



November 24, 2020

MEMORANDUM TO: The Board of Directors

FROM: Nicholas J. Podsiadly
General Counsel

SUBJECT: Final Rule to Revise the FDIC's Regulations Concerning
Collection of Delinquent Civil Money Penalties

PROPOSAL

The Legal Division recommends that the Board of Directors (Board) approve, for publication in the *Federal Register*, a final rule that would amend part 313, subpart A and add subpart H to the FDIC's Rules and Regulations.¹ This final rule would amend the FDIC's procedures for debt collection to include provisions for the collection of delinquent civil money penalties (CMPs), in accordance with the Debt Collection Improvement Act of 1996 (DCIA)² and its implementing regulations—the Federal Claims Collection Standards (FCCS).³ The amendments would improve the effectiveness and efficiency of debt-collection efforts, primarily by allowing the FDIC to refer CMP debts for collection to the U.S. Department of the Treasury (Treasury).

BACKGROUND

Congress enacted the DCIA to centralize the government-wide collection of delinquent debt. The statute gave the Treasury responsibilities in this area. Under the DCIA's authority, Treasury and the Department of Justice (DOJ) updated the FCCS regulations in 2000,⁴ and these regulations are found at 31 C.F.R. parts 900–904. The DCIA and the FCCS generally govern the federal government's debt collection activities. Before collecting a claim by administrative offset (discussed below), agencies must either adopt the FCCS without change or prescribe agency regulations for collecting debts by administrative offset that are consistent with the FCCS.⁵ Treasury has issued additional regulations applicable to collection under the DCIA at 31 C.F.R. part 285.

The Treasury rules set out affirmative debt collection obligations for federal agencies, including administrative collection, offset, compromise, and the suspension or termination of collection activity for civil claims for money, funds, or property. These regulations also prescribe standards for referring debts to the DOJ for litigation.

One of the most significant effects of the DCIA and its implementing regulations is that federal agencies are required to refer most delinquent debts to Treasury's Bureau of the Fiscal Service

¹ 12 C.F.R. pt. 313, subpt. A & subpt. H.

² 31 U.S.C. §§ 3701–3720E.

³ 31 C.F.R. ch. IX, pts. 900–904.

⁴ See 65 Fed. Reg. 70,390 (Nov. 22, 2000).

⁵ See 31 U.S.C. § 3716(b).

(Fiscal Service), rather than directly to a U.S. Attorney’s Office for litigation, as was previously done. The Fiscal Service collects the debts with administrative offsets of non-tax payments (e.g., vendor, federal retirement, federal salary, and social security benefits), as well as via the tax refund offset program. The other primary debt collection tool operated by the Fiscal Service is “cross-servicing,” which uses a variety of collection tools to encourage debtors to repay the federal government. Agencies are required to refer debts that are “delinquent”⁶ more than 180 days to the Treasury for debt collection action (if the agencies have not been successful at collecting those debts),⁷ and agencies are encouraged to refer debts that are less than 180 days delinquent to accomplish efficient, cost-effective debt collection.⁸ However, if collection is not possible through the cross-servicing methods available to the Fiscal Service, agencies “shall make every effort to refer delinquent debts to the [DOJ] for litigation within one year of the date such debts last became delinquent.”⁹ This litigation process reduces the penalty to judgment and allows collection by placing liens on property owned by the debtor. Under 31 C.F.R. § 904.4, agencies shall not refer claims of less than \$2,500, unless an enumerated regulatory exception applies and the agency has consulted with the Financial Litigation Staff of the Executive Office for U.S. Attorneys in the DOJ.

Although the DCIA applies to “fines or penalties assessed by” federal agencies,¹⁰ the FDIC’s Rules of Practice and Procedure do not presently include provisions addressing the collection of delinquent CMPs under the DCIA. The FDIC issued part 313 to address procedures for corporate debt collection—and later the collection of criminal restitution debt—under the DCIA, but part 313 specifically excludes supervisory and enforcement functions from its scope.¹¹ Staff has been unable to find a specific or persuasive rationale for excluding supervision and enforcement matters from the scope of part 313 in the previous rulemakings.

FDIC staff recommends that the FDIC now formally adopt Treasury’s applicable debt collection regulations in relation to CMPs as well. The Federal Reserve Board (FRB) has recently adopted

⁶ A debt is considered “delinquent” “if it has not been paid by the date specified in the agency’s initial written demand for payment or applicable agreement or instrument (including a post-delinquency payment agreement), unless other satisfactory payment arrangements have been made.” 31 C.F.R. § 900.2(b).

⁷ See 31 U.S.C. § 3711(g)(1).

⁸ See Treasury, Treasury Financial Manual, Chapter 4025—General Rule (last accessed Oct. 19, 2020), <https://tfm.fiscal.treasury.gov/v1/p4/c400.html>. Note that the DCIA was amended by the Digital Accountability and Transparency Act of 2014 (Pub. L. No. 113-101, 128 Stat. 1146, § 5) to require agencies to *notify* Treasury of all debts delinquent over 120 days for purposes of administrative offset. See 31 U.S.C. § 3716(c)(6)(A). This notification is required even though the transfer of that debt to Treasury’s Fiscal Service for general debt collection services is not required until the debt is 180 days delinquent. See 31 U.S.C. § 3711(g). Regardless, Treasury encourages all creditor agencies—such as the FDIC—to transfer all eligible debts to the Fiscal Service as early as possible, rather than waiting until the debt is 120- or 180-days delinquent.

⁹ See 31 C.F.R. § 904.1(a).

¹⁰ 31 U.S.C. § 3701(b)(1).

¹¹ See 12 C.F.R. § 313.1(c)(3) (“With the exception of criminal restitution debt noted in paragraph (c)(2) of this section, this part *does not apply* to debts owed to or payments made by the FDIC in connection with the FDIC’s liquidation, *supervision, enforcement, or insurance responsibilities . . .*” (emphasis added)). Note that part 313 does not presently include—and will not include through the present rulemaking—debt incurred from an administrative order of restitution under 12 U.S.C. § 1818(b)(6). This kind of restitution is owed to a consumer or IDI that has been harmed by a respondent’s misconduct and, therefore, is not considered a debt that is owed to the United States.

debt-referral regulations for the collection of CMPs under the DCIA.¹² Staff recommends following the FRB's approach because the statute (the DCIA) under which the FDIC's delinquent CMPs would be collected is the same as the FRB's.

THE FINAL RULE

The rule amends FDIC regulations to provide for the collection of CMP debt. It does so by adopting existing Treasury regulations concerning debt collection procedures as to the collection of CMP debt. It improves the effectiveness of the FDIC's debt collection efforts, primarily by allowing the FDIC to refer debts arising from its enforcement-related activities to Treasury for collection. The rule does not affect the FDIC's existing authority under part 313 to collect other forms of debt, including debt owed to the FDIC in its corporate capacity or for the collection of criminal restitution debt.

Specifically, the rule revises part 313 as follows:

- The title of part 313 is amended to reflect its expanded scope from “Procedures for Corporate Debt Collection” to “Procedures for Collection of Corporate Debt, Criminal Restitution Debt, and Civil Money Penalty Debt.”
- Section 313.1 (Scope) is revised to include CMP debt in part 313. New paragraph (a)(4) provides that part 313 applies to collections by the FDIC from “Civil money penalty debtors assessed civil money penalties by the FDIC.” This broader language extends beyond debts owed to the FDIC in the current regulation. Paragraph (c)(3) says that part 313 applies to “Civil money penalties arising out of the FDIC's activities in its supervision or enforcement capacities.” Paragraph (c)(4) clarifies that, with the exception of criminal restitution debt and civil money penalty debt, part 313 does not apply to “debts owed to or payments made by the FDIC in connection with the FDIC's liquidation, supervision, enforcement, or insurance responsibilities, nor does it limit or affect the FDIC's authority with respect to debts or claims under 12 U.S.C. 1819(a) and 1820(a).” Moreover, paragraph (d) states that subparts B through G of part 313 *do not apply* to the collection of CMP debt.
- Section 313.3 (Definitions) is amended to include CMP debtors among the list of debtors, under paragraph (r), to whom a creditor agency (the FDIC) may send a written notice that the agency intends to collect the debt by administrative offset. Section 313.3 is further amended, under paragraphs (j), (m), (n), and (q) to add the Directors of RMS, DCP, and CISR to the defined list of directors covered by the rule, as the activities of those divisions may result in CMPs subject to the rule. The rule also makes a technical revision to paragraph (d) to substitute “the Bureau of the Fiscal Service” as the successor Treasury entity to “FMS” (Treasury's former Financial Management Service).¹³

¹² See 84 Fed. Reg. 15,502, 15,502 (Apr. 16, 2019) (“The Board is adopting these regulations in order to improve the effectiveness of its debt collection efforts, primarily by allowing it to refer debts for collection to the [Treasury].” 12 C.F.R. § 267.3(a) accordingly authorizes the FRB to refer such debts to the Treasury.

¹³ See 78 Fed. Reg. 60,695, 60,695 (Oct. 2, 2013) (noting that Treasury had consolidated the bureaus formerly known as the Financial Management Service and the Bureau of Public Debt into the Bureau of the Fiscal Service).

- The rule amends delegations of authority as set out in section 313.4. Previously, this section stated that the authority to collect debt rested in one of three division directors: in the Director of DOA or the Director of DOF for all debt owed to the FDIC in its corporate capacity, as applicable (or the respective director's designee), or in the Director of DRR for criminal restitution debt (or that director's designee). The rule contains technical amendments to clarify these existing delegations.
- The rule adds a new subpart H, which addresses the collection of CMP debt. Section 313.181 (Scope) states that subpart H establishes FDIC procedures for the collection of CMP debt. Section 313.182 (Purpose) notes that the purpose of subpart H is to implement federal statutes and regulatory standards authorizing the FDIC to collect delinquent CMPs. Section 313.183 (Definitions) indicates that the definitions provided at section 313.3 apply to subpart H to the extent they are applicable.
- Finally, subpart H includes section 313.184 (Collection of Civil Money Penalty Debt), which outlines how the FDIC will collect CMP debt. Paragraph (a) states that the FDIC will follow Treasury regulations for the collection of CMP debt, including centralized offset of federal payments to collect non-tax debts that may be owed to the FDIC, as applicable and consistent with subpart H. Paragraph (b) states that nothing in subpart H shall be construed to require the FDIC to provide duplicate notice or other procedural protections that have already been provided or afforded to a CMP debtor in the course of administrative or judicial litigation or otherwise. Paragraph (c) says that the FDIC adopts without change the regulations on collection by administrative offset set forth at 31 C.F.R. § 901.3 and other relevant sections of the FCCS applicable to such offset, to the extent those regulations are consistent with subpart H. Paragraph (d) states that nothing in part 313, subpart H precludes the collection of debts through any other available means or precludes the FDIC from engaging in litigation or the compromise of debt as provided under 12 U.S.C. § 1818(i) or any other applicable law or regulation.

This rule is not subject to the provisions of the Administrative Procedure Act that require notice and public participation because the rule relates solely to agency procedure and practice.¹⁴ The rule would be effective 30 days after publication in the *Federal Register*.

RECOMMENDATION

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

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¹⁴ See 5 U.S.C. § 553(b)(3)(A).