June 14, 2016

MEMORANDUM TO: The Board of Directors

FROM: Charles Yi
General Counsel

SUBJECT: Interim Final Rule Adjusting Civil Money Penalties for Inflation

PROPOSAL

The Legal Division recommends that the Board of Directors approve, for publication in the *Federal Register*, an interim final rule amending 12 C.F.R. Part 308. This interim 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.[1] These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Adjustment Act),[2] 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.[3] Under the previous statutory process, the FDIC adjusted its CMP amounts every four years, most recently in 2012.[4] In contrast, the 2015 Adjustment Act requires the FDIC to (1) adjust CMP levels with an initial catch-up adjustment through the publication of an interim final rule on or before July 1, 2016, and (2) make

[1] The adjusted numbers reflect the maximum amounts that the FDIC is authorized to assess under each applicable statute, on or after August 1, 2016. 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).
[2] Pub. L. 114-74, sec. 701, 129 Stat. 584.
[3] 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).
[4] *See* 77 FR 74,573 (Dec. 17, 2012).

subsequent annual adjustments for inflation on or before January 15 of each year, starting in 2017.[5]

The 2015 Adjustment Act requires the FDIC to amend its rules through an interim final rulemaking. In making these adjustments, the 2015 Adjustment Act directs the FDIC to follow guidance issued by the Office of Management and Budget (OMB) on February 24, 2016 (OMB Guidance).[6] Initial, catch-up adjustments are to be based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U)[7] for the month of October in the year for which the CMP was established by Congress or last adjusted for inflation (other than through the 1990 Adjustment Act), and the October 2015 CPI-U.[8] Although the FDIC is not required to complete a notice-and-comment process prior to publication of this interim final rule in the *Federal Register*,[9] the FDIC will invite comments on all aspects of this interim final rule for a period of 60-days to ensure that the interim final rule has been presented in a clear, understandable, and well-organized manner and to identify any technical issues that may be raised by the rule.

Implementing the Required Inflation Adjustment

To satisfy the requirements of the 2015 Adjustment Act, staff has applied the required inflation adjustments to each CMP the FDIC is authorized to assess. 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.

Inclusion of Previously Omitted CMPs

As required by the 2015 Adjustment Act, the proposed interim final rule also incorporates adjustments to two categories of CMPs previously inadvertently omitted from the FDIC's last inflation-adjustment rulemaking in 2012. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)[10] amended the Truth in Lending Act to establish independence standards for property appraisals and authorized the FDIC and other federal agencies to assess specified CMPs against persons who violate these provisions (Appraisal Independence CMP).[11] Title III of the Dodd-Frank Act also transferred the functions, powers,

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[5] Staff expects to return to the Board before January 15, 2017, to implement the next set of required adjustments.
[6] *See* OMB, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M-16-06 *available at* https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.
[7] The CPI-U is compiled by the Bureau of Statistics of the Department of Labor.
[8] The OMB Guidance directs agencies to identify, for each CMP, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (*i.e.*, as originally enacted by Congress) or last adjusted (*i.e.*, by Congress in statute, or by the agency through regulation), whichever is later, other than under the Inflation Adjustment Act. OMB Guidance at 3.
[9] OMB Guidance at 3.
[10] Pub. L. 111-203, tit. XIV, sec. 1472(a), 124 Stat. 2187.
[11] 15 U.S.C. 1639e(k).

and duties of the Office of Thrift Supervision relating to State savings associations to the FDIC and amended section 3 of the Federal Deposit Insurance Act to designate the FDIC as the ''appropriate Federal banking agency'' for State savings associations. Among the transferred authorities was the authority to impose CMPs against any State savings association under section 9(d) of the Home Owners' Loan Act (HOLA) (12 U.S.C. § 1467(d)) if an affiliate of such an institution refuses to permit a duly-appointed examiner to conduct an examination or refuses to provide information during the course of an examination (Savings Association CMP).

Neither the Appraisal Independence CMP nor the Savings Association CMP was previously included in Part 308. Nonetheless, the FDIC is required by the 2015 Adjustment Act to adjust all CMPs the FDIC is authorized to assess in the agency's inflation-adjustment rulemaking. Consequently, the present amendment to Part 308 specifically incorporates provisions in 12 C.F.R. § 308.132 (Section 308.132) related to the Appraisal Independence CMP and Savings Association CMP, applying the adjustments required under the 2015 Adjustment Act and the OMB Guidance to these penalties.

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

The proposed interim final rule corrects a typographical error in Section 308.132(c) by indicating that the FDIC's Board of Directors or its designee may assess CMPs under 12 C.F.R. § 308.1(e) rather than the incorrect "308.01(e)(1)." Staff also proposes reorganizing the CMPs referenced in Section 308.132 in ascending alpha-numeric order by title and section to assist readers in quickly identifying the applicable CMP amounts. A table identifying the current and proposed revised location of each provision within Section 308.132 is attached to this document as Exhibit B. Finally, the proposed interim final rule updates existing cross-references to Section 308.132 that are found in Chapter III of Title 12 of the Code of Federal Regulations to reflect the resultant changes made by the interim final rule.

RECOMMENDATION

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

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Exhibit A – Calculation of Inflation Adjustments

Statute or Regulation		Year Enacted or Last Adjusted	Amount of Penalty (Originally Enacted or Last Adjusted)[1]	Multiplier	Adjusted Penalty (before rounding)	Adjusted Penalty (after rounding and comparison calculation)[2]
12 U.S.C. § 1464(v)	Tier 1	1989	$2,000 per day	1.89361	$3,787.22	$3,787
	Tier 2	1989	$20,000 per day	1.89361	$37,872.20	$37,872
	Tier 3	1989	The lesser of $1,000,000 or 1% of total assets, per day	1.89361	$1,893,610	$1,893,610
12 U.S.C. 1467(d)		1989	$5,000 per day	1.89361	$9,468.05	$9,468
12 U.S.C. § 1817(a)[3]	Tier 1	1989	$2,000 per day	1.89361	$3,787.22	$3,787
	Tier 2	1989	$20,000 per day	1.89361	$37,872.20	$37,872
	Tier 3	1989	The lesser of $1,000,000 or 1% of total assets, per day	1.89361	$1,893,610	$1,893,610

[1] 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.

[2] The methodology for the adjustment calculations can be found at page 3 of the relevant OMB guidance *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*, M-16-06 (Feb. 24, 2016) (OMB Guidance), *available at* https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.

[3] 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). The OMB Guidance states that penalty figures from 1991 should be multiplied by 1.73099; accordingly, the revised penalty amounts will be adjusted as follows:

- First violation:
  - $25 million or more assets 1-15 days late: from $300 per day (original) to $519 per day (adjusted).
  - $25 million or more assets 16 or more days late: from $600 per day to $1,039 per day.
  - Under $25 million assets 1-15 days late: from $100 per day to $173 per day.
  - Under $25 million assets 16 or more days late: from $200 per day to $346 per day.
- Subsequent violations:
  - $25 million or more assets 1 to 15 days late: from $500 per day to $865 per day.
  - $25 million or more assets 16 or more days late: from $1,000 per day to $1,731 per day.

Statute or Regulation		Year Enacted or Last Adjusted	Amount of Penalty (Originally Enacted or Last Adjusted)[1]	Multiplier	Adjusted Penalty (before rounding)	Adjusted Penalty (after rounding and comparison calculation)[2]
12 U.S.C. § 1817(c)	Tier 1	1991	$2,000 per day	1.73099	$3,461.98	$3,462
	Tier 2	1991	$20,000 per day	1.73099	$34,619.80	$34,620
	Tier 3	1991	The lesser of $1,000,000 or 1% of total assets, per day	1.73099	$1,730,990	$1,730,990
12 U.S.C. § 1818(i)(2)[4]	Tier 1	1989	$5,000 per day	1.89361	$9,468.05	$9,468
	Tier 2	1989	$25,000 per day	1.89361	$47,340.25	$47,340
	Tier 3 (insured depository institution)	1989	The lesser of $1,000,000 or 1% of total assets, per day	1.89361	$1,893,610	$1,893,610
	Tier 3 (other)	1989	$1,000,000 per day	1.89361	$1,893,610	$1,893,610
12 U.S.C. § 1820(e)(4)		1991	$5,000 per day	1.73099	$8,654.95	$8,655
12 U.S.C. § 1820(k)(6)		2004	$250,000 per violation	1.24588	$311,470	$311,470
12 U.S.C. § 1828(a)(3)		2006	$100 per day	1.17858	$117.86	$118
12 U.S.C. § 1828(h)		2006	1% of amount of assessment per day unless assessment is < $10,000, then $100 per day[5]	1.17858	$117.86	$118
12 U.S.C. § 1829b(j)		1988	$10,000 per violation	1.97869	$19,786.90	$19,787

[4] 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. § 1693*o*(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. § 1692*l*(b)); the Electronic Funds Transfer Act (15 U.S.C. § 1693*o*(a)); and the Fair Housing Act (42 U.S.C. § 3601 *et seq.*).

[5] The $100-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.

Statute or Regulation		Year Enacted or Last Adjusted	Amount of Penalty (Originally Enacted or Last Adjusted)[1]	Multiplier	Adjusted Penalty (before rounding)	Adjusted Penalty (after rounding and comparison calculation)[2]
12 U.S.C. § 1832(c)		1973	$1,000 per violation	5.21575	$5,215.75	$2,750
12 U.S.C. § 1884		1968	$100 per day	6.73762	$673.76	$275
12 U.S.C. § 1972(2)(F)	Tier 1	1989	$5,000 per day	1.89361	$9,468.05	$9,468
	Tier 2	1989	$25,000 per day	1.89361	$47,340.25	$47,340
	Tier 3 (insured depository institution)	1989	The lesser of $1,000,000 or 1% of total assets, per day	1.89361	$1,893,610	$1,893,610
	Tier 3 (other)	1989	$1,000,000 per day	1.89361	$1,893,610	$1,893,610
12 U.S.C. § 3909(d)		1983	$1,000 per day	2.35483	$2,354.83	$2,355
15 U.S.C. § 78u-2(b)	Tier 1 (individuals)	1990	$5,000 per violation	1.78156	$8,907.80	$8,908
	Tier 1 (others)	1990	$50,000 per violation	1.78156	$89,078	$89,078
	Tier 2 (individuals)	1990	$50,000 per violation	1.78156	$89,078	$89,078
	Tier 2 (others)	1990	$250,000 per violation	1.78156	$445,390	$445,390
	Tier 3 (individuals)	1990	$100,000 per violation	1.78156	$178,156	$178,156
	Tier 3 (others)	1990	$500,000 per violation	1.78156	$890,780	$890,780
15 U.S.C. § 1639e(k)	First violation	2010	$10,000 per day	1.08745	$10,874.50	$10,875
	Subsequent violations	2010	$20,000 per day	1.08745	$21,749	$21,749
31 U.S.C. § 3802		1986	$5,000 per claim	2.15628	$10,781.40	$10,781
42 U.S.C. § 4012a(f)		2012	$2,000 per violation	1.02819	$2,056.38	$2,056

Exhibit B

Proposed Revision to of 12 C.F.R. § 308.132		
Statute	**Current Citation**	**Proposed Citation**
12 U.S.C. § 1464(v)	(c)(2)	(d)(1)
12 U.S.C. § 1467(d)	N/A	(d)(2)
12 U.S.C. § 1817(a)	(c)(2)	(d)(3)
12 U.S.C. § 1817(c)	(c)(3)(ii)	(d)(4)
12 U.S.C. § 1818(i)(2)[1]	(c)(3)(i) (c)(3)(x) (c)(3)(xi) (c)(3)(xiii)	(d)(5)(i)-(v)
12 U.S.C. § 1820(e)(4)	(c)(3)(iii)	(d)(6)
12 U.S.C. § 1820(k)(6)	(c)(3)(xvii)	(d)(7)
12 U.S.C. § 1828(a)(3)	(c)(3)(iv)	(d)(8)
12 U.S.C. § 1828(h)	(c)(3)(v)	(d)(9)
12 U.S.C. § 1829b(j)	(c)(3)(vi)	(d)(10)
12 U.S.C. § 1832(c)	(c)(3)(vii)	(d)(11)
12 U.S.C. § 1884	(c)(3)(viii)	(d)(12)
12 U.S.C. § 1972(2)(F)	(c)(3)(ix)	(d)(13)
12 U.S.C. § 3909(d)	(c)(3)(xii)	(d)(14)
15 U.S.C. § 78u-2(b)	(c)(3)(xiv)	(d)(15)
15 U.S.C. § 1639e(k)	N/A	(d)(16)
31 U.S.C. § 3802	(c)(3)(xv)	(d)(17)
42 U.S.C. § 4012a(f)	(c)(3)(xvi)	(d)(18)

[1] 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. § 1693*o*(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. § 1692*l*(b)); the Electronic Funds Transfer Act (15 U.S.C. § 1693*o*(a)); and the Fair Housing Act (42 U.S.C. § 3601 *et seq.*).