Chapter 9 – Restitution and Civil Money Penalties

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Restitution and Civil Money Penalties

Section 8(b)(6)(A) of the FDI Act grants the FDIC authority to issue cease-and-desist orders requiring an IAP or IDI to make restitution to the institution, consumers, or the FDIC as receiver for a failed IDI if either (1) the IAP or IDI was unjustly enriched by certain violations or practices or (2) if the violation or practice involved a reckless disregard of the law or any applicable regulations or prior order of the appropriate FBA.

Section 8(i)(2) of the FDI Act grants the FDIC authority to issue an order to assess three different tiers of CMPs against IDIs and IAPs for certain forms of misconduct. Depending on the CMP tier, CMPs may be assessed for violations of laws, regulations, final and temporary orders, certain conditions imposed in writing, and written agreements with the FDIC (violations). The FDIC may also impose CMPs for misconduct that demonstrates unsafe or unsound practices (practices) or breaches of fiduciary duty (breaches).

Determining the Appropriate Monetary Action

Both restitution and CMPs involve the payment of money by the IAP or IDI, but their conceptual underpinnings are different. Restitution is an equitable and remedial action because its purpose is to compensate the institution or consumer (or other customer) for losses suffered or to obtain the disgorgement of unjust enrichment as a result of misconduct involving violations or practices. CMPs are punitive and imposed to punish for misconduct involving violations, practices, or breaches, and to create, by example, a disincentive for similar misconduct by others. This distinction between restitution and CMPs is reflected in how recovery is directed: restitution awards are paid to the party or parties that have suffered (monetary or non-monetary) harm, while CMPs are paid to the U.S. Treasury.

Misconduct by an IAP that warrants the issuance of a removal or prohibition order under Section 8(e) of the FDI Act may also warrant restitution under Section 8(b)(6) or a CMP under Section 8(i)(2) of the FDI Act. While the FDIC does not expect to pursue a restitution or CMP action in every removal or prohibition proceeding, both actions should be considered in all IAP cases.

When the statutory criteria are met, restitution in lieu of or in addition to a CMP should be considered. The amount of the loss caused, as well as the amount of any voluntary restitution already paid, will be considered when calculating the amount of any restitution to be sought. Where an IAP is willing to consent to a restitution order but where sworn financial statements submitted by the IAP demonstrate that his or her financial resources are such that he or she cannot reasonably be expected to pay both restitution and a CMP, the FDIC generally favors the payment of restitution to the harmed party.

If restitution is ordered, arranged, or likely to be imposed by a third party other than the FDIC (e.g., as a result of criminal sentencing or a civil judgment), the FDIC will generally not pursue a duplicate restitution action. In addition, if the third-party restitution order or agreement exceeds the IAP's ability to pay, the FDIC will typically not pursue a CMP.

Whether or not restitution or CMPs are sought is based on the specific facts and circumstances of each case, and pursuing one of these actions does not preclude the FDIC from pursuing the other.

Statute of Limitations

The applicable SOL for Section 8 actions is defined in chapter 1.

Jurisdiction over IAPs

Enforcement actions under Section 8 against IAPs must be brought within 6 years after a person ceases to qualify as an IAP. For example, the action must be brought within 6 years after a person's employment was terminated at an IDI. The personal jurisdiction statute is separate and distinct from the laws governing the statute of limitations, which generally are based upon dates of misconduct.

Restitution Under Section 8(b)(6)

The following section describes FDIC policy governing the imposition of restitution, including the grounds for ordering restitution.

Statutory Authority

Section 8(b)(6) of the FDI Act authorizes the FDIC to issue an order for restitution.

Grounds

In order to initiate an action for restitution pursuant to Section 8(b)(6)(A) of the FDI Act, the FDIC must establish at least one of the following statutory factors:

- The IDI or IAP was unjustly enriched in connection with a violation of law or regulation or an unsafe or unsound practice, or

- The violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate FBA.

There is no uniform definition of "unjust enrichment." However, relevant case law has indicated that "unjust enrichment" generally means that one party has received a benefit at the expense of another in circumstances where it is unjust to allow retention of the benefit without adequate compensation.

There is also no uniform definition of "reckless disregard." However, relevant case law has indicated that "reckless disregard" may occur when (1) the party acts with clear neglect for, or plain indifference to, the requirements of the law, applicable regulations, or agency orders of which the party was, or with reasonable diligence should have been, aware; and (2) the risk of loss or harm or other damage from the conduct is such that the party knows it, or is so obvious that the party should have been aware of it.

If staff encounters situations that may involve unjust enrichment or reckless disregard, they should contact the RO Legal Division for guidance.

Policy

Restitution under Section 8(b)(6) of the FDI Act should be considered when the IAP or IDI was unjustly enriched or the misconduct involved a reckless disregard for the law.

Other Considerations

Even where the statutory factors are met, the FDIC in some cases may forgo restitution under Section 8(b)(6), for example:

- Where the wrongdoer is a major shareholder of the institution, the money collected through a restitution order may ultimately be returned to the respondent by virtue of his ownership in the institution.

- Where the institution files a bond claim that is paid by the insurance company less the deductible on the institution's policy.

- Where the institution suffered a loss and the institution was later sold at a price that reflected those losses. Recovery by the FDIC of restitution on the institution's behalf would produce a windfall for the new shareholders.

Any decision to not pursue restitution despite the merits of the case should be fully documented.

Note: For certain violations of the TILA, payment of restitution is mandatory. The grounds for ordering such restitution are set forth in Section 108 of the TILA.

Civil Money Penalties under Section 8(i)(2)

The following section describes FDIC policy governing the imposition of CMPs under Section 8(i)(2) of the FDI Act, including the grounds for assessing penalties and the factors considered in determining the amount of penalties. It also provides instructions to be followed during examinations of IDIs that may be subject to fines.

Note: For potential misconduct involving Section 7 of the FDI Act regarding late or inaccurate Reports of Condition and Income, inaccurate certification statements, or late payment of insurance assessments, staff should seek guidance from the RO on whether to recommend CMPs.

Statutory Authority

Section 8(i)(2) of the FDI Act authorizes the FDIC to assess CMPs against IAPs and IDIs.

Grounds

Section 8(i)(2) of the FDI Act authorizes the assessment of CMPs and divides them into three tiers of increasing severity. Penalties are assessed against an IDI or IAP based on the severity of the violation and the level of culpability and can be levied for each day the actionable conduct continues. Each year, the FDIC is statutorily required to adjust for inflation the *maximum* penalty amounts of CMPs within its jurisdiction, and the FDIC publishes these adjustments through a *Federal Register* notice.

Tier 1 – An IDI or IAP may be assessed CMPs for violations of any law or regulation; certain final or temporary orders; any condition imposed in writing in connection with the granting of any application, notice, or other request by an IDI or IAP; or any written agreement between an IDI and the FDIC. If the maximum possible Tier 1 CMP does not adequately reflect the serious nature of the misconduct (e.g., a long history of noncompliance with laws and regulations, or

evidence of the possible flow of criminal funds is detected), then a Tier 2 CMP would be appropriate, if the statutory elements to impose a Tier 2 penalty can be satisfied.

Tier 2 – An IDI or IAP may be assessed CMPs for violations listed under the Tier 1 CMP framework, for recklessly engaging in an unsafe or unsound practice in conducting the affairs of the IDI, or any breach of fiduciary duty, if the violation, practice, or breach:

- Is part of a pattern of misconduct; or
- Causes or is likely to cause more than a minimal loss to the IDI; or
- Results in financial gain or other benefit to the IAP.

Tier 3 – An IDI or IAP may be assessed CMPs for knowingly committing violations, practices, or breaches listed under the Tier 1 or 2 CMPs and knowingly or recklessly causing substantial loss to the IDI or substantial financial gain or other benefit to an IAP by reason of such violation, practice, or breach. Tier 3 CMPs should be reserved, generally, for the most egregious cases of misconduct.

Policy

A recommendation for assessment of CMPs should be made when one or more of the following criteria are present:

- A violation, practice, or breach causes substantial harm to depositors, consumers, or to an IDI.
- A violation, practice, or breach subjects an IDI to substantial risk or causes substantial harm to the public confidence in the institution.
- A violation, practice, or breach is willful, flagrant, or shows bad faith on the part of an IDI or IAP (e.g., repeated or multiple violations).
- A violation, practice, or breach directly or indirectly involves an IAP, associate, or related interest who received material or substantial benefit from the activity.
- Previous supervisory actions (such as MOUs or cease-and-desist orders) have been ineffective in eliminating or deterring a violation, pattern, practice, or breach.
- Weaknesses in the IDI’s third-party oversight causes harm to consumers or the institution.
- Misreporting or failing to report government monitoring information relied upon by government agencies or, where required by law, failing to implement systems to ensure the reporting or accuracy of this data.
- A violation or practice potentially exposes the IDI to money laundering or other illicit financial activity or causes substantial harm to the public confidence in the institution.

- An AML/CFT program[2] violation or component violation is cited.

- Noncompliance with AML/CFT-related laws and regulations.

- CMPs should be imposed carefully and judiciously because they are designed to be punitive. The primary purpose of the penalties is to sanction violators according to the degree of culpability and severity of the violation and to deter future violations. Effecting remedial action is not the primary purpose of CMPs. Remedial action, in the form of restitution or other corrective measures, may be separately pursued under Section 8(b)(6) of the FDI Act or other authority. CMPs may be sought in conjunction with such remedial actions.

- **Note:** 12 U.S.C. § 1828(k) and 12 C.F.R. §§ 359.1(l)(2)(i) and 359.3 (20229) prohibit IDIs and IDI holding companies from directly indemnifying an IAP for a CMP or purchasing any commercial insurance policy or fidelity bond that would indemnify an IAP for a CMP.

Considerations in Assessing CMPs

The following factors, as enumerated in the 1998 FFIEC Joint Statement of Policy titled, "*Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies*" (Interagency Policy Statement on CMPs) should be considered in determining whether a violation, unsafe or unsound practice, or breach of fiduciary duty is of sufficient gravity to warrant imposition of CMPs.

1. Evidence that the violation, practice, or breach of fiduciary duty was intentional or committed with a disregard of the law or 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 breaches 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 public confidence in the institution, and the degree of any 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 violations, practices, or breaches of fiduciary duty, particularly where they

[2] Refer to chapter 1, within the section *Grounds for Informal and Formal Actions* regarding changes to BSA- and AML-related terminology.

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.

Determining the Amount of CMPs

In determining the appropriate amount of CMP, the assessment factors listed in the previous section must be balanced against the mitigating factors contained in Section 8(i)(2)(G) of the FDI Act:

1. Current financial resources and good faith of the IDI or IAP;
2. The gravity of the violations, practices, or breaches;
3. The history of previous violations, practices, or breaches; and
4. Such other factors as justice requires.
    - For example, consideration may be given to other possible fines, penalties, or monetary sanctions (e.g., CFPB, OCC, FRB, Department of Justice, FinCEN, Office of Foreign Assets Control, state authorities, or reimbursement of costs of prosecutors' investigations) that will or have been imposed for the same conduct. In addition, the RO and WO should consider recent CMP cases for comparison purposes to ensure that the CMP is appropriate for the nature and gravity of the issues.

Assessing Civil Money Penalties for Violations of Appraisal Independence

Section 1026.42 of Regulation Z (12 C.F.R. § 1026.42) implements section 129E of the Truth-in-Lending Act (15 U.S.C. § 1639e), which establishes appraisal independence requirements for open- and closed-end consumer credit transactions secured by the consumer's principal dwelling. Section 129E of the Truth-in-Lending Act also requires the FDIC to assess CMPs for violations of the appraisal independence requirements. Staff who discover acts or practices that appear to violate the appraisal independence requirements in Section 1026.42 of Regulation Z should follow existing protocols in determining whether to recommend a CMP. When completing the *Matrix for CMPs against Institutions*, staff should assess how the apparent violation(s) of the appraisal independence requirements reflect on the banking industry or on the public perception of the banking industry relative to the *Impact Other Than Loss* factor in determining the amount of the CMP.

Payment of CMPs

In general, it is expected that the respondent will remit payment of the CMP at the same time that the respondent stipulates to the order. If other arrangements are recommended, such as installment payments, the reason for these arrangements should be documented.

Violations Detected by State Examinations

If a state examination reveals misconduct for which an action to impose a CMP or restitution appears appropriate, the RO should schedule a visitation. Staff should investigate the misconduct and, if appropriate, gather sufficient information to support a CMP recommendation and/or request for restitution. If material misconduct is not involved, the RD may postpone the investigation until the next regularly scheduled FDIC examination or visitation.

Note: A state ROE generally should not be used to support a CMP recommendation or request for restitution. However, the RD has discretion to use the report for this purpose if the report provides sufficient grounds.

CMP Matrices

The FDIC has developed various decision matrices for use when considering CMPs against IAPs and IDIs. The matrices provided on the following pages are intended to cause CMPs to be assessed in a consistent and equitable manner. These matrices are provided for consideration. They do not reduce the CMP process to a mathematical equation and are not a substitute for experience and sound supervisory judgment. The matrices in no way limit the discretion of the FDIC to factor in the precise facts and circumstances of each case, or other factors as justice requires, into the CMP determination. Staff must complete the matrices based on the facts and circumstances of the particular case. It is important to fully support and properly document the assigned scoring in any recommendation memorandum. As used in the matrices, the term “misconduct” has the same meaning as “actionable misconduct” as previously defined. The CMP amount may not exceed the adjusted statutory maximums published each year in the Federal Register.

In determining a CMP amount, several quantitative and qualitative factors should be considered, including the IDI’s asset size, capital level, and overall financial condition, or the IAP’s assets, liabilities, and income. Consideration may be given to reducing the amount of the CMP, if an IDI or IAP lacks the ability to pay, cooperates, makes full and timely corrective action, and/or assists the regulatory agency in the investigation.

Instruction for Determining Asset Size

Typically, in connection with IDIs, the asset size used is that reflected in the bank’s most recent Consolidated Reports of Condition and Income prior to the date of the examination in which the misconduct was identified. However, if significant changes occurred in the size of the institution while the practice that caused the violation was outstanding, staff may want to consider another means to determine the total assets to apply in the chart. Factors will likely be unique, and total assets should be determined on a case-by-case basis. For instance, staff may want to calculate average assets of the institution during the time period the practice was outstanding or over the period restitution will be required.

In some cases, staff may identify a violation that results in the consideration of CMPs, where the asset size of the institution is not reflective of its resources and activity. Examples include an IDI that originates loans that involve a Section 5 UDAP violation but soon after origination sells the loans to another entity. In these instances, staff may consider adjusting the total assets of the institution to add back the dollar volume of assets sold to other entities during the review period that is the basis for the violation.

In summary, the intent is to apply an appropriate asset size and, therefore, an appropriate CMP based on the facts and circumstances of the specific case.

Adjusted Penalty

The matrices are tools that assist staff with assessment of the 13 factors enumerated in the 1998 FFIEC Interagency Policy Statement and help ensure CMPs are imposed consistently and equitably. The matrix should, however, be considered guidance and is not intended to substitute for sound supervisory judgement. As such, staff should consider whether it is appropriate to increase or decrease the CMP amount recommended by the matrix “as justice may require.” Examples of situations where deviations from the matrix may be justified include, but are not limited to those in which: (1) there was a failure of an institution’s CMS that resulted in widespread violations; (2) an IDI or IAP engaged in more than one significant violation of law, breach of fiduciary duty, or unsafe or unsound practice; or (3) the penalty amount reflected by the matrix would not be considered an effective deterrent for future illegal activity.

Ability to Pay

If a respondent has limited ability to pay, the FDIC may accept payment of a smaller monetary penalty rather than either (1) litigating a case in order to obtain a larger, but likely uncollectible, monetary penalty, or (2) entering a payment plan in which a larger monetary penalty must be collected over time.

Restitution

In those instances where an institution or respondent pays or is required to pay restitution, but lacks financial capacity to pay both restitution and a CMP, the FDIC favors the payment of restitution above a CMP. If restitution is ordered or arranged for by a third party (e.g., ordered by a criminal or civil court or agreed upon with a private-party) and exceeds the respondent’s ability to pay, the FDIC will generally not pursue a CMP.

CMPs against Individuals

Instructions for Using the CMP Matrix against Individuals

The CMP matrix against individuals contains factors identified by the FFIEC as those that are relevant in determining the appropriateness of initiating a CMP assessment. These factors, along with those statutorily provided, are also used in determining a recommended CMP amount.

Instructions for Scoring the Matrix Factors

1. *Intent:* Assess this factor based on the evidence concerning the IAP’s state of mind and good faith. Under the Interagency Policy Statement on CMPs, consideration should be afforded

to evidence that the IAP's misconduct "was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution."

Evidence of personal dishonesty or an awareness on the part of the IAP that his or her conduct is illegal or a breach of fiduciary duty should result in scoring commensurate with clear intent. Typically, where the IAP engaged in misconduct in order to obtain personal gain, such as in a nominee lending scheme, the misconduct was purposeful and reflects bad faith.

Evidence that an IAP participated in one or more acts of misconduct, which the IAP knew, or reasonably should have known, posed an abnormal risk of loss or harm to the institution, may be scored as willful disregard. For example, causing an institution primarily engaged in residential lending to originate an unsafe or unsound speculative acquisition, development, and construction loan that is the largest loan in the institution's history, might merit scoring as willful disregard absent any evidence of personal gain.

Misconduct reflecting a lack of reasonable care on the part of an IAP over time may merit scoring as continuing disregard. The key is whether the IAP went beyond mere carelessness and displayed indifference with respect to risks to the institution, of which the IAP reasonably should have been aware. In either situation, the IAP's disregard of risk is not consistent with good faith, and thus it merits this score.

Negligent misconduct should receive a score of "2." Negligent misconduct typically is present when an IAP acts carelessly or without sufficient attention.

In rare instances, most of an IAP's misconduct might qualify as good faith, unintentional, technical violations, but an isolated act might rise to the level of negligence. In such circumstances, consideration may be afforded to scoring the IAP's intent as "1."

Unintentional misconduct ought to receive no score. Unintentional misconduct typically comes into play when an IAP participates in a technical violation of a law or regulation, despite acting in good faith and with reasonable diligence and care.

2. *Pecuniary Gain or Other Benefit to IAP or Related Interest:* Pecuniary or monetary gain may be straightforward to assess when the gain directly benefits the IAP or the IAP's related interest, as it is often the dollar amount involved in the misconduct (e.g., where the IAP embezzles money from a customer account). However, in certain circumstances, the monetary gain or other benefit may indirectly flow to the IAP or his related interest(s), such as the IAP's relative or an organization with which the IAP is involved. For example, where an IAP directs, recommends, or approves a loan to his related entity that does not satisfy underwriting requirements, the loan amount may be considered an indirect financial gain to the IAP. In other instances, the IAP recommends a transaction that benefits an unrelated party, but the IAP receives an indirect or other benefit, e.g., commissions or bonuses earned by the IAP. Finally, an IAP may gain a benefit that is intangible from his or her misconduct, such as a promotion. The gain should not be weighted in light of the institution's size.

3. *Loss or Risk of Loss:* Loss to the institution may be straightforward to assess because it is often the dollar amount involved in the misconduct (e.g., where the institution reimburses the dollar amount embezzled from a customer account). However, in certain contexts, such as a lending case in which the misconduct commenced after the loan's origination and involved the unsafe or unsound diversion of principal or renewal of the loan with additional principal, the loss might be less than the full transaction amount.

Risk of loss to the institution involves instances in which an IAP caused the institution to engage in a transaction(s) that could have caused, or might yet cause, the institution to sustain a loss under certain circumstances. For example, the IAP directs/recommends/approves a portfolio of loans in an unsafe or unsound manner, and the loans have not yet defaulted but are anticipated to result in less than a full recovery for the institution. The loss should not be weighted in light of the institution's size.

In addition, any costs incurred by the institution to investigate or resolve the misconduct (e.g., cost of a forensic audit) may be considered in this factor. The loss amount should be considered before any recovery through a blanket bond claim or restitution.

4. *Impact Other than Loss:* In assessing this factor, it is appropriate to consider any conceivable negative impact or harm, other than loss, to the institution, the banking industry, or consumers. However, any impact must be tangible. The mere existence of a speculative impact is not sufficient to justify an increasingly severe score. For example, a relatively small defalcation by a lower-level institution employee is unlikely to have an impact other than any loss. However, violations or activities that receive extensive local media coverage or leave a void in institution management could be given a more severe score.

5. *History, Including Previous Administrative Action or Criticism:* "Administrative action or criticism" is any criticism conveyed to the IAP in writing, or to the Institution if the IAP was or should have been aware of the criticism. Criticism that was merely conveyed orally, such as in an exit meeting, must have been documented in the ROE or in some other written communication in order to be considered, including by supervisory or other letter communication or in a formal manner, such as a consent order. The reference to a "condition in writing" could refer not only to criticism or an enforcement action but also to a condition imposed as part of an application approval or other request by the IDI or IAP.

The reference to "similar misconduct" 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 Section 23A provision. This could also refer to violations similar in nature, e.g., a previous violation of state law regarding lending limits and currently a violation of the aggregate lending-limit provision of Regulation O.

Evidence of similar misconduct that would be excluded from the case due to the expiration of the statute of limitations may be considered under this factor when completing the matrix and determining any penalty.

6. *Concealment:* This factor pertains to the concealment of the misconduct from the FDIC, the institution's BOD, the institution's management, or internal and external auditors. Efforts to conceal misconduct reflect a lack of good faith on the part of the IAP. At one end of the spectrum, meriting a score of "1," is generally a failure to voluntarily disclose information that would facilitate an accurate assessment of a transaction or an institution's safety and soundness. For example, an IAP might accurately describe a loan to an auditor as paying as agreed, without noting that the loan agreement provides for an institution-funded interest reserve.

A score of "2" should generally be assigned when an IAP nominally acts within the scope of his or her authority but reasonably should escalate a particular decision or action. For instance, a loan officer might approve a series of loans to a borrower over a period of time, each of which falls within his lending authority under the institution's loan policy. However, if the final loan

would cause the aggregate indebtedness to exceed the loan officer's lending authority, then the loan officer's failure to elevate the loan to the lending committee for approval would be a form of concealment.

A score of "3" should generally be assigned when an IAP takes actions to prevent others from readily recognizing the true nature of a transaction or an aspect of an institution's or a borrower's operating or financial condition, although the IAP does not affirmatively falsify, misstate, or fail to disclose any information. For example, an IAP might bury information about an environmental condition impacting collateral toward the end of a multi-page loan presentation. This conduct should be scored consistently with efforts to obscure the nature of the loan.

In contrast, active concealment encompasses deliberate falsifications of institution records, deliberate misstatements of material facts, and deliberate failures to disclose material facts. In the prior example, if the IAP were to misrepresent in the loan presentation that the collateral is free of environmental conditions, the misrepresentation could be a form of active concealment.

As a general matter, evidence that supports scoring this factor commensurately with active concealment will also support scoring the "Intent" factor commensurately with clear intent/personal dishonesty/bad faith.

7. *IAP's Responsibility for Presence or Absence of Internal Control Environment and its Effectiveness:* This factor should be considered in cases where the institution's internal control policies and procedures are inadequate but only when assessing CMPs against an IAP responsible for ensuring adequate internal controls are in place for that particular area (e.g., director, senior officer, or anyone that has significant influence over or participates in major policymaking decisions).

8. *Continuation after Notification:* "Notification" in this factor includes notice of the misconduct by the FDIC, other regulatory agencies, external auditors, internal auditors, or other parties whose responsibilities include providing the institution and/or its subsidiaries with information about its operations. In addition, notification includes discovery of the misconduct by the institution itself. Continuation generally refers to the activity itself, not any lingering result. For example, a loan that was made in violation of Regulation O that remains outstanding is not considered to be continuing, as long as steps have been taken (if possible) to address the violation.

However, if after notification, the institution or the IAP continues to extend loans in violation of Regulation O or fails to address (if possible) the earlier violation, the practice is considered to be continuing. Renewal of loans originally made as a result of the IAP's misconduct is considered a continuation unless the renewal was made under changed circumstances (e.g., improved financial condition of the debtor). However, renewals made by the institution, not by the IAP, in an attempt to mitigate the impact of the IAP's misconduct are not considered as continuation.

9. *Number of Instances of Misconduct at Issue:* In assessing this factor, each instance or transaction that is considered misconduct is counted individually (e.g., five loans that violate Regulation O are considered five instances of misconduct). Conversely, a single action that violates multiple regulations is generally considered to be one instance of misconduct. Misconduct that is excluded due to expiration of the statute of limitations should not be considered when scoring this factor. Without limiting the FDIC's discretion to assign a score

appropriate to the specific facts and circumstances at issue, the following framework is generally suggested when scoring this factor:

- No instances at 0,
- 1 to 3 instances at 1,
- 4 to 6 instances at 2,
- 7 to 10 instances at 3, and
- Over 10 instances at 4.

10. *Duration of Misconduct Prior to Notification or Discovery:* “Notification” in this factor has the same meaning as in the “Notification” in the “Continuation After Notification” factor. In addition, notification includes discovery of the misconduct by the institution itself. Misconduct that is excluded due to expiration of the statute of limitations should not be included when scoring this factor. Without limiting the FDIC’s discretion to assign a score appropriate to the specific facts and circumstances at issue, the following framework is generally suggested when scoring this factor:

- 0 to 3 months at 0,
- Over 3 to 6 months at 1,
- Over 6 to 9 months at 2,
- Over 9 to 12 months at 3, and
- Over 12 months at 4.
- Mitigating Factors

11. *Cooperation and Disclosure:* “Notification” in this factor means the same as in the “Continuation After Notification” factor. This factor should be assessed based on the facts and circumstances after notification of the misconduct, except in those cases where the IAP voluntarily discloses the misconduct to management or the state or federal regulator prior to notification and cooperates fully in rectifying the situation.

Higher scores may be justified in instances where the individual IAP fully and completely confesses the misconduct when confronted and cooperates in rectifying the situation. Lower scores may be appropriate in instances where the responses are incomplete or limited to only questions asked and the individual does little to help rectify the situation.

The “Disclosure” portion of this factor would be the converse of “Concealment,” except that “Cooperation and Disclosure” are assessed based on the facts and circumstances and the IAP’s conduct after notification.

12. *Restitution and Corrective Actions:* “Notification” in this factor means the same as in the “Continuation After Notification” factor. This factor may be scored as indicated in the matrix. Some consideration may be appropriate for partial restitution, or actions taken by the IAP other

than restitution, which improved the institution's overall position related to the misconduct. For example, if an IAP originated unsecured loans beyond his lending authority and without the knowledge or approval of the institution's BOD, but after notification, took steps to collateralize the loans to improve the institution's position, this could be considered as "corrective action" for purposes of this matrix.

A score of "2" is generally appropriate when complete restitution is made under compulsion. If a parallel criminal prosecution has commenced, inquiries should be made to the appropriate U.S. Attorney's office to determine if a criminal restitution order has been or will be issued and the terms of any such order. If complete restitution is made as a part of a plea agreement or otherwise in the criminal case, consideration should be given to a matrix score of "2."

Matrix for CMPs against Individuals

Factors to be Considered	0	1	2	3	4	Assigned Level	Weight Factor	Weight X Level
Intent	None / Good Faith		Negligence	Continuing or Willful Disregard	Clear Intent / Personal Dishonesty / Bad Faith		6	
Pecuniary Gain or Other Benefit to IAP or Related Interest	No Direct/Indirect Gain/Benefit ($0)	Intangible Benefit	Direct/Indirect Gain/Benefit between $0 and$50,000	Direct/Indirect Gain/Benefit between $50,000 and $100,000	Direct/Indirect Gain/Benefit greater than $100,000		6	
Loss or Risk of Loss to Institution	No Actual/Risk of Loss ($0)	No Actual Loss ($0) / Risk of Loss ($0 -$50,000)	Actual Loss($0-$50,000) / Risk of Loss($50,000-$100,000)	Actual Loss ($50,000-$100,000)/Risk of Loss ($100,000 and $250,000)	Actual Loss (greater than$100,000) /Risk of Loss (greater than $250,000)		6	
Impact Other than Loss	No Impact on Institution, Banking Industry or Harm to Consumers	Minimal or Moderate Impact on Institution or Minimal Consumer Harm. No Impact on Banking Industry	Substantial Impact on Institution or Moderate Consumer Harm. No Impact on Banking Industry	Moderate Impact on Banking Industry or on Public Perception of Banking Industry or Substantial Consumer Harm	Substantial Impact on Banking Industry or on Public Perception or Substantial Consumer Harm related to a Significant Business Line		6	
History, Including Previous Administrative Action or Criticism	None	History or Criticism of Unrelated Instance(s) of Misconduct	History or Criticism of Similar Instance(s) of Misconduct	History of Repeated Instances of Misconduct or Criticism of Same Misconduct	Violation of 8(b), 8(c), Agreement, Condition in Writing or Prior Assessment on Point		5	
Concealment	None		Lack of Voluntary Disclosure or Failure to Escalate to Appropriate Authority	Efforts To Obscure Nature of Transaction	Active Concealment		5	
IAP's Responsibility for Presence or Absence of Internal Control Environment and its Effectiveness	IAP Has No Responsibility and/or Adequate Programs and Policies Exist in Area Where Wrongdoing Occurred	IAP Has Responsibility for Inadequate Monitoring and Reporting of Exceptions, Despite Adequate Programs and Policies	IAP Has Responsibility for Inadequate Programs and Policies, but IAP Has Cooperated in Management's Responsiveness to Supervisory Recommendations	IAP Has Responsibility for Absence of any Programs and Policies in Area Where Wrongdoing Occurred	IAP Has Responsibility for Inadequate Programs and Policies, and IAP Has Not Been Responsive to Supervisory Recommendations		4	
Continuation after Notification	Immediately Ceased	>0-1 months	1-3 months	3-6 months	More than 6 months		3	
Number of Instances of Misconduct at Issue	None	1- 3 instances	4-6 instances	7-10 instances	More than 10 instances		2	
Duration of Misconduct Prior to Notification or Discovery	0 - 3 Months	>3- 6 Months	>6 -9 Months	>9 -12 Months	>12-Months		2	
SUBTOTAL 1								

Factors to be Considered	0	1	2	3	4	Assigned Level	Weight Factor	Weight X Level
Cooperation and Disclosure	None	Limited Disclosure and Limited Cooperation After Notification	Full Disclosure and Limited Cooperation or Limited Disclosure and Full Cooperation After Notification	Full Disclosure and Cooperation After Notification	Individual Voluntarily Fully Discloses to Management or Regulator and Fully Cooperates		4	
Restitution and Corrective Actions	No Restitution or Corrective Action	Partial Restitution or Substantial Corrective Action	Complete Restitution under Compulsion	Complete Restitution Immediately After Notification	Complete Restitution Voluntarily, Before Notification		3	
SUBTOTAL 2								
TOTAL (subtract 2 from 1)								

Recommended Penalty Ranges for CMPs against Individuals

Points from Matrix	Suggested Action Penalty Range
0-30	Consider taking no action
31-40	Consider sending supervisory letter
41-50	Consider assessing from $1,000 to $7,000
51-60	Consider assessing more than $7,000 (up to $15,000)
61-80	Consider assessing more than $15,000 (up to $35,000)
81-90	Consider assessing more than $35,000 (up to $70,000)
91-100	Consider assessing more than $70,000 (up to $105,000)
101-110	Consider assessing more than $105,000 (up to $140,000)
111-120	Consider assessing more than $140,000 (up to $175,000)
Over 120	Consider assessing more than $175,000

Penalty Ranges

The suggested CMP ranges are provided for guidance only and are not intended to limit staff discretion to assess a penalty below or above the recommended amounts, taking all facts into account, including the respondent's financial resources.

Additional Penalty

In those instances where the respondent is a senior officer, director, or has significant influence over, or participates in, major policymaking decisions of the IDI, and the gravity of the misconduct is egregious (e.g., dishonest conduct that caused a substantial gain or loss, or harm to consumers), the FDIC will generally move the range up one level to more appropriately reflect the severity of the misconduct.

Profits or Gains

In those instances where restitution is not applicable and the respondent's profits or gains can be verified and traced to the respondent's misconduct, the FDIC favors assessing the total amount of the benefit. This is in addition to the recommended penalty amount derived from the matrix, as long as the total amount does not exceed the statutory maximum amount.

Supervisory Letter

A matrix score of 31-40 generally suggests a supervisory letter. The FDIC may send an individual a supervisory letter when it wants to communicate a concern about a supervisory problem or issue or admonish an individual without seeking a formal enforcement action.

CMPs against Institutions

Instructions for Using the CMP Matrix against Institutions

The Matrix for CMPs against Institutions (Matrix for Institutions) will assist staff in determining whether CMPs are appropriate and establishing the amount of CMPs to be assessed (if any). The 13 assessment factors identified in the Interagency Policy Statement on CMPs are contained in the matrix and provide the basis for the recommendation.

Note: The Matrix for Institutions does not apply to mandatory CMPs for violations of the Flood Act, as implemented by Part 339 of the FDIC's Rules and Regulations (Part 339). Refer to the Flood Insurance Violations section of this chapter for penalties pertaining to flood insurance. Finally, the Matrix for Institutions does not apply to AML/CFT violations. A separate matrix, which is discussed later in this chapter, is completed for those matters.

The matrix is used for CMPs against institutions and IAPs that are business entities. The complete statutory definition of an IAP is in Section 3(u) of the FDI Act. An IAP determination for a business entity is often complex and requires extensive analysis with Legal involvement.

For the purposes of this matrix and related instructions, the term "consumer" is defined to include both individual consumers as well as business entities.

Instructions for Scoring the Matrix Factors

1. *Consumer Harm or Harm to Public Confidence; Unsafe or Unsound Banking Practice; Violation*: This factor weighs the severity of the practices at issue by assessing two potentially interrelated issues: (1) whether the practices resulted in or were likely to result in harm to the public's confidence in the institution or the banking industry, and (2) whether the practices resulted in or were likely to result in loss or harm to consumers. The existence of unsafe or unsound banking practices, and severity of violations are also considered.

General Instructions: Staff should generally assess the impact of a given practice on both the institution and on consumers, using the highest scoring issue (i.e., the greatest harm) as the assigned value for this factor. For example, if a practice was likely to result in minimal harm to public confidence (a level "1" score), but resulted in significant consumer harm (a level "3" score), then this factor should generally be assigned a level "3" score. Similarly, if multiple practices already resulted in moderate, actual consumer harm (a level "2" score), but staff

determined that these practices were likely to result in substantial consumer harm (a level "4" score), then this factor would generally be assigned a level "4" score.

Harm to Public Confidence in the Institution or the Banking Industry: In assessing this factor, staff should consider any direct or indirect harm to public confidence as a result of the practices at issue. For example, staff should consider whether the misconduct, if brought to light, would adversely impact the public's perception of and confidence in an institution.

Staff should consider whether an institution's conduct might result in depositors withdrawing their funds from the institution or result in potential borrowers electing to do business with other entities. Misconduct that results in a lack of public confidence in the banking system as a whole should generally be assigned in the most severe scoring category.

Consumer Harm: Consumer Harm is an actual or potential injury or loss to a consumer, whether such injury or loss is economically quantifiable or non-quantifiable, caused by a financial institution's violation of a consumer protection law or regulation, or a wrongful act by a financial institution directly or through a third party. Staff should not limit consideration to harm upon which a definite monetary value can be easily placed. Certain practices may result in or be likely to result in "substantial" harm even though a precise assessment of economic damages cannot be calculated. For example, a denial of credit based upon a prohibited basis could result in substantial, albeit difficult to quantify, harm. Similarly, staff should consider both the immediate and the long-term effects that a practice may have on consumers. For example, if an institution engaged in an unfair or deceptive practice which resulted in excessive, derogatory, and inaccurate trade lines being reported on consumers' credit reports, staff should consider the consequential effects this conduct may have on the impacted consumers, such as adversely affecting the consumers' ability to obtain credit or resulting in these consumers obtaining credit at a higher cost due to the damage to the consumers' credit scores.

When evaluating consumer harm, the totality of the facts and circumstances should be carefully considered. Specifically, the number of consumers impacted, the harm per consumer, and the proportion of the institution's consumers harmed are significant factors. These factors should be considered in combination to determine the overall degree of harm.

When evaluating the proportion of consumers impacted, the universe of consumers used for analysis should consider the consumers for that particular product line.

There are also instances in which the impacted consumers or a dollar amount of harm cannot be identified, such as in redlining cases or cases involving violations of Section 5 of the Federal Trade Commission Act where the institution provided consumers with misleading information that prompted them to obtain a particular product or service. In these scenarios, staff should use their judgment to assess the severity of the consumer harm based upon the estimated consumer impact of the specific IDI's policies, practices, or procedures leading to consumer harm.

Unsafe or Unsound Banking Practice: Any misconduct that is deemed to be unsafe or unsound should generally be scored most severely. It should be noted that an unsafe or unsound practice may exist, and should be considered in scoring this factor, even if the CMP is not solely based on the unsafe or unsound practice. For example, where an institution has violated a cease-and-desist order that required it to correct its credit review procedures, a Tier 1 CMP may be assessed for the violation of the order, but a continuing failure to have adequate procedures could be an unsafe or unsound practice that might justify a higher score on this factor.

Violations: Includes any law or regulation, any final or temporary order, any condition imposed in writing in connection with the granting of any application or other request by an institution, or any written agreement between an institution and the FDIC. In cases involving consumer protection violations, consumer harm should generally be the focus of the analysis for this factor, rather than the violations classification.

2. ***Intent***: This factor requires a review of the extent to which the violation or practice was intentional, including whether the violation was committed with recklessness or willful disregard of the law.

"No intent" (level "0" score) would generally be appropriate where an institution violated the law despite reasonable efforts and systems to ensure compliance. This may be particularly appropriate in situations where the institution is changing its systems to comply with regulatory changes.

"Careless" (level "1" score) would generally be appropriate where an institution made reasonable efforts to comply with the law but made an error due to inadequate diligence.

"Should have known" (level "2" score) would generally be appropriate where an institution should have been aware of the risk associated with the conduct at issue, but continued to act without addressing the risk. This would involve situations where an institution was put on notice of the potential risk of a violation through consumer complaint(s) or the FDIC has outstanding guidance alerting the industry to the issue(s); however, the institution did little to mitigate such risks. It would also include situations where the institution was notified of potential risks through the institution's own internal or external audit. Additionally, if an institution contracted out a service to a third party and the third party violated the law, the institution should have known about such violation because it should have been monitoring such activity. Similarly, if an institution failed to engage in appropriate due diligence or failed to establish an adequate CMS that would have reasonably detected the violations at issue, the institution "should have known" about such violations.

"Reckless" conduct or "Willful Disregard" (level "3" score) would generally be appropriate where an institution was aware that the conduct could result in a violation and yet did nothing to mitigate such risks. This includes situations where the institution engaged in conduct similar to what was criticized during a prior examination, or where the institution was the subject of a prior enforcement action. This would also include situations where there is a complete lack of or significant weaknesses in an institution's CMS.

"Deliberate" (level "4" score) would generally be appropriate where an institution engaged in conduct that it knew would violate a law, or where the institution deliberately pursued a strategy that resulted in substantial harm.

3. ***Concealment***: The focus of this factor is on the actions of the institution or officers, employees, or others working on the institution's behalf when FDIC staff is attempting to determine whether an institution violated any law or regulation or engages in unsafe or unsound practices. Also, the focus of this factor is on deliberate (as opposed to inadvertent) conduct by the institution or its officers and employees in connection with providing documents and information. This includes, but is not limited to, providing documents or other information as requested by FDIC staff. This factor does not cover actions by the institution or institution personnel after FDIC staff has identified a violation, raised it with management, and the FDIC begins taking steps to stop or remedy the violation via informal or formal enforcement action.

These actions would be considered under the *Cooperation* mitigating factor. **Note:** While breach of fiduciary duty is also actionable misconduct, it applies to individuals, not institutions, and is, therefore, not addressed under this factor.

A level "0" score generally applies to those situations in which the institution promptly supplies all documents and information requested regarding a possible violation of law or regulation.

A level "1" score may include situations where there is a delay in the production of a limited amount of material or information after repeated requests for the information from an IDI that is otherwise cooperative in providing information and documents. It may also cover actions by the institution that, while the actions may require otherwise unnecessary additional requests or other steps by FDIC personnel, do not seriously impair the FDIC's ability to determine whether a violation has occurred.

A level "2" score may be appropriate when there has been a more serious delay in the institution's willingness to provide documents and other information as requested, or those situations in which the review is hindered because the institution cannot provide documents because it failed to keep adequate records as required by law.

A level "3" score generally applies to those situations in which the institution cannot provide documents because it recklessly and/or deliberately failed to keep adequate records as required by law to intentionally impede an investigation or review, or the institution or its officers or employees otherwise deliberately obstruct or purposely complicate an issue to make it difficult to uncover.

A level "4" score generally applies in those situations where the institution or its officers or employees deliberately falsify or destroy documents or fail to produce all of the documents and information sought by FDIC staff, auditors, or other requesting parties, with no reasonable explanation for the failure to produce all of the information.

4. *History of Previous Supervisory Action/Commitment to Prevent Misconduct*: This factor is based on the extent to which prior agreements, commitments, orders or conditions imposed in writing by the FDIC were required to address or prevent the violation, underlying practice (i.e., root cause), or unsafe or unsound practice. The type of supervisory action utilized will be considered when determining the score for this factor. In most cases, the applicable time period covered for this factor is the last two examinations. The score for this factor should generally be assigned as follows:

Institution's Written Commitment (level "1" score): did the institution commit to stopping the same violation or fixing the underlying practice (i.e., root cause) in a written commitment?

BOD Resolution (level "2" score): did the institution commit to stopping the same violation or fixing the underlying practice (i.e., root cause) in a board resolution?

Memorandum of Understanding (level "3" score): did the institution commit to stopping the same violation or fixing the underlying practice (i.e., root cause) in a MOU?

Formal Enforcement Action (level "4" score): did the institution commit to stopping the same violation or fixing the underlying practice (i.e., root cause) in a formal enforcement action?

5. *Continuation after Notification*: This factor is based on the IDI's response after notification. Notification means when an institution becomes aware, or should have become aware, that its action/non- action constitutes misconduct. The notification may be written or oral and must be sufficient to make an institution aware that it is reasonably likely that its practice(s) constitutes misconduct. Notification includes notice of misconduct by the FDIC, other regulatory agencies, external auditors, internal auditors, or other parties, including law enforcement. In addition, notification includes discovery of the misconduct by the institution itself. The score on the matrix for this factor is based primarily on the length of time that has elapsed since notification, with misconduct occurring for more than six months after notification receiving the most severe score. Continuation refers to the activity itself, not any lingering result. For example, an activity being conducted without obtaining prior FDIC approval is not considered continuing once an application/request for approval is filed; however, the misconduct would be considered continuing if the institution continues the activity or fails to file the appropriate application/request.

6. *Duration of Misconduct Prior to Notification or Discovery*: "Notification" in this factor means the same as that under "*Continuation after Notification*." In determining the duration of the misconduct, the entire time period during which the misconduct occurred should be considered, not just the time period that was reviewed. The score on the matrix for this factor is based primarily on the length of time the misconduct occurred, with misconduct occurring over 24 months receiving the most severe score.

7. *Frequency of Misconduct Prior to Notification or Discovery*: "Notification" in this factor means the same as that under "*Continuation after Notification*." In determining the frequency of the misconduct, staff should first determine if the misconduct was isolated or a pattern or practice/systemic. If the misconduct was isolated, the institution will often be assigned a score of "1." If the misconduct was a pattern or practice/systemic, staff should next determine if such conduct had a minimal, moderate, or substantial impact on consumers or the institution. The analysis of this factor will be fact-specific and may change based on IDI specific factors, including the number of harmed consumers, etc. Misconduct that is excluded due to the expiration of the statute of limitations should not be included when scoring this factor.

8. *Financial Gain and/or Other Benefit and/or Loss or Risk of Loss to the Institution*: This factor considers whether the institution received financial gain or other benefit from the misconduct at issue. *Financial gain* must be distinguished from *consumer harm*, which is a separate matrix factor. In many cases, the amount of consumer harm is equal to the amount of financial gain to the institution, such as when an institution charges an unlawful fee. However, there may be situations where financial gain is different from consumer harm, such as when an illegal fee is charged through a relationship with a third-party vendor and the institution only receives a portion of the illegal fee. As discussed below, where there is both quantifiable financial gain and "other benefit," the gain or "other benefit" that produces the highest score should be used.

Financial gain: With regard to quantifiable financial gain, the matrix provides a suggested formula for scoring that is tied to an institution's size as measured by assets. This formula should be used in most instances, but if the formula produces a score that is too high or too low considering all the facts of the case, staff should use judgment and support the assigned score.

Other benefit: Other benefit is a benefit to the institution from misconduct that is not readily quantifiable. This benefit may result from avoiding expenses that the institution would have incurred to comply with regulatory requirements, such as when, in connection with an institution's efforts to investigate a disputed card charge, an institution may improperly impose

additional procedures for account holders in connection with the claim. The effect of these procedures is to discourage consumers from pursuing error claims, thereby sparing the institution from providing provisional credit, and resulting in "other benefit" to the institution. The total dollar amount of the discouraged claims is virtually impossible to quantify, especially if the institution does not keep records of consumers who withdrew error resolution claims after being notified of the additional procedures, or for those consumers who, knowing about the additional procedures, decided not to pursue a claim.

Determinations of non-quantifiable "other benefit" are tied to an assessment of the significance of that other benefit. In these cases, the amount of benefit to the institution will not be reflected in a specific dollar amount.

Both Quantifiable Gain and Non-Quantifiable Other Benefit: In some cases, the institution's misconduct may result only in quantifiable gain. In other cases, the misconduct may result only in non-quantifiable "other benefit." It is not necessary for there to be some quantifiable gain in order to assess the degree of "other benefit," and it is not necessary for there to be "other benefit" to assess the amount of quantifiable gain. When there is both quantifiable gain and "other benefit," the gain or "other benefit" that produces the highest score should be used.

No Financial Gain or Other Benefit: Staff may also find cases where there is no financial gain or other benefit. For example, an institution is cited for deceptive practices because it informed consumers who were required to purchase private mortgage insurance that they would not be eligible for any refund if they purchased two of the lower cost options: advance payment option or split premium monthly option. Premiums are paid directly to the private insurance companies and the IDI does not retain any fee or receive any compensation.

Loss or Risk of Loss to the Institution: In some instances, the loss or risk of loss to the institution may be quantifiable. For example, a de novo institution purchases securities that are outside of its business plan, without prior FDIC approval, which resulted in losses to the institution or exposed the institution to risk of loss. However, in other instances, the loss or risk of loss may not be quantifiable. For example, an institution that recklessly or negligently allows access to its customers' personally identifiable information exposes the institution to loss. In those cases where the risk of loss is not quantifiable, staff should exercise sound judgment as to the severity of the impact that the potential loss would have had on the institution if realized.

9. *Previous Misconduct or Criticism*: This factor is based on history of prior violations or practices, particularly where they are similar to the actions under consideration, and previous criticism (including any recommendations made in the ROE or other supervisory correspondence) of the institution or IAP for similar actions. In most cases, the time period covered for this factor is the last two examinations. The score for this factor should generally be assigned as follows:

Level "1" score (Same or similar criticism): An example would be where there was criticism of fair lending training at a prior examination, and a fair lending violation noted at the current examination was caused by a training deficiency.

Level "2" score (Same root cause/different misconduct): An example would be deficiencies in third-party oversight caused UDAP violations at the last examination and fair lending violations at the current examination.

Level “3” score (Same root cause, similar misconduct): An example would be an institution failed to disclose the overdraft fee at last examination and has failed to disclose the ATM fee at the current examination.

Level “4” score (Same root cause, same misconduct): An example would be where an institution failed to disclose the overdraft fee and ATM fee at the last examination and also failed to disclose the overdraft fee and ATM fee at the current examination.

10. *Effectiveness of Compliance Program (CP) and Internal Controls (IC)*: Staff should evaluate if and how weaknesses within an institution’s CMS and/or internal control environment contributed to the violation and/or deficiency for which a CMP is being considered. In applying this factor in a case involving violations of consumer protection laws, the relevant consideration is the strength or weakness of the institution’s CMS. Staff should consider the extent to which the components of an institution’s CMS are effective in evaluating this factor. In general, the more areas in which the CMS or internal control environment show weakness, the greater the score. Special attention is given to management, where weakness in management alone, will generally result in a higher score even if there are no other weaknesses.

For RMS, staff should evaluate the IDI’s internal control environment and determine the impact of weaknesses and deficiencies.

11. *Restitution and Other Remedial Action*: Staff should consider whether an institution has provided consumer restitution or taken other remedial action to correct or mitigate all past harms arising out of the institution’s past practices. Steps taken to prevent future violations do not constitute restitution or remediation of past violations. **Note**: Institutions are expected to promptly adopt corrective actions to prevent the reoccurrence of violations. The failure to promptly adopt such corrective actions is addressed under the factor “Continuation after Notification.”

Restitution typically takes the form of monetary payment for losses suffered as a result of an institution’s violation. Alternatively, restitution may take the form of disgorgement of unjust enrichment. In some cases, however, neither consumer harm nor unjust enrichment can be quantified, but an institution may be able to provide other remedial action.

An institution that self-identifies a violation after the examination commences and provides at least substantial restitution and remedial action prior to notification of the violation by the FDIC or other regulatory agency, should be awarded the highest score for this factor. **Note**: For the purposes of this factor, notification includes but is not limited to notice of misconduct by the FDIC or any other regulatory agencies, which would make the institution aware of the underlying violations at issue. Frequently, such notification would take the form of a formal citation in an ROE or the issuance of a 15-day letter.

Similarly, if an institution voluntarily offers to go above-and-beyond any regulatory requirement for restitution, such efforts will merit the highest score for this factor. An example would include agreeing to provide several years of restitution, dating back to when the institution began the problematic practice.

If an institution has provided full restitution and remedial action when the matrix is completed, such an institution might be assigned a score of “3.” If an institution has provided a commitment in writing to make complete restitution and takes all necessary remedial actions as required by

the FDIC, the institution might be assigned a score of “2” for this factor, even if it has not yet paid restitution.

Institutions that agree to make only limited restitution and/or remedial action (i.e., less than requested by the FDIC) should generally receive no more than a score of “1” for this factor**.** Institutions that are unwilling to make restitution or take remedial action should generally receive a score of “0.”

12. *Cooperation*: Staff should consider the extent to which an institution has been cooperative after they have identified a violation, raised it with management, and initiated steps to stop or remedy the violations. The FDIC expects institutions to fully cooperate with examination efforts.

An institution that self-identifies a potential violation and alerts the FDIC of its concerns regarding the issue, or proactively cooperates with the FDIC to resolve the issue will generally be assigned the highest score of “4” for this factor. An example of proactive assistance would include where the institution begins to identify potential restitution recipients, even before the FDIC has asked that restitution be made.

If an institution does not meet the criteria for a score of “4” but provides full and prompt cooperation to the FDIC, the institution should generally be assigned a score of “3.”

An institution that does not provide full and prompt cooperation can receive some credit for its assistance if staff believes that it is merited. If an institution is cooperating with the FDIC, a score of “2” or “1” for this factor may be justified, even if the information provided by the institution is delayed, if staff believes that the delays were unintentional and were not an attempt to hinder the examination process.

If an institution resists or fails to provide information, intentionally or repeatedly provides partial or incomplete answers, holds back information, or is otherwise uncooperative, it should generally be assigned a score of “0” for this factor.

CMP Matrix against Institutions

Factors to be Considered	0	1	2	3	4	Assigned Level	Weight Factor	Weight X Level
Consumer harm and/or harm to public confidence; unsafe or unsound banking practice; violation	Neither any actual harm nor any likelihood of harm to public confidence or to consumers; no unsafe/unsound practices	Minimal harm to consumers or public confidence; and/or technical violations	Moderate actual harm to public confidence or to consumers, or the likelihood of moderate harm to public confidence or consumers; and/or minimal number of substantive violations	Significant actual harm to public confidence or to consumers, or the likelihood of significant harm to consumer confidence or consumers; and/or moderate number of substantive violations	Substantial actual harm to public confidence or to consumers, or the likelihood of substantial harm to public confidence or consumers; and/or unsafe/unsound practices exist; and/or significant number of substantive violations. Violations of a final or temporary order or condition imposed in writing in granting an application or other request by an institution		10	
Intent	No intent – occurred despite reasonable efforts and systems	Careless – made reasonable efforts but error due to inadequate diligence	Should have known – should have been aware of the risk	Reckless or willful disregard – put on specific notice, but institution did nothing	Deliberate – intentional misconduct		9	
Concealment	Institution (or IAP) provides all the information requested by FDIC promptly	Institution (or IAP) provides information requested by FDIC, after delay, but does not seriously impair FDIC ability to make determination	Institution (or IAP) provides information requested by FDIC, after a significant delay, or cannot provide documents because it failed to keep records	Institution (or IAP) recklessly / deliberately failed to keep records, or otherwise deliberately obstructs or complicates issues	Institution (or IAP) falsifies or destroys documents or information or fails to produce all documents or provide all information		8	
History of previous supervisory action / commitment to prevent misconduct (last 2 exams)	No history of previous supervisory actions or commitments	Institution's written commitment	Board Resolution	Memorandum of Understanding	Formal Enforcement Action		8	
Continuation after Notification	Institution (or IAP) self-identifies misconduct and misconduct ceases 2 months or less after notification or as soon as reasonably practicable	FDIC or other party identifies misconduct and misconduct ceases 2 months or less after notification or as soon as reasonably practicable	FDIC, Institution (or IAP), or other party identifies misconduct and misconduct ceased more than 2 months to 4 months after notification	FDIC, Institution (or IAP), or other party identifies misconduct and misconduct ceased more than 4 months to 6 months after notification	FDIC, Institution (or IAP), or other party identifies misconduct and misconduct continued more than 6 months after notification		5	
Duration of misconduct prior to notification or discovery	0 to 6 months	Over 6 months to 12 months	Over 12 months to 18 months	Over 18 months to 24 months	Over 24 months		5	

Factors to be Considered	**0**	**1**	**2**	**3**	**4**	**Assigned Level**	**Weight Factor**	**Weight X Level**
Frequency of misconduct prior to notification or discovery	N/A	The misconduct / violation is isolated	The misconduct / violation is a pattern or practice or system-wide with minimal impact	The misconduct / violation is a pattern or practice or system-wide with moderate impact	The misconduct / violation is a pattern or practice or system-wide with significant impact		5	
Financial gain and/or other benefit and/or loss or risk of loss to the institution	None	Financial benefit or actual loss is 0.025% or less of total assets; and/or minimal other benefit; and/or risk of minimal loss	Financial benefit or actual loss is >0.025% but ≤0.050% of total assets; and/or moderate other benefit; and/or risk of moderate loss	Financial benefit or actual loss is >0.050% but ≤0.075% of total assets; and/or significant other benefit; and/or risk of significant loss	Financial benefit or, actual loss is >0.075% of total assets; and/or substantial other benefit		5	
Previous Misconduct or Criticism (last 2 exams)	None	Same or similar criticism	Different misconduct, same root cause	Same root cause, similar misconduct	Same root cause, same misconduct		4	
Effectiveness of compliance programs (CP) and internal controls (IC)	Institution has a fully effective CMS/IC	CMS is generally effective with weaknesses noted in only the CP; ICs are generally effective and any weaknesses noted are minor	CMS exists but is only moderately effective with weaknesses noted in both areas of the CMS, or weakness in management alone; ICs are present but need improvement	CMS exists but is minimally effective with significant weaknesses noted in both areas of the CMS; ICs are weak and require significant enhancements	No CMS exists, or one exists but is not implemented or is completely ineffective; ICs are ineffective or nonexistent		3	
SUBTOTAL 1								
Restitution or other remedial action	No remedial action or restitution provided	Limited remedial action or partial restitution	Written commitment to provide full restitution and remedial action	Full restitution and remedial action	At least substantial restitution and remedial action before notification by a regulator; or written commitment to provide restitution and remedial action beyond regulatory requirements		5	
Cooperation	Resists or fails to provide information, intentionally provides partial or incomplete answers, holdback evidence, or is otherwise uncooperative	Cooperation but with significant delays	Cooperation with few minor delays	Full and prompt cooperation	Institution identifies and notifies regulator of potential violation or proactively cooperates to resolve the violation during the examination		5	
SUBTOTAL 2								
TOTAL (subtract 2 from 1)								

Recommended Penalty Ranges for CMPs against Institutions

Points from Matrix	Base Penalty Range*	Formula**
0-80	None	None
81-100	$40,000 – $110,000	Total Assets / 1 billion x penalty
101-120	$110,000 – $220,000	Total Assets / 1 billion x penalty
121-140	$220,000 – $370,000	Total Assets / 1 billion x penalty
141-160	$370,000 – $560,000	Total Assets / 1 billion x penalty
161-180	$560,000 – $790,000	Total Assets / 1 billion x penalty
181-200	$790,000 – $1,050,000	Total Assets / 1 billion x penalty
201-220	$1,050,000 – $1,360,000	Total Assets / 1 billion x penalty
221-240	$1,360,000 – $1,710,000	Total Assets / 1 billion x penalty
241-250	$1,710,000 – $1,900,000	Total Assets / 1 billion x penalty

* If CMPs are not pursued, staff may consider other appropriate supervisory action to address the deficiency.

** The penalty amount for institutions is determined using two steps. First, a penalty amount range is determined using the range under “Base Penalty Range” based on the score. Second, that penalty amount is multiplied by total assets (or, if applicable, modified total assets using the “Instruction for Determining Asset Size”) and divided by $1 billion. For example, an institution with $3.4 billion in total assets scores 90 points on the matrix, the “Base Penalty Range” is $40,000 to $110,000. The penalty range for a $3.4 billion institution would be $136,000 to $374,000 (penalty x TA/$1 billion or $40,000 x 3.4 and $110,000 x 3.4).

CMPs against Institutions for Anti-Money Laundering/Countering the Financing of Terrorism Violations

The AML/CFT CMP Matrix incorporates the factors identified by the Interagency Policy Statement on CMPs as relevant in determining the appropriateness of initiating a CMP assessment. These factors, along with those statutorily provided, are used in determining the CMP assessment amount. There may be occasions where staff does not recommend a CMP based on the overall score. However, whenever a CMP is being considered against an institution, the AML/CFT CMP Matrix must be completed.

The AML/CFT CMP Matrix should be used to calculate a possible CMP range before any adjustments are made for mitigating factors, such as the amount of financial resources of the institution. The possible CMP range should not be adjusted for corrective action since the matrix already provides credit to the institution for “corrective action” under Subtotal 2 of the AML/CFT CMP Matrix.

When determining the *ability to pay a CMP*, staff should analyze the institution’s financial condition, including capital levels and earnings. If there is cause to assess a CMP, the matrix should be completed regardless of the institution’s assigned ratings, and the institution’s ability to pay should be evaluated after the possible penalty range is determined.

Instructions for Scoring the AML/CFT Matrix Factors

Where the information below refers to “Institution,” it applies in the same manner to IAPs.

1. *Intent*: This factor requires a review of the extent to which the violation or practice was intentional, including whether the violation was committed with recklessness or willful disregard of the law.

"No intent" (level "0" score) would be appropriate where an institution violated the law despite reasonable efforts and systems to ensure compliance.

"Careless" (level "1" score) would be appropriate where an institution made reasonable efforts to comply with the law but made an error or errors due to inadequate diligence.

"Should have known" (level "2" score) would be appropriate where an institution should have been aware of the risk associated with the conduct at issue but continued to act without addressing the risk. This would involve situations where an institution learned of the potential risk yet did nothing to mitigate such risk. Additionally, if an institution contracted out a service to a third party and the third party, including an affiliate, violated the law, the institution should have known about such violation because it should have been monitoring such activity. [Similarly, if an institution failed to engage in appropriate third-party due diligence or failed to establish an adequate AML/CFT program that would have reasonably detected the violations at issue, the institution "should have known" about such violations.]

"Reckless Conduct" or "Willful Disregard" (level "3" score) would be appropriate where an institution was aware that its AML/CFT internal controls environment, policies, procedures, and/or staffing likely would fail to detect and prevent a violation and yet did nothing to redress the risk. For example, an institution criticized during an examination for employing an insufficient number of staff given its high-risk transaction volume that subsequently increases the transaction volume without increasing staff may be deemed reckless with respect to intent for subsequent violations. [This would also involve situations where there is a complete lack of or a systemic failure of an institution's AML/CFT program.]

"Deliberate" (level "4" score) would be appropriate where an institution engaged in conduct that it knew would violate a law. This score requires the institution to have actively participated in conduct (i.e., to have knowingly aided and abetted) that is deemed a violation. If an institution facilitated a customer's structuring, for example, such misconduct would qualify as deliberate.

2. *Concealment*: The focus of this factor is on the actions of the institution or officers, employees, or others working on the institution's behalf when FDIC staff or others such as the institution's auditors, other regulatory agencies, or law enforcement are attempting to determine whether an institution violated any law or regulation or engaged in unsafe or unsound practices. This factor would also apply if a corporate entity IAP sought to conceal violations or unsafe or unsound practices from institution management. The focus of this factor is on deliberate (as opposed to inadvertent) conduct by the institution or its officers and employees in connection with withholding documents and information. This includes, but is not limited to, withholding documents or other information as requested by FDIC staff. Scoring of this factor should not consider actions by the institution or individuals after the FDIC identified the violation. Thus, any actions taken by the institution would be considered under the *Cooperation* mitigating factor.

Level "0" score: Applies to those situations in which the institution promptly supplies all documents and information requested regarding a possible violation of law or regulation.

Level “1” score: Applies when the institution purposely complicates an issue to make it difficult to uncover, but supplies accurate and complete documents and information from which the violation can be ascertained by staff.

Level “2” score: Applies when the institution cannot provide documents or information because it deliberately failed to keep adequate records as required by law.

Level “3” score: Applies when the institution both deliberately obstructs FDIC staff or others in an attempt to make an issue difficult to uncover, and recklessly and/or intentionally failed to keep adequate records as required by law.

Level “4” score: Applies in those situations where the institution deliberately falsified documents or destroyed documents with the intent to impede an investigation or review and/or provided inaccurate, misleading, or false information to FDIC examiners or others.

3. *AML/CFT Program Violation or Systemic Deficiencies*: This factor includes any AML/CFT law or regulation, any final or temporary order, any AML/CFT condition imposed in writing in connection with the granting of any application or other request by an institution, or any AML/CFT-related written agreement between an institution and the FDIC. Substantive violations (e.g., program, pillar or systemic) warrant a more severe score, including potentially the highest score. A significant number of substantive violations may also justify the highest score.

4. *Failure to Report and/or Monitor for Suspicious Activity/Systemic Failure to Complete Currency Transaction Reports (CTR)s*: The institution exhibited systemic failures to file, or correctly file, reports required by AML/CFT regulations, or failed to implement systems to ensure the reporting or accuracy of this data. The “Look Back” requirement in most cases is a provision of a formal enforcement action and would require the highest score.

5. *History of Previous Supervisory Actions*: This matrix factor refers to a formal or informal enforcement action that previously addressed the same or a related issue. This factor is based on the extent to which prior informal or formal enforcement actions or conditions imposed in writing by the FDIC were required to address or prevent a violation, underlying practice, or unsafe or unsound practice. The type of supervisory action taken will be considered when determining the score for this factor. The score for this factor will generally be assigned as follows:

Level “1” score: A different violation or deficiency (i.e., distinct root cause) resulted in an informal enforcement action.

Level “2” score: A similar violation or deficiency (i.e., same root cause) resulted in an informal enforcement action (such as, a violation of currency transaction reporting or monetary instrument recordkeeping requirements).

Level “3” score: Again, the same root cause but violations (such as an AML/CFT program violation or an uncorrected violation with one or more of the AML/CFT program components) and deficiencies resulted in a formal enforcement action.

Level “4” score: The institution has an informal or formal enforcement action outstanding and has a history of noncompliance with laws and regulations.

6. *Continuation after Notification*: This factor is based on the IDI's response after notification. Notification occurs when an institution becomes aware that its action/non-action constitutes misconduct, a deficiency, or a violation. The notification may be written or oral and must be sufficient to make an institution aware that it is reasonably likely that its practice(s) constitutes misconduct. Notification includes notice of misconduct by the FDIC, other regulatory agencies, external auditors, internal auditors, or other parties, including law enforcement. In addition, notification includes discovery by IDI staff with notice to a member of management of the misconduct. The term "continuation" refers to the activity itself, not any lingering result. For example, an institution may not be collecting appropriate information on its customers, prior to account opening, as required under the Customer Identification Program rule. If, after notification, the institution continues not to collect proper customer identification information, this would be considered an uncorrected violation.

7. *History of Previous Violations and Previous Deficiencies*: This factor is based on history of prior violations or practices (particularly where they are similar to the actions under consideration) and previous criticism (including any recommendations made in the ROE or other supervisory correspondence) of the institution or IAP for similar actions.

Violations or deficiencies need not be continuous to elevate concern, and if identified in earlier examinations, should be considered in applying this factor, even if they have been corrected or there has been an intervening examination in which no similar violation or deficiency was reported.

Level "1" score: Same or similar criticism. An example is a criticism of AML/CFT training for not training new employees at a prior examination, and an AML/CFT training deficiency noted for lack of training for the board members at the current examination.

Level "2" score: Same root cause, different misconduct. An example would be deficiencies in the internal control environment resulting in suspicious activity reporting violations at the prior examination. During the current examination, the weak internal control environment led to the citation of information sharing violations.

Level "3" score: Same root cause, similar misconduct. An example would be an institution failing to have adequate AML/CFT internal controls that resulted in problems flagging unusual activity or aggregating branch-level cash transactions at a prior examination. At the current examination, the institution has suspicious activity report and currency transaction reporting violations resulting from inadequate AML/CFT internal controls at the current examination.

Level "4" score: Same root cause, same misconduct. An example would be an institution cited for an AML/CFT internal control violation for systemic problems in developing customer risk profiles at the last examination. At the current examination, the institution has not completed customer risk profiles for the majority of new customers.

8. *Duration of Misconduct Prior to Notification or Discovery*: "Notification" in this factor means the same as that under "Continuation after Notification." In determining the duration of the misconduct, the entire time period during which the misconduct occurred should be considered, not just the time period that was reviewed. The score on the matrix for this factor is based primarily on the length of time the misconduct occurred, with misconduct exceeding 18 months receiving the most severe score. Use the following timeframes to determine the assigned level:

Level "1" score: Less than or equal to 6 months,

Level "2" score: Over 6 months and up to 12 months,

Level "3" score: Over 12 months and up to 18 months, and

Level "4" score: Over 18 months.

9. *Frequency of Misconduct prior to Notification or Discovery*: "Notification" in this factor means the same as that under "Continuation after Notification." In determining the frequency of the misconduct, staff needs to first determine if the misconduct was isolated, infrequent, frequent, or a pattern or practice/systemic.

Level "1" score: The institution's misconduct was isolated. In assessing this factor, a single transaction that violates multiple regulations is considered one instance of misconduct.

Level "2" score: The institution's misconduct was infrequent. "Infrequent" means the occurrence of the misconduct took place over long intervals, and did not occur regularly.

Level "3" score: The institution's misconduct was frequent. "Frequent" means misconduct that occurs often, but not as regular as a pattern or practice.

Level "4" score: The institution's misconduct, deficiency, or violation rises to the level of a pattern or practice, otherwise referred to as systemic. In assessing this factor, a pattern or practice may be found when each instance or transaction that is considered misconduct is based on systemic failures (for example, 50 failures to file accurate and complete currency transaction reports may be considered a systemic failure if the institution generally only files a small number of currency transaction reports). Misconduct that is excluded due to the expiration of the statute of limitations should not be included when scoring this factor.

10. *Gain or Other Benefit to the Institution, and/or Loss or Risk of Loss to the Institution*: This factor considers whether the institution received financial gain or other benefit from the misconduct at issue. In assessing this factor, staff should consider any direct or indirect monetary gain or other benefit to the institution. A practice may not have resulted in monetary gain but may have resulted in some other benefit to the institution. Staff may also find cases where there is no financial gain or other benefit, but there is loss or risk of loss to the institution, including criminal fines for "specified unlawful activity." For example, an institution that permits structuring may not realize a gain or benefit, but repeated, extended, or flagrant AML/CFT failures may subject the institution to risk of loss. AML/CFT failures that facilitate a fraud resulting in actual loss should receive the highest score.

11. *Impact Other Than Loss*: In assessing this factor, it is appropriate to consider any possible negative impact or harm to the IDI and the banking industry, other than loss. Activity that facilitates money laundering, terrorist financing, or other illicit financial activity could negatively affect the public's confidence in the IDI or the banking industry. Conducting a few transactions, or failing to report a few transactions, may present risks that are confined to one IDI. In contrast, conducting high-risk (tied to a jurisdiction, or a U.S. high-intensity financial crimes area or a U.S. high-intensity drug trafficking area), high-dollar, high-frequency transactions with other banks through funds transfers, correspondent banking services, or U.S. dollar repatriation may adversely impact public confidence in the IDI or the banking industry.

12. *Effectiveness of AML/CFT Internal Control Environment*: Staff should determine whether an institution's AML/CFT system of internal controls are commensurate with the institution's money

laundering, terrorist financing, and other illicit financial act risks and ensure ongoing compliance with the requirements Bank Secrecy Act (also referred to as AML/CFT requirements). Alternatively, staff should determine if the system of internal controls has contributed to the violation and/or deficiency for which a CMP is being considered. In applying this factor, the relative consideration is the strength or weakness of the institution's AML/CFT program. In evaluating the AML/CFT program, staff should consider the extent to which the program components are effective. In general, the more components failures that have weaknesses, the greater the score. Additionally, if illicit financial transactions are detected, the highest score would be appropriate. Institutions will receive the most severe score in instances of weak internal controls that do not prevent violations, particularly if those violations remain unidentified or undetected for a prolonged period. In contrast, a system of internal controls, including relevant staff, that identified the violation or deficiency, allowing the institution to initiate timely corrective measures, may receive a lower score.

Instructions for Scoring the AML/CFT Matrix Factors under Subtotal 2

This portion of the matrix provides the institution positive consideration for corrective action, cooperation, and disclosure.

1. *Corrective Action and or Restitution*: In assessing this factor, staff should consider whether an institution has taken other remedial action to correct or mitigate all past harms arising out of the institution's past practices. Steps taken to prevent future violations do not constitute restitution or remediation of past violations. An institution that self-identifies a violation after the examination commences, and provides full corrective action prior to notification of the violation by the FDIC or other regulatory agency, should be awarded the highest score for this factor. Partial corrective action(s) would include instances where the institution did not make full corrective action or did not properly identify all necessary corrective action(s). **Note**: It is unlikely that circumstances requiring restitution in an AML/CFT institutional CMP case would arise.

2. *Cooperation and Disclosure*: In assessing this factor, staff should consider the extent to which an institution has been cooperative after they have identified a violation, raised it with management, and initiated steps to stop or remedy the violations through supervisory actions. The FDIC expects institutions to fully cooperate with examination efforts. An institution that self-identifies a potential violation and alerts the FDIC of its concerns regarding the issue, or proactively cooperates with the FDIC to resolve the issue, will be awarded the highest score of "4" for this factor. An example of proactive assistance would include where the institution begins to investigate the matter once it is discovered. If an institution does not meet the criteria for a score of "4" but provides full and prompt cooperation to the FIC, the institution should receive a score of "3." An institution that does not provide full and prompt cooperation may receive a score of "1" or "2."

CMP Matrix for Anti-Money Laundering//Countering the Financing of Terrorism

Factors to be Considered	**0**	**1**	**2**	**3**	**4**	**Assigned Level**	**Weight Factor**	**Weight X Level**
Intent	No Intent	Careless	Should have Known	Reckless or Willful Disregard	Deliberate		15	
Concealment	None	Purposeful complication of an issue / obstruction	Deliberate failure to keep adequate records	Deliberate obstruction and deliberately or recklessly failed to keep adequate records	Deliberate falsification or destroying of documents or providing false information to FDIC staff or others		15	

Factors to be Considered	0	1	2	3	4	Assigned Level	Weight Factor	Weight X Level
AML/CFT program violation or systemic deficiencies	None	Technical violations	Systemic violations or recurring violations that are not pillar violations	AML/CFT program, pillar violations	Failure to comply with Section 8(b)		10	
Failure to report Suspicious Activity and/or monitor for Suspicious Activity Look Back required and/or a systemic failure to complete CTRs	None	Institution fails to report and/or implement systems designed to ensure accurate reporting of required data	Repeat failure to report and/or implement systems designed to ensure accurate reporting of required data	Numerous repeat failures to report and/or implement systems designed to ensure accurate reporting of required data	Substantial repeat failure and/or failure to implement appropriate monitoring systems to ensure data accuracy. Look Back or Transaction review required for SARs or CTRs		10	
History of all previous AML/CFT supervisory actions	None	Different violation or deficiencies results in informal enforcement action issued	Similar violation or deficiencies results in informal enforcement action issued	Violations and deficiencies result in formal enforcement actions issued	Informal or formal enforcement actions outstanding; History of noncompliance with law, regulation or order		10	
Continuation after notification		Violation(s) ceased promptly upon notification	Violation(s) continued for short period of time after notification, less than 3 months	Violation(s) continued for long period of time after notification, more than 3 months	Violation(s) still continuing		8	
History of previous violations or previous deficiencies	None	Same or similar criticism	Same root cause/different misconduct	Same root cause, similar misconduct	Same root cause/same misconduct		8	
Duration of misconduct prior to notification or discovery		0 to 6 months	Over 6 and up to 12 months	Over 12 and up to 18 months	Over 18 months		8	
Frequency of misconduct prior to notification or discovery		Isolated instance of misconduct	More than one instance of misconduct/ infrequent	Frequent/Repeated	Pattern or practice		8	
Gain or other benefit to institution; and/or loss or risk of loss to the institution	None		Indirect gain or benefit to institution; and/or some actual loss	Direct gain or benefit to institution; and/or moderate actual loss or risk of substantial loss	Substantial direct gain or benefit to institution; and/or substantial actual loss		6	
Impact other than loss	None		Institution exposed to limited risk of money laundering	Moderate impact on banking industry or public confidence in banking due to an isolated instance of money laundering and/or other illicit transactions	Substantial impact on banking industry or public confidence in banking; Evidence of significant money laundering and other illicit financial transactions		6	
Effectiveness of AML/CFT Internal Control Environment		Weak oversight, or policies are stale or procedures are weak	Practices vary from Board approved policies and procedures	Deficient oversight, lax compliance efforts, weak controls	Lax compliance efforts, deficient controls, money laundering and/or illicit transactions detected		6	

Factors to be Considered	0	1	2	3	4	Assigned Level	Weight Factor	Weight X Level
SUBTOTAL 1								
Corrective Action to Remediate deficiencies and or Restitution	No corrective action	Limited corrective action after notification	Complete corrective action after notification	Partial corrective action voluntarily before notification	Complete corrective action voluntarily before notification		4	
Cooperation and disclosure	None	Limited disclosure or limited cooperation		Full disclosure and cooperation after notice	Institution self identifies voluntarily; full disclosure and cooperation before notice		4	
SUBTOTAL 2								
TOTAL (subtract 2 from 1)								

Matrix for AML/CFT CMPs against Institutions

Points from Matrix	Base Penalty Range Total Assets $1 Billion or less	Penalty Formula Total Assets Over $1 Billion*
0-100	None**	None
101-130	$10,000 – $25,000	Total Assets / 1 billion x penalty
131-150	$25,000 – $45,000	Total Assets / 1 billion x penalty
151-170	$45,000 – $65,000	Total Assets / 1 billion x penalty
171-190	$65,000 – $85,000	Total Assets / 1 billion x penalty
191-210	$85,000 – $200,000	Total Assets / 1 billion x penalty
211-220	$200,000 – $400,000	Total Assets / 1 billion x penalty
221-240	$400,000 – $600,000	Total Assets / 1 billion x penalty
241-260	$600,000 – $800,000	Total Assets / 1 billion x penalty
261-290	$800,000 – $1MM	Total Assets / 1 billion x penalty
291-310	$1MM – $2MM	Total Assets / 1 billion x penalty
311-330	$2MM – $3MM	Total Assets / 1 billion x penalty
331-350	$3MM – $4MM	Total Assets / 1 billion x penalty
351-370	$4MM – $5MM	Total Assets / 1 billion x penalty
371-390	$5MM – $6MM	Total Assets / 1 billion x penalty
391-400	$6MM – $7MM	Total Assets / 1 billion x penalty
400 +440***	$7MM +	Total Assets / 1 billion x penalty

* The penalty amount for institutions over $1 billion is determined using two steps. First, a penalty amount is determined using the range under “Total Assets over $1 Billion.” Second, that penalty amount is multiplied by total assets and divided by $1 billion. For example, an institution with $2.2 billion in total assets scores 248 points on the matrix. The recommended penalty range under $1 billion column is $600,000 to $800,000. The penalty range for a $2.2 billion institution would be $1.32MM to $1.76MM. (The actual calculation steps would be: first, determine Total Assets/$1 billion or in this example, $2.2 billion/1 billion for a factor of 2.2; and then, multiply this factor times the low end and high end of the range for banks up to $1 billion. The result is: 2.2 x $600,000, which results in a low end range of $1.32MM and then 2.2 x $800,000, which results in a high end range of $1.76MM.)

** If a CMP is not pursued, staff may still consider other appropriate supervisory action to address the deficiency.

*** In instances where the matrix score is over 400 and the IDI’s assets are more than $1 billion, the statutory maximums per violation, per day, should be calculated and considered.

Note: The suggested CMP ranges are provided for guidance only and are not intended to limit staff discretion to assess a penalty below or above the recommended amounts, taking all facts into account.

Assessment of CMPs Based on Consumer Compliance and Fair Lending Violations

Violations of consumer and fair lending laws and regulations may result in a recommendation for CMP assessments.

With the exception of mandatory CMPs related to pattern or practice flood insurance violations, which are discussed below, CMPs related to consumer compliance and fair lending violations are determined using the CMP matrices for institutions and/or individuals described above.

Flood Insurance Violations

Mandatory Civil Money Penalties

The FDIC must assess a CMP when it finds that an IDI has engaged in a pattern or practice of:

- making, increasing, extending, or renewing loans in violation of—
  - the requirement to purchase flood insurance under 42 U.S.C. § 4012a(b), as implemented by 12 C.F.R. § 339.3;
  - the escrow requirements under 42 U.S.C. § 4012a(d), as implemented by 12 C.F.R. § 339.5(a);
  - the notice requirements regarding special flood hazards and the availability of Federal disaster relief assistance under 42 U.S.C. § 4104a(a), as implemented by 12 C.F.R. § 339.9; or
  - the notice requirements regarding loan servicer and change of servicer under 42 U.S.C. § 4104a(b), as implemented by 12 C.F.R. § 339.10; or
- failing to provide notice of force placement or to force place flood insurance coverage in violation of 42 U.S.C. § 4012a(e), as implemented by 12 C.F.R. § 339.7(a).

The above violations of the Flood Act are referred to as Mandatory Penalty Violations. Where appropriate, the FDIC may also separately assess discretionary CMPs against an IDI or IAP for other violations of the Flood Act or Part 339.

Statutory Authority

The FDIC assesses CMPs for Mandatory Penalty Violations under section 102(f) of the Flood Act, 42 U.S.C. § 4012a(f). CMPs for Mandatory Penalty Violations are calculated using the framework outlined below.

Discretionary penalties against IDIs and IAPs for other violations of the Flood Act and Part 339 are assessed under Section 8(i)(2) of the FDI Act. Discretionary CMPs for other violations of the

Flood Act and Part 339 are determined using the CMP matrices for institutions and/or individuals described above.

Determining a Pattern or Practice for Mandatory CMPs

Determining whether a pattern or practice exists requires weighing the individual facts and circumstances of each case. In general, isolated, unrelated, or accidental occurrences will not constitute a pattern or practice. However, repeated, intentional, regular, usual, deliberate, or institutionalized practices will most likely constitute a pattern or practice. The totality of the circumstances must be considered when assessing whether a pattern or practice is present.

As noted in the Interagency Questions and Answers Regarding Flood Insurance, the presence of one or more of the following factors may support a finding that a pattern or practice exists:

- Conduct has some common source or cause within the IDI's control;
- Conduct appears to be grounded in a written or unwritten policy or established practice;
- Noncompliance occurred over an extended period of time;
- Relationship of the instances of noncompliance to one another (e.g., whether they all occurred in the same area of the IDI's operations);
- Number of instances of violations is significant relative to the total number of applicable transactions (depending on the circumstances, however, violations that involve only a small percentage of an institution's total activity could constitute a pattern or practice);
- IDI was cited for violations of the Flood Act at prior examinations and no steps have been taken by the IDI to correct the identified deficiencies;
- IDI's internal and/or external audit program had not identified and addressed deficiencies in its Flood Act compliance; or
- IDI lacks generally effective flood insurance policies and procedures and/or a training program for its employees.

These factors serve as a reference point in evaluating whether there may be a pattern or practice of violations in a particular case, but they are not exclusive or dispositive to a final determination. Depending on the totality of the facts and circumstances involved, one or more of these factors could provide evidence of a pattern or practice.

Determining the Number of Violations

When staff finds evidence of Mandatory Penalty Violations, prior to their departure from the IDI, staff should instruct IDI management to review the relevant universe of loans during the previous four years and determine the total number of violations. The person(s) performing the review should be aware that even loans that have been paid off prior to the current examination may nonetheless involve Mandatory Penalty Violations.

Pursuant to the Flood Act, the FBAs have four years from the time that a violation occurs to impose a CMP for the violation. Therefore, the IDI's review should include loans outstanding at

any time during the previous four years, unless flood insurance CMPs were imposed at the previous examination. If flood insurance CMPs were imposed at the previous examination, then, apart from verifying that corrective actions were taken regarding those prior violations, the flood review should generally encompass the time period since the previous examination.

Depending on the circumstances, it may be appropriate to limit the file search in scope to only cover the issues that were identified as a pattern or practice. For example, if staff identified a pattern or practice of inadequate flood insurance coverage but found no issues in other aspects of flood compliance, staff should consider limiting the file search to only identify additional violations of inadequate flood insurance. However, if more widespread concerns with flood compliance are noted or a pattern or practice of different sections is noted, the file search should be comprehensive enough to identify all violations during the lookback period. The IDI's documented results should be reviewed to confirm the search method and the findings.

Acquired Loans

If a loan is purchased or otherwise acquired by the IDI, that transaction itself is not an event that triggers any requirements under the Flood Act. If the acquiring IDI determines at any point during the life of the acquired loan that the loan is not compliant with the Flood Act or Part 339, then the acquiring IDI is responsible for correcting the compliance deficiency. If the acquiring IDI does not comply with the Flood Act or Part 339 in these instances, the IDI may be subject to violations and CMPs.

Participation Loans

Participation loans are subject to the requirements of the Flood Act and Part 339. Participation loans could include loans made and secured by improved real estate where multiple lenders pool or contribute funds that will be simultaneously advanced to a borrower or borrowers.

Extensions, renewals, or increases for participation loans, are also subject to the requirements of the Flood Act and Part 339.

Although there may be an agreement that a lead lender or agent has the compliance duties, each participating lender is responsible for compliance with the Flood Act and Part 339 and, as a result, may be individually subject to CMPs if violations are present. Therefore, these types of loans should be considered when determining whether there may be violations of the Flood Act or Part 339 and the total number of violations.

Charter Conversions

For an IDI that has changed its charter to one that is under the supervision of the FDIC, loans originated by that IDI prior to the date of the charter conversion should be considered when determining whether there may be Mandatory Penalty Violations. Staff should include all violations occurring both before and after the charter conversion date when determining the CMP amount. The FDIC may pursue CMPs for all violations that occur within the 4-year limitations period. If CMPs are recommended for violations that occurred prior to the date of charter conversion, staff should request information from the IDI to avoid assessing CMPs for violations that the previous regulatory agency already identified and assessed penalties.

For an IDI that is in the process of changing its charter to one where another FBA will be the IDI’s primary regulator, staff should attempt to complete the CMP process before the effective

date of the charter conversion. In instances when the CMP process is not completed prior to the charter conversion date, staff should refer their findings of flood-related violations to the new FBA that will exercise primary supervisory authority over the IDI.

Determining the Amount of the CMP for Mandatory Penalty Violations

The Flood Act mandates a penalty of up to $2,000 per violation per loan if staff finds Mandatory Penalty Violations by an institution. The $2,000 statutory maximum is adjusted annually to take into account inflation. The Flood Act requires that CMPs be imposed on a per violation basis, not on a per loan basis. Consequently, where a loan involves multiple flood- related violations, the total penalties assessed for that loan may be greater than $2,000.

The framework presented outlines a two-step process that will assist staff in determining the penalty amount to be assessed. Staff will first determine the base CMP amount and then will apply a percentage based on the asset size of the institution to the base CMP amount.

Step 1: Determine Base CMP Amounts:

Staff will first determine the base CMP amount to be assessed per violation based on whether the violation is categorized as a Tier 1 or Tier 2 violation. The penalty amounts increase for each repeat violation. A repeat violation exists where Mandatory Penalty Violations subject to a CMP were found in either of the two prior examinations. A violation does not have to be the same citation or the same tier to be considered a repeat violation. For example, if the bank was cited for a pattern or practice for failing to obtain flood insurance at origination at the last examination, but cited for a pattern or practice for failing to obtain force placed insurance at the current examination, that would be considered a repeat violation.

Mandatory Penalty Violations fall into Tier 1 and Tier 2 categories, as described below:

- Tier 1 violations include force placement notice [42 U.S.C. § 4012a(e), as implemented by 12 C.F.R. § 339.7(a)]; special flood hazard notice [42 U.S.C. § 4104a(a), as implemented by 12 C.F.R. § 339.9]; and servicer notice [42 U.S.C. § 4104a(b), as implemented by 12 C.F.R. § 339.10].

- Tier 2 violations include failure to insure or provide adequate insurance coverage for the term of the loan [42 U.S.C. § 4012a(b), as implemented by 12 C.F.R. § 339.3]; failure to escrow [42 U.S.C. § 4012a(d), as implemented by 12 C.F.R. § 339.5(a)]; and failure to force place [42 U.S.C. § 4012a(e), as implemented by 12 C.F.R. § 339.7(a)].

Exam with pattern or practice of Flood Act violations	Tier 1 – Base CMP amount per violation	Tier 2 – Base CMP amount per violation
1st Exam	$500	$1,000
2nd Exam	$1,000	$1,500
3rd Exam or more	$2,000	Maximum Inflation Adjusted Penalty

Step 2: Apply Institution Asset Size Factor:

Staff will then take into account an institution's asset size, based on Instruction for Determining Asset Size, by applying a percentage to the base CMP amount using the following formula:

Amount to be assessed per violation = [Base CMP amount(s)] x [Institution size factor].

Size category, based on total asset size (000s)	Percentage of the base CMP Amount
$500,000 and greater	100%
$250,001 to less than $500,000	75%
$250,000 and less	50%

While these steps and charts are tools to establish an appropriate CMP when identifying Mandatory Penalty Violations, the FDIC maintains its discretion to consider the facts and circumstances of each case, such as the institution's ability to repay, when determining the total amount of the CMPs to be assessed (including discretionary CMPs for other compliance violations). In connection with Mandatory Penalty Violations, the size factor is intended to be a tool that will generally take into account an institution's ability to repay. However, in cases where the aggregate value of all CMPs being pursued could potentially adversely impact a bank's capital levels, the FDIC reserves the right to exercise its discretion and further adjust the amount assessed for Mandatory Penalty Violations.

Enforcement Case Coordination

In order to facilitate the timely resolution of enforcement actions, staff is expected to contact the responsible Field/Regional RMS or DCP Office as soon as misconduct possibly warranting enforcement action is identified. This allows for Regional Legal Division personnel to be advised and for an attorney to be assigned to assist in the matter. Legal Division involvement while staff is still onsite at the IDI can help to focus staff's inquiry and the collection of pertinent documentation so that a return trip to the IDI may be avoided. Early Legal Division involvement can also expedite the decision on the need for and the completion of any formal Section 10(c) investigation requests.

While processing timeframes will vary based on the specific case, it is expected that all enforcement action cases will be processed as expeditiously as possible. For more complex matters, RO management should develop a processing timeframe and milestones that are appropriate for the situation.

Modifying and Terminating CMP or Restitution Actions

Modifying CMP or Restitution Actions

Recommendations to modify CMP or restitution notices and orders may result from settlement negotiations or from the receipt of new information following issuance of a notice. To process modifications, RO and WO staff will follow a similar process as that for issuing a new CMP or restitution action. If the RO recommends modifying an action, the RO should document its

justification for the proposed changes. In cases where settlements are reached, RO staff should inform respondents that the WO has final authority to approve any settlement.

Terminating CMP or Restitution Actions

CMP or restitution actions (typically in the notice stage) may be terminated when a respondent stipulates to an acceptable administrative enforcement action. For example, a CMP notice of assessment may be terminated if the respondent agrees to stipulate to a removal or prohibition order, when information is provided that negates the propriety of assessment, or for other good cause. To process terminations, RO and WO staff will follow a similar process as that for issuing a new CMP or restitution action. If the RO recommends terminating an action, the case memorandum should support the proposed changes.