

# Regulatory Bulletin

# RESCINDED

Handbook: Thrift Activities  
Subject: Enforcement Actions

Section: 150  
RB 18-3a

July 30, 1993

## Enforcement

Rescinded 12/3/09 with the issuance of RB 18-3b. Click to link to RB 18-3b.

## Penalties

*Summary:* This Regulatory Bulletin describes the Office of Thrift Supervision's (OTS) powers and policies for the assessment of civil money penalties, as well as the factors to be taken into consideration by OTS in deciding whether a civil money penalty should be imposed, and if so, in what amount. The Bulletin provides instructions for use of the civil money penalty assessment form. This Bulletin supersedes Regulatory Bulletin 18-3, dated June 13, 1990.

*For Further Information Contact:* Your Regional Office or Legal Policy, Office of Thrift Supervision, Washington, D.C.: Dwight Smith, Deputy Chief Counsel, (202) 906-6990 or Lewis Segall, Senior Attorney, (202) 906-6648.

*Regulatory Bulletin 18-3a*

### Introduction

Among the enforcement tools available to OTS is the assessment of civil money penalties ("CMPs").

As with its other enforcement powers, OTS assesses CMPs so as to ensure the safety and soundness of savings associations and the industry's compliance with applicable laws, rules, and regulations. A CMP is particularly appropriate to remove the incentive for financial gain from misconduct, and to deter further misconduct involving the particular savings association and similar abuses elsewhere in the industry.

The policies and procedures discussed in this policy statement are guidelines for the use of OTS, its staff and agents; they do not create substantive or procedural rights enforceable at law or in any administrative proceeding. OTS uses the CMP Form as guidance in considering and assessing CMPs. The Form consists of a CMP Tier Matrix that is used to determine the tier of a viola-

tion, and a CMP Calculation Sheet that is used to assess a penalty amount for the violation. Two tier matrices have been prepared: a General Tier Matrix and a Reporting Violation Tier Matrix. A Tier Matrix (if applicable to the violation) and Calculation Sheet should be completed according to the instructions before any penalty is assessed. As explained below, in some cases a determination not to assess a CMP can be made without completing the Tier Matrix; in others, the determination will be made after completing the Tier Matrix.

This Policy Statement briefly describes the statutory framework for civil money penalties, the considerations that should inform the decision whether to assess a CMP for a violation, and the procedure for making that decision. Instructions for determining the amount of an assessment are also provided.

### Statutory Scheme

*General Civil Money Penalty Statute*

The general civil money penalty statute establishes three tiers of ascending penalties. 12 U.S.C. 1818 (i)(2). The General Tier Matrix applies to civil money penalties assessed under this statute.

The first CMP tier reaches an institution or institution-affiliated-party who violates any law or regulation,

any final order or temporary order, any written condition, or any written agreement between the institution and the agency.

The second CMP tier reaches an institution or institution-affiliated-party who: (i) violates a law or regulation or order or written condition or agreement; (ii) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (iii) breaches any fiduciary duty, which violation, practice, or breach (a) is part of a pattern of misconduct; (b) causes or is likely to cause more than a minimal loss to the institution; or (c) results in pecuniary gain or other benefit to the party.

The third CMP tier reaches an institution or institution-affiliated-party who knowingly commits the violation, practice, or breach described in (i), (ii), or (iii) above, and by reason of such violation, practice, or breach knowingly or recklessly causes a substantial loss to the institution or a substantial pecuniary gain or other benefit to that party.

In addition to defining the three tiered structure, the general civil money penalty statute also provides in subparagraphs (E) - (I) for the manner in which civil money penalties shall be assessed and collected by OTS.

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*Other Civil Money Penalty Statutes*

## Control Act

The FDIA authorizes OTS to assess civil money penalties against persons who violate any provision of the Control Act or any regulation or order issued thereunder. 12 U.S.C. 1817(j)(16). Such penalties are assessed according to the three-tier structure and other provisions in the general civil money penalty statute.

## Non-Certified Appraisers

OTS is authorized to assess civil money penalties against associations that seek, obtain, or give money or any other thing of value in exchange for the performance of an appraisal by a person the association knows is not a State-certified or State-licensed appraiser (as defined in 12 U.S.C. 3345) in connection with a federally-related transaction (as defined in 12 U.S.C. 3350). The type of federally-related transaction and the type of appraiser required are described in 12 U.S.C. 3342, 3343.

Such penalties are assessed according to the three tier structure and other provisions in the general civil money penalty statute.

## Home Mortgage Disclosure Act

OTS is authorized to assess civil money penalties for violations of the Home Mortgage Disclosure Act. 12 U.S.C. 2804. Such penalties are to be assessed according to the three-tier structure and other provisions of the general civil money penalty statute.

## Reports of Condition/Holding Company Reports/Certified Statement of Assessment Base

Under the HOLA, OTS is authorized to assess civil money penalties against associations, holding companies or their subsidiaries that either fail to submit or to publish any

report within the time frame required by OTS or that submit or publish any false or misleading information. 12 U.S.C. 1464(v); 12 U.S.C. 1467a(r). A similar penalty structure governs the failure to make a timely or accurate submission of a certified statement of assessment base. 12 U.S.C. 1817(c) (5).

These provisions contain a separate three-tiered structure that OTS must apply when making an assessment under those sections. The Reporting Tier Matrix applies to civil money penalties assessed under these statutes.

The first tier addresses instances where, despite procedures reasonably adapted to avoid inadvertent and unintentional error, and as a result of such error, the savings association fails to submit or publish a required report, information, or certified statement within the specified time; submits or publishes any false or misleading report, information, or certified statement; or inadvertently transmits or publishes any report or certified statement that is minimally late. The savings association is subject to a penalty of up to \$2,000 for each day the failure continues or the false or misleading information is not corrected.

The second tier addresses instances not falling within the first tier where a savings association fails to submit or publish a required report, information, or certified statement within the specified time, or submits or publishes any false or misleading report, information or certified statement. The savings association is subject to a penalty of up to \$20,000 for each day the failure continues or such false or misleading information is not corrected.

Under the third tier, civil money penalties may be assessed if the savings association knowingly or with

reckless disregard for accuracy submits or publishes a false or misleading report, information or certified statement. The savings association is subject to a penalty of up to \$1,000,000 or 1 per cent of total assets, whichever is less, for each day the failure continues or such false or misleading information is not corrected.

A penalty imposed under these provisions is to be assessed and collected by the agency in the manner provided in subparagraphs (E), (F), (G), and (I) of the general civil money penalty statute.

## Affiliate Refusal to Cooperate

Under the HOLA, OTS is authorized to assess civil money penalties against an association if any affiliate of the association refuses to permit any examiner of OTS to conduct an examination, or refuses to provide any information required to be disclosed in the course of any examination. 12 U.S.C. 1467(d). The agency may assess a penalty of up to \$5,000 for each day that such refusal continues. This penalty is to be assessed and collected in the manner provided in the general civil money penalty statute.

## Holding Company Act

The HOLA also authorizes OTS to assess civil money penalties against any company that violates, or any person who participates in a violation, of any provision of the Holding Company Act or any regulation or order issued pursuant thereto. 12 U.S.C. 1467a(i)(3). The agency may assess a penalty of up to \$25,000 for each day the violation continues. This penalty is to be assessed and collected in the manner provided in subparagraphs (E), (F), (G), and (I) of the general civil money penalty statute.

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## Consideration and Assessment of CMPs

The tier of a violation should be a central factor in determining whether a violation should be assessed a CMP, and it should be evaluated in the context of the enforcement and supervisory objectives in an individual case. If in a particular instance a CMP is not assessed when it otherwise is available, that should be because the enforcement and supervisory objectives that would be served by assessment of a CMP are effectively addressed through other means.

Only rarely if ever should conduct that falls within Tier 3 not be assessed a CMP. By contrast, many Tier 1 violations, and some Tier 2 violations, will appropriately not be assessed a CMP where the regulatory objectives are better addressed through other means and there are no “plus factors.” Examples of such plus factors are: financial gain to the respondent from the violation; an intent to commit the violation; a substantial loss to the institution; violation despite notice to management; evidence of concealment of the violation; a history of similar violations; or substantial noncompliance with the corrective measures required by agency actions such as Supervisory Agreements, cease and desist orders, and directives on supervisory issues.

CMPs and other enforcement actions would normally not be employed when addressing occasional and inadvertent regulatory violations or record keeping errors, provided the errors or violations do not pose a threat to the safety and

soundness of an institution or undermine the integrity of its books and records.

Conduct that should prompt CMP assessment would include significant regulatory violations or practices that remain substantially uncorrected after management or the board of directors of an institution has been placed on notice. In general, CMPs usually are warranted for substantial non-compliance with the corrective actions required by Supervisory Agreements, cease and desist orders, and directives on supervisory issues. Substantial non-compliance with a prompt corrective action directive also may warrant a CMP.

Prior regulatory warnings or sanctions are of course not a prerequisite for the consideration of CMPs or other enforcement actions. Unlawful conduct or unsafe and unsound practices that could affect adversely the health of the institution or the integrity of the regulatory process often are subject to redress through CMPs.

### Procedure Regarding Determination Whether to Assess a Civil Money Penalty

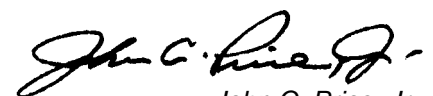
If an examiner discovers a violation of law, regulation or order, violation of a condition imposed in writing or a written agreement, a breach of fiduciary duty, or an unsafe or unsound practice, that examiner should consider recommending the assessment of a civil money penalty. The decision whether to assess should apply the analysis described

above, in the context of the overall enforcement and supervisory strategy appropriate to the associated institution.

If the examination/supervision staff recommends against pursuing enforcement action, then it is unnecessary to document separately the decision not to assess civil money penalties. If enforcement action is recommended, but does not include the assessment of civil money penalties, then the decision not to recommend assessment should be explained and documented in the following manner.

Where the assessment of a civil money penalty is clearly unwarranted for a violation, and there are no “plus factors” described above, a Tier Matrix need not be completed. Instead, the document recommending enforcement action should include a statement that explains why, applying this Policy statement and the governing overall enforcement and supervisory strategy, a civil money penalty is not recommended.

If any of the “plus factors” is present, then a Tier Matrix should be completed for the violation, and consideration of assessment should proceed according to the instructions there. While the presence of “plus factors” does not require assessment, such factors do warrant careful consideration of the tier of the violation. Unless the decision is made after completing the Tier Matrix to recommend against assessment of a civil money penalty, the 15 day letter should be sent out at that time.



John C. Price, Jr.  
Acting Assistant Director  
of Policy

## Civil Money Penalty Assessment Form Instructions

### Introduction

These are instructions for completing the Civil Money Penalty Assessment Form. The Form provides a two-step process for assessment. First, the examiner (or other person completing the form) determines the Tier of the violation by means of the General Tier Matrix or the Reporting Violation Tier Matrix. Second, the examiner calculates an assessment amount by means of the Civil Money Penalty Calculation Sheet. Separate instructions are provided for the General Tier Matrix, the Reporting Violation Tier Matrix, and the Calculation Sheet.

The Form is intended to focus agency discretion in making the determinations and decisions that are part of a civil money penalty assessment. Accordingly, at certain points in the process of completing the Form, the examiner is asked to provide a brief summary of the factual basis for judgments that are made. These summaries are not meant to be the final statements on the issues, and may later be supplemented or modified. The summaries should be supplied in a separate memorandum with the headings provided in these instructions.

The General Tier Matrix should be used for civil money penalty assessments under the three-tier structure in the general civil money penalty statute. See 12 U.S.C. 1818(i)(2)(A)-(D). It should also be used for assessments under civil money penalty statutes that incorporate that structure, including transactions with affiliates violations, control act violations, the use of non-certified appraisers, and violations of the home mortgage disclosure act. The Reporting Violation Tier Matrix should be used for violations of the statutes regarding reports of condition, holding company reports, and statements of assess-

ment base. The tier matrices should not be used for assessments under other statutes.

The Calculation Sheet should be applied to assessments under all civil money penalty statutes.

### Note on Multiple Respondents and Violations

#### *Multiple Respondents*

It is frequently the case that the facts and circumstances are so similar for each of a group of respondents that it is appropriate to complete a single Form for the group. For example, some members of a board of directors may be equally culpable with regard to a particular violation.

When the circumstances surrounding each of a group of respondents are similar, and the violations are the same, the examiner may use a single Form. If a single Form is used, the examiner should write "Multiple" on the respondent identifying line, and list on a separate sheet the respondents covered by the Form and their institution-affiliated-party relationships. If in working through the Form the examiner determines that the facts and circumstances for one or more individuals are sufficiently different from the others, a separate Form should be completed for those individuals.

#### *Different Violations*

An examination or investigation frequently reveals different violations for which a single respondent may be assessed. A series of minor violations may also indicate a broader violation, such as a breach of fiduciary duty. It is generally necessary to complete a separate Form for each different violation on which assessment is made. (By contrast, a single form may be used for

repeated commissions of the same violation.) As a result, it is generally advisable to assess for the most significant violation(s). The assessment procedure does consider the presence of multiple violations in calculating the ultimate assessment.

### Tier Matrix Instructions

The user first completes the Tier Matrix, which determines the Tier of the violation. If the violation is covered by the three-tier structure in the general civil money penalty statute then the General Tier Matrix should be completed according to those instructions. If it is a reporting violation covered by the reporting violation tier matrix, then the Reporting Violation Tier Matrix should be completed according to the instructions that immediately follow. If the violation is not covered by either matrix, proceed to the Calculation Sheet.

#### *Identifying Information*

Provide the name of the related institution, the docket number, and the name of the respondent. If the respondent is an individual, identify the facts and circumstances that render the respondent an institution-affiliated party.

Note on the designated line who completed the Matrix, and the date.

#### *Instructions for General Tier Matrix*

The matrix is completed column by column, beginning with Column 1 and ending with Column 5(b). Your answer in Column 1 will select a particular Row, based on the identified violation, and your answers to subsequent columns should be placed within that Row.

**Column 1:** Choose only one box. Briefly describe the violation in the box. If the conduct in question

might fall within more than one category, choose the box where the evidence is strongest.

**Column 2:** "Knowingly" means that the respondent knew he was committing the act and did not act mistakenly or accidentally. It does not require the respondent to have known specifically that the conduct was wrong.

**Column 3:** "Recklessly" means that the respondent acted with disregard of, or indifference to, the consequences of an act or omission. Such disregard or indifference should be an extreme departure from the standards of ordinary care and conduct that the respondent is expected to follow. It includes clear neglect for, or plain indifference to, the requirements of the law, applicable regulations or agency orders of which the party should have been aware. Negligence by itself does not constitute recklessness. By contrast, a conscious decision to act in a negligent fashion could be reckless conduct.

**Column 4(a):** "Pattern of Misconduct" is not necessarily met by two or more instances of wrong or improper conduct. In a pattern, the instances of misconduct should be interrelated by one or more distinguishing characteristics and should not be isolated events. In the particular case, multiple instances of the same violation and multiple instances of different violations may each constitute a pattern of misconduct. The instances of misconduct may constitute a pattern if each is the result of the same kind of wrongful or neglectful conduct.

**Column 4(b):** A more than minimal loss is one that is not trivial or insignificant with respect to the safety and soundness of the institution. In order to find that the violation "caused or is likely to cause" a more than minimal loss, you must determine either (1) that the commission of the violation directly resulted, or is likely to directly result, in the loss, or (2) that the violation played a substantial role in producing, or is likely to play a substantial role in producing, the loss.

**Column 4(c):** In order to find that the violation "caused or is likely to cause" a pecuniary gain or other benefit to the respondent, you must determine either (1) that the commission of the violation directly resulted, or is likely to directly result, in the gain or benefit, or (2) that the violation played a substantial role in producing, or is likely to play a substantial role in producing, the gain or benefit.

**Column 5(a):** A substantial loss is a loss that is considerable with respect to the safety and soundness of the institution. In order to find that the respondent knowingly or recklessly caused a substantial loss, you must determine that the respondent committed the violation either knowing that the violation could cause a substantial loss or with disregard of or indifference to the possibility that the violation could cause a substantial loss. This includes circumstances where the risk of substantial loss from the conduct is such that the party knows it or it is so obvious that the party should have known it.

**Column 5(b):** A pecuniary gain or other benefit is substantial if it is considerable in amount, value, or the like, generally on the order of \$25,000 or more. In order to find that the respondent knowingly or recklessly caused a substantial pecuniary gain or other benefit to the respondent, you must determine that the respondent committed the violation either knowing that the violation could cause such a gain or other benefit or with clear neglect for or plain indifference to the possibility that the violation could cause such a gain or other benefit.

#### *Tier Determination*

After you have completed Columns 1 through 5(b), you can determine the Tier of the violation. Work within the row of the violation you identified (Row A, B, or C). You should determine all of the Tiers in which a violation may fall.

#### Column 1 identified Row A

If no other columns are marked Yes for Row A, then the violation is Tier 1. If you have marked Yes in at least one of Columns 4(a), 4(b), or 4(c), then mark Yes for Tier 2. If you have marked Yes in Column 2, and Yes in either Column 5(a) or 5(b), then mark Yes in Tier 3.

#### Column 1 identified Row B

If you have marked Yes in Column 3, and in at least one of Columns 4(a), 4(b), or 4(c), then mark Yes for Tier 2. If you have marked Yes in Column 2, and Yes in either Column 5(a) or 5(b), then mark Yes for Tier 3. Otherwise, no CMP is available for the violation.

#### Column 1 identified Row C

If you have marked Yes in at least one of Columns 4(a), 4(b), or 4(c), then mark Yes for Tier 2. If you have marked Yes in Column 2, and Yes in either Column 5(a) or 5(b), then mark Yes for Tier 3. Otherwise, no CMP is available for the violation.

#### Factual Summary: Tier Determination

Please describe the factual circumstances on which you based the determinations (both "Yes" and "No") you made in completing the General Tier Matrix. You should include a description of the violation and the evidence on which you based your conclusions regarding: the knowledge or intent of the respondent in committing the violation; whether the violation was part of a pattern of misconduct; what loss if any the violation caused or is likely to cause to the institution; and what gains, if any, the violation caused or was likely to cause for the Respondent.

#### *Instructions for Reporting Violation Tier Matrix*

The matrix is completed column by column, beginning with Column 7 and ending with Column 8. Your answer in Column 1 will select a

particular row, based on the type of violation, and your answers to subsequent columns should be placed within that row. The term "report" includes a statement of assessment base.

**Column 1:** Choose only one box. Briefly describe the violation (i.e. what type of report is involved) in the box. If the violation in question might fall within more than one box, choose the box where the evidence is strongest.

**Column 2:** "Minimally Late" means the report is only slightly or trivially late.

**Column 3:** "Inadvertently" means without intention and as a result of conduct that is heedless, negligent, or inattentive. If the minimally late report was transmitted or published recklessly, then the conduct may not have been inadvertent. The respondent has the burden of proving that the report was inadvertently transmitted or published late.

**Column 4:** The violation was the result of an inadvertent and unintentional error if such an error was the substantial cause of the violation. The statute assigns to the respondent association the burden of proof that the error was inadvertent and unintentional. Accordingly, you should answer this question affirmatively only if you have good reason to think the error was inadvertent and unintentional; otherwise, answer "no."

**Column 5:** "Maintain procedures" requires that the respondent not only have the requisite procedures in place, but that the respondent have undertaken reasonable efforts to ensure that those procedures are implemented and adhered to in the institution's operations.

**Column 6:** In order to find that the respondent knowingly or with reckless disregard for accuracy submitted or published a false report or information, you must determine that the respondent submitted or published the report or information

either knowing that the report or information was false or with reckless disregard of or indifference to the possibility that the report or information was false. This includes circumstances where the risk that the report or information was false was such that the respondent knew it or it was so obvious that the respondent should have known it.

**Columns 7 and 8:** Enter the tier of the violation in the appropriate box. Determine all tiers that apply.

#### Factual Summary: Tier Determination

Please describe the factual circumstances on which you based the determinations (both "Yes" and "No") you made in completing the Reporting Violation Matrix. You should include a description of the violation and the evidence on which you based your conclusions regarding: whether the report was minimally late; whether a minimally late report was transmitted or published inadvertently; whether the violation was the result of an inadvertent and unintentional error; whether the respondent maintained procedures reasonably adapted to avoid any such error; and whether the respondent knowingly or with reckless disregard for accuracy submitted or published the false report or information.

#### *Decision Whether to Assess CMP*

The OTS CMP Policy Statement articulates the agency policy regarding the decision whether to assess a CMP.

Check the appropriate line above the Tier Matrix identifying whether you recommend assessment of a CMP. If you do recommend assessment, continue on to the Calculation Sheet.

#### Factual Summary: Decision Whether to Assess CMP

Please provide a brief summary of the basis for your decision whether to assess a CMP. Your discussion

should address the considerations noted in the OTS Policy Statement.

### **Civil Money Penalty Calculation Sheet**

#### *Introduction*

This sheet will produce an assessment for the violation identified on the General Tier Matrix or the Reporting Violation Tier Matrix. The sheet will also produce assessments for violations not governed by either of the matrices.

#### *Identifying Information*

Provide the name of the related institution, the docket number, and the name of the respondent. If the Tier applies to more than one respondent, enter "Multiple" on the Respondent line and attach, on a separate sheet of paper, the list of names.

The calculation sheet is organized into five sections: Base Level Amount; Aggravating Factors; Mitigating Factors; Other Adjustments; Financial Resources; and Final Assessment.

#### *Base Level Amount*

#### Tier of Violation

Enter the highest Tier determined on the General Tier Matrix or Reporting Violation Tier Matrix. If the violation is not covered by the tier matrices, enter "No Tier."

#### Initial Tier Amount

The amount entered is influenced by the Tier of the violation.

#### Tier 1

**General Matrix:** If you entered a Tier 1 violation, enter the greater of (a) \$2,500, (b) the loss to the institution, or (c) the benefit to the respondent. The maximum amount is \$5,000.

**Reporting Matrix:** If you entered a Tier 1 violation, enter \$1,000.

**Tier 2**

**General Matrix:** If you entered a Tier 2 violation, enter the greater of (a) \$12,500, (b) the loss to the institution, or (c) the benefit to the respondent. The maximum amount is \$25,000.

**Reporting Matrix:** If you entered a Tier 2 violation, enter \$10,000.

**Tier 3**

**General Matrix:** If you entered a Tier 3 violation, enter the greater of (a) \$100,000, (b) the loss to the institution, or (c) the amount of gain to the respondent. The maximum amount is \$1,000,000 or, if the respondent is an institution, the lesser of \$1,000,000 or 1 percent of the total assets of the institution.

**Reporting Matrix:** If you entered a Tier 3 violation, enter \$100,000.

**No Tier**

If you entered a No Tier violation, enter the greater of (a) one-half the maximum permitted daily amount, (b) the loss to the institution, or (c) the benefit to the respondent. The maximum amount you may enter is the maximum daily assessment provided for the violation.

**No identifiable loss or gain**

If there is no identifiable loss or gain, the fixed amount in alternative (a) should be selected.

**Multiple Respondents Involved in Violation**

Where more than one respondent is involved, it is appropriate to select different initial tier amounts based on relative culpability. Generally, the examiner should first determine the initial tier amount for the respondent that appears the most culpable, using the procedure above. Next, initial amounts for the other respondents can be selected, using the most culpable respondent's amount as a reference.

**Continuing Violation**

Due to the nature of banking offenses and the civil money penalty statutes, the assessment of a violation on a continuing basis can have a substantial effect on the amount of assessment. The decision whether and in what amounts to assess for a continuing violation requires the broad exercise of discretion, taking account of factors such as the nature of the continuing violation, the continuing nature of the harm or potential harm to the institution, and the respondent's conduct during the period of the continuing violation.

This section addresses three issues: (1) whether the violation is a continuing violation; (2) whether and to what extent the respondent should be assessed for a continuing violation; and (3) if a continuing assessment is appropriate, at what daily amount(s) the respondent should be assessed. The mere fact that a violation continues does not of itself indicate that assessment on a continuing basis is appropriate. Nor, even if continuing assessment is warranted, is it necessarily appropriate to assess at the initial tier amount for the entire period of continuing assessment.

**Is the Violation Continuing?**

There are two questions to be answered: (a) was there a period of time during which the effect of the violation caused continuing harm to the institution, and (b) was there a period of time during which the effect of the violation could have been cured by a particular action or by refraining from a particular action. If you can answer yes to both of these questions, then the violation is continuing and you should enter YES. If not, enter NO.

In determining whether to answer "yes" to question (a), it will usually be helpful to consider the purpose behind the prohibition or mandate that the respondent has violated. For example, the change in control regulations are meant in part to regulate the control of the institution. A

change in control act violation arising from impermissible control of a thrift will therefore frequently cause continuing harm for each day such control continues, because the control itself is what the regulations mean to prevent. Continuing harm does not require identifiable monetary loss, or risk of loss, to the institution; the nature of the harm is determined by the nature of the violation.

Question (b) is meant to assess whether, once the violation has been committed, the respondent could have undone or cured the consequences. Thus, in the change of control example, if the respondent could have divested the interest that caused the impermissible control, or otherwise cured the improper nature of the control, then the answer to question (b) would be "yes."

**Number of Days for Which the Respondent Should Be Assessed**

If you have found the violation not to be continuing, enter 1 for both the maximum and assessed number of days. If you have decided the violation is continuing, then you must determine whether the respondent should be assessed for any or all of the days of the continuing violation. Generally if a respondent had notice or knowledge of the violation, or should have had notice or knowledge, then continuing assessment should be considered.

The maximum number of days of the continuing violation would extend from the time the respondent had or should have had notice or knowledge of the violation, until the date the violation was corrected or the respondent made a reasonable, good faith effort to seek correction. If the violation has not been corrected or no such effort was made, then the violation would be held to continue to the last date on which it could have been corrected but was not. If at some point the violation could no longer have been corrected, the last date of assessment would be the last day on which cor-

rection was possible. If the violation is outstanding as of the date of this form, but could still be undone or corrected, and the respondent has made no reasonable good faith effort to seek correction, then the date of completion of the form would be the last date.

Enter on the form the maximum possible number of days of assessment, and the number of days for which the respondent will be assessed.

#### Daily Amounts for Continuing Violation

Having determined that the respondent should be assessed for a period of days for a continuing violation, you must determine what daily amount is appropriate. This is a determination in which the exercise of discretion is particularly fact-specific and appropriately has a very broad range. The following discussion suggests perspectives the examiner should consider.

The harm to the institution, the economic benefit to the respondent, and the respondent's conduct are central considerations in the assessment of civil money penalties. Although you have determined the respondent should be assessed for a period of continuing violation, the continuing harm to the institution (or economic benefit to the respondent) may be of a different order than that caused by the initiation of the violation. Therefore, it may be appropriate to reduce the daily assessment amount as a violation continues.

For example, a violation may involve the unlawful transfer of a fixed sum of money from the institution. Even if the violation is continuing, the additional harm from the continuing nature of the violation will likely be reduced unless additional sums are transferred from the institution.

When the continuing harm is of a lesser magnitude than the initial harm, the daily amount during the

period of assessment for a continuing violation may be reduced below the amount selected as the initial tier amount. If, during the period of continuing violation, the respondent engages in further misconduct, for example taking additional action to conceal or to benefit from the continuing violation, the assessment amount for the continuing violation should be increased.

There are other violations where, although the harm or benefit may be difficult to quantify, the additional harm from the continuing nature of the violation is not reduced. In those instances, the examiner may wish to focus on the respondent's conduct during, and benefit from, the continuing period of the violation.

Enter the number of days assessed at the initial tier amount, and the number of days assessed at other amounts. These should total the number of days for which the respondent is to be assessed.

#### Factual Summary: Assessment for Continuing Violation

Please provide a brief summary of the facts and analysis on which you based your conclusions as to assessment for a continuing violation. Your discussion should explain your determinations regarding: whether there was a period of continuing harm to the institution; whether the violation could have been undone or cured; the respondent's notice or knowledge of the violation; and how you came to determine the amount, if any, that the respondent should be assessed for a continuing violation.

#### *Base Level Amount*

Multiply the number of days by the assessment amounts and enter the total as the Base Level Amount.

#### *Reduction for Restitution*

If the respondent has made restitution, the base level amount should be reduced by the amount of restitution, up to a maximum of a 75% reduction in the Base Level Amount.

#### Aggravating Factors

This section determines what effect, if any, possible aggravating factors should have on your assessment. The section yields a percentage increase to the base level amount based on the presence and significance of these factors. After determining the appropriate percentage increase for each factor, the percentages are summed and the base level amount increased accordingly. The resulting amount is the Aggravated Civil Money Penalty Amount.

#### Gain or Benefit

Answer yes if the respondent received financial or other gain or benefit or preferential treatment as a result of or from the violation. The benefit need not be quantifiable. Increase the base level amount up to 10% for this factor.

#### Frequency or Recurrence

Answer yes if there has been a frequency or recurrence of violations involving this respondent, or if the violation has been outstanding for an inordinate length of time. Increase the base level amount up to 10% for this factor.

#### Previous Criticism

Answer yes if there has been previous regulatory criticism of the institution for similar violations. Increase the base level amount up to 10% for this factor.

#### Prior Violations

Answer yes if there has been a history of prior violations involving this respondent. Similarities between the prior violations and the violation being assessed should particularly influence the amount of increase. Increase the base level up to 10% for this factor.

#### Breach of Existing Agreement

Answer yes if the violation involves the breach of an existing agreement, commitment, or order with the



agency. Increase the base level amount up to 10% for this factor.

#### Continuation of Violation

Answer yes if the violation continued after the respondent became aware of it. According to the respondent's conduct after gaining such knowledge, increase the base level amount up to 15% for this factor.

#### Failure to Cooperate

Answer yes if the respondent, without substantial basis, failed to cooperate with the agency in effecting early resolution of the violation. Increase the base level amount up to 15% for this factor.

#### Concealment

Answer yes if the respondent made active efforts to conceal the violation. Increase the base level amount up to 25% for this factor.

#### Willfulness

Answer yes if the respondent's conduct in committing the violation was intentional or committed with a disregard of the law or the consequences to the institution. Increase the base level amount up to 25%.

#### Unsafe or Unsound Practices/ Breach of Fiduciary Duty

Answer yes if the violation was an unsafe or unsound practice or breach of fiduciary duty that threatened the safety and soundness of the institution. Increase the base level amount up to 25%.

#### Harm to Institution or Public Confidence

Answer yes if the violation resulted in harm to the institution in addition to any quantifiable loss. Examples of such harm include a liquidity crisis, or the impairment of public confidence in the institution. Increase the base level amount up to 25%.

#### Factual Summary: Aggravating Factors

Please provide a brief summary of the facts on which you based a percentage increase for any aggravating factor and the reasons for selecting the percentage increase that you did.

#### Total Aggravating Percentage

Total the aggravating percentages for each of the aggravating factors.

#### *Aggravated Preliminary Assessment*

Increase the Base Level Amount by the Total Aggravating Percentage and enter this as the Aggravated Preliminary Assessment.

#### *Mitigating Factors*

This section determines what effect, if any, possible mitigating factors should have on your assessment. It yields percentage reductions based on the presence and significance of these factors. These decreases are applied in a staged manner that balances the importance of mitigating factors both individually and taken as a whole and provides an appropriate reduction in the assessment.

#### Harm or Risk of Harm

This mitigating factor is meant to reduce the penalty substantially if the respondent's conduct, in neither its means nor in its intent, was the sort that did or could have caused a harm of sufficient magnitude to threaten the financial condition of the institution. Decrease the preliminary assessment by up to 75%, and insert the resulting amount in the space provided.

#### Good Faith

This mitigating factor is meant to reduce the penalty if there is evidence the respondent acted in good faith. Decrease the staged amount by up to 50%, and enter this amount in the space provided.

#### Disclosure, Restitution, Compliance

Voluntary Disclosure: This factor reduces the penalty if the respondent voluntarily disclosed the violation before its discovery by the agency. Decrease the amount for this factor up to 25%.

Voluntary Restitution: This factor reduces the penalty if the respondent has paid restitution voluntarily. Considerations in assessing the weight to be given this factor include whether full restitution has been made, and the circumstances. Decrease the amount for this factor up to 25%.

Compliance Program: This factor reduces the penalty if the respondent had in place a compliance program. Decrease the amount for this factor up to 25%.

Total the percentages assigned for disclosure, restitution, and compliance, and reduce the staged amount accordingly. Enter the resulting amount in the space provided.

#### Agreement and No Prior Violations

Post-violation agreement: This factor reduces the penalty if the respondent, after identification of the violations by the agency, initiated substantial efforts to create an appropriate agreement, commitment or order. Decrease the amount for this factor up to 10%.

No prior violations: This factor reduces the penalty if the respondent is a first time offender. Decrease the amount for this factor up to 10%.

Total the percentages assigned for agreement and no prior violations and reduce the staged amount accordingly. The resulting amount is the Net Preliminary Civil Money Penalty Assessment and should be entered where indicated on the form.

**Factual Summary: Mitigating Factors**

Please provide a brief summary of the facts on which you based a percentage decrease for any mitigating factor and the reasons for selecting the percentage decrease that you did.

***Adjustment for Other Factors***

The examiner should separately consider whether the Net Preliminary Civil Money Penalty Assessment needs to be adjusted for "such other factors as justice may require." The examiner should consider whether there are other issues or factors not already considered in the process of completing the form that should be taken into account. Adjustment may also be appropriate if the examiner concludes that the form has not dealt adequately with a particular factor.

If there are such grounds that warrant increasing or decreasing the Net Preliminary Civil Money Penalty Assessment, enter YES. There are no suggested limits on these adjustments, and considered judgment should be used in determining

how the assessment should be increased or decreased. Calculate any adjustment and enter the resulting amount where indicated.

**Factual Summary: Other Factors**

If you have adjusted the assessment under this section, please provide a brief summary of what other factors you considered and how you determined the adjustment.

***Financial Resources*****Information**

Frequently, the Office will not have adequate information to determine the respondent's financial resources. If this is the case, enter "No" in the space on the form and enter the amount from the line above as the final assessment. This assessment will need to be reconsidered when financial information is received from the respondent.

**Limited Financial Resources**

There is no limit on the degree to which a limited capacity to pay may mitigate a penalty. If the penalty exceeds the respondent's ability to

pay, it should be reduced to a level that can be paid. The ability to pay includes future income as well as current assets. Make any reduction for ability to pay that is appropriate, and enter the resulting amount as the final assessment.

**Factual Summary: Financial Resources**

If you have determined the Office does not have adequate information to evaluate the Respondent's financial resources, please describe what efforts have been or are being made to obtain such information. If you have been able to consider the Respondent's financial resources, please describe the basis for your conclusions regarding whether an adjustment is appropriate.

***Resulting Assessment***

Enter the last figure as the Civil Money Penalty Assessment.

Institution: \_\_\_\_\_

Matrix Completed by: \_\_\_\_\_

\_\_\_\_\_ Recommend CMP Assessment:

Docket Number: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_ Recommend Against CMP Assessment

Respondent: \_\_\_\_\_

Institution – Affiliated – Party Relationship: \_\_\_\_\_

**Instructions:**

In column 1, identify the type of violation. In columns 2-5(b), place a "Y" or "N", according to whether the answer is yes or no, in each open square in a column for the row of the violation.

## General Tier Matrix

	Column 1	Column 2	Column 3	Column 4(a)	Column 4(b)	Column 4(c)	Column 5(a)	Column 5(b)		
	Identify the violation (check one box)	Was the violation committed knowingly?	Was the violation committed recklessly?	Was the violation part of a pattern of misconduct?	Did the violation cause or is it likely to cause more than a minimal loss?	Did the violation cause or is it likely to cause pecuniary gain or other benefit to the respondent?	Did the respondent knowingly or recklessly cause substantial loss?	Did the respondent knowingly or recklessly cause substantial pecuniary gain or other benefit?		
<b>Row A</b>	Law Regulation Final order Temporary order Written condition Written agreement								Tier 1	
									Tier 2	
										Tier 3
										Tier 3
<b>Row B</b>	Unsafe or unsound practice in conducting the affairs of a depository institution								Tier 2	
									Tier 3	
<b>Row C</b>	Breach of fiduciary duty								Tier 2	
									Tier 3	
									Tier 3	

Respondent Institution: \_\_\_\_\_

Matrix Completed by: \_\_\_\_\_

\_\_\_\_\_ Recommend CMP Assessment:

Docket Number: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_ Recommend Against CMP Assessment

**Instructions:**

In column 1, identify the type of violation and report or information involved. Generally reporting violations will involve either the failure to submit a report or information in a timely fashion, or the submission or publication of a report or information that is false or misleading. In columns 2-6, answer "Y" for yes or "N" for no in each open square in a column for the row of the violation. Use the Tier Key in Column 7 to determine the tier of the violation.

## Reporting Violation Tier Matrix

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
	Type of violation	Was the report minimally late?	Was the minimally late report transmitted or published inadvertently?	Was the violation a result of an inadvertent and unintentional error?	If the error was inadvertent and unintentional, does the respondent maintain procedures reasonably adapted to avoid any such error?	Did the respondent knowingly or with reckless disregard for accuracy submit or publish the false report or information?	Tier key	Tier of violation
<b>Row A</b>	Report or Information Not Timely Filed						If both boxes are marked "Yes," or if the violation involves a certified statement of assessment base, and the box in Column 2 is marked "Yes," then the violation is Tier 1 and no higher tier applies. Otherwise, complete the next row.	
							If both boxes are marked "Yes," then the violation is Tier 1. If either box is marked "No," then the violation is Tier 2.	
<b>Row B</b>	Report or Information False or Misleading						If both boxes are marked "Yes," then the violation is Tier 1. If either box is marked "No," then the violation is Tier 2.	
							If the box is marked "Yes," then the violation is Tier 3.	