumer Laws Only)	No Loss and No Harm	No Loss or Minimal Harm	Minimal Loss or Moderate Harm		Substantial Loss or Harm	5	
Subtotal 1							
Restitution	No Restitution	Complete Restitution Under Compulsion	Partial Restitution	Complete Restitution Immediately After Loss or Violation Brought to Attention	Complete Restitution Voluntarily, Before Bank or Examiner Uncovered Loss	2	
Good Faith (prior to Notification)	None				Unintentional Violation	3	
Full Cooperation (after Notification)	None				Forthcoming in Interviews	2	
Subtotal 2							
Total (subtract 2 from 1)							

CMP MATRIX (Continued)

Points	Suggested Action	Responsibility
0-30	Consider not making referral.	Examiner reviews fineable offense(s) and applies Matrix. Workpapers should support decision to not refer.
31-40	Consider sending supervisory letter.	Examiner reviews fineable offense(s) and applies Matrix. Prepares referral to Regional Office. Regional Director considers sending 15-day letter. After consideration of response and referral, Regional Office applies Matrix. Regional Director considers sending a supervisory letter which would inform that, while a penalty assessment will not be pursued, policies which will prevent recurrence of the fineable offense(s) must be adopted and implemented. If decision is made to send a supervisory letter, such letter is sent by the Regional Director.
41-50	Consider assessment of $1M up to $5M.	Examiner reviews fineable offense(s), applies Matrix, and prepares referral to Regional Office. Regional Director sends 15-day letter. After consideration of response and referral, Regional Office applies Matrix. If recommendation is to assess a penalty, case should be submitted to the Washington Office. Prior to submission to Washington Office, Regional Office should determine that recommended penalty does not exceed maximum penalty permitted. Washington Office reviews recommendation and takes appropriate action.
51-60	Consider assessment of greater than $5M up to $10M.	Same as immediately above.
61-80	Consider assessment of greater than $10M up to $25M.	Same as above.
81-100	Consider assessment of greater than $25M up to $75M.	Same as above.
101-120	Consider assessment of greater than $75M up to $125M.	Same as above.
120+	Consider assessment of greater than $125M.	Same as above.