Chapter 1 – Overview and Administrative Matters

Chapter 9 – Restitution and Civil Money Penalties

Chapter 1 – Overview and Administrative Matters

Abbreviations

The following abbreviations will be used throughout this manual.

AML	Anti-Money Laundering
AUSA	Assistant United States Attorney
BBR	Bank Board Resolution
BOD	Board of Directors
BSA	Bank Secrecy Act
CFPB	Consumer Financial Protection Bureau
C.F.R.	Code of Federal Regulations
CM	Case Manager
CRA	Community Reinvestment Act
CRC	Case Review Committee
CMP	Civil Money Penalty
CMS	Compliance Management System
CFT	Countering the Financing of Terrorism
DIF	Deposit Insurance Fund
DCP	Division of Depositor and Consumer Protection
DRR	Division of Resolutions and Receiverships
ECOA	Equal Credit Opportunity Act
FBA	Federal Banking Agency
FHFA	Federal Housing Finance Agency
FDI Act	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FFIEC	Federal Financial Institutions Examination Council
FinCEN	Financial Crimes Enforcement Network
FIL	Financial Institution Letter
Flood Act	Flood Disaster Protection Act of 1973
FO	Field Office
FRB	Federal Reserve Board
IAP	Institution-Affiliated Party
IDI	Insured Depository Institution
MOU	Memorandum of Understanding
MSA	Metropolitan Statistical Area
NCUA	National Credit Union Administration
NOC	Notice of Charges
NOI	Notice of Intent
NPR	Notice to Primary Regulator
OCC	Office of the Comptroller of the Currency
PCA	Prompt Corrective Action
PC&D	Personal Cease-and-Desist
RC	Regional Counsel
RD	Regional Director
RE	Review Examiner
RMS	Division of Risk Management Supervision
RO	Regional Office
ROE	Report of Examination
RO Reviewer	Regional Reviewer – Any Regional staff member assigned the task
TILA	Truth In Lending Act

UDAP	Unfair or Deceptive Acts or Practices
U.S.	United States
U.S.C.	United States Code
WO	Washington Office
WO Reviewer	Washington Reviewer – Any Washington staff member assigned the task

Introduction

The Formal and Informal Enforcement Actions Manual provides instructions related to the work necessary to develop and process formal and informal enforcement actions. Developed by the Divisions of RMS and DCP, the manual is intended to support the work of FO, RO, and WO staff involved in processing and monitoring enforcement actions. The manual provides instructions for processing both formal and informal actions against IDIs and IAPs.

This manual is designed to promote consistency in the development and processing of FDIC enforcement actions. A consistent approach toward determining the appropriate action against IDIs and IAPs will allow the FDIC to fairly address violations, unsafe or unsound practices, and other actionable misconduct (as defined below) exhibited by IDIs and IAPs. This manual is intended to serve primarily as an instructional guide and resource for RMS and DCP staff. This manual should not be interpreted as an independent source of rights of or obligations to parties in any formal actions described herein. In addition, this manual does not interpret any law or regulation; rather it operationalizes the application of relevant laws and regulations and the development of enforcement matters in response to violations and other actionable misconduct.

About the Formal and Informal Enforcement Actions Manual

The Overview and Administrative Matters chapter provides basic information about formal and informal corrective actions, instructions for notifying other agencies, FDIC delegations of authority, and the agencies' requirements for publishing certain formal actions.

Chapters 2 through 7 and chapters 9 and 10 describe the following types of enforcement actions used by the FDIC:

- Informal actions;
- Cease-and-desist orders, consent orders, and personal cease-and-desist orders;
- Prompt corrective action directives and provisions;
- Removal, prohibition, and suspension actions;
- Insurance terminations;
- Restitution and civil money penalties; and
- Safety and soundness actions under Section 39 of the FDI Act.

In addition to the chapters devoted to specific types of enforcement actions, chapter 8 provides a comparison of prompt corrective action directives to Section 8 actions, and chapter 11 addresses the FDIC's authority to initiate formal investigations. Each chapter includes information and instructions applicable to RMS and DCP FO, RO, and WO staffs.

Definitions

The following defined terms are used throughout this manual.

Actionable Misconduct

Actionable misconduct is **generally**: (1) any action (alone or with another or others) that results in, causes, or brings about any violation of any law or regulation, any cease and desist order which has become final, any condition imposed in writing by the FDIC in connection with any action or any application, notice, or request, or any written agreement between the IDI and the FDIC; (2) any participation, counseling, aiding, or abetting in the commission of such a violation; (3) the engagement in any unsafe or unsound practice; or (4) any breach of a fiduciary duty.

Fiduciary Duty

A fiduciary duty is the obligation of an IDI’s directors, officers, and certain employees to act in the best interests of their financial institution. This obligation includes the duties of loyalty and care. Loyalty requires the individual to administer the affairs of the IDI with candor, personal honesty, and integrity. Care requires the individual to act prudently and diligently in conducting the affairs of the IDI. For example, institution officers and directors have a fiduciary duty to protect the IDI’s assets, further the best interests of the IDI, and not place their interests above those of the IDI.

Formal Actions

Formal actions are notices or orders issued by the FDIC against IDIs or IAPs. Formal actions are legally enforceable. Most notices and final orders are published after issuance, as required by law.

Informal Actions

Informal actions are voluntary commitments made by an IDI’s BOD or an IAP. Informal actions are not legally enforceable and are not publicly disclosed or published.

Institution-Affiliated Party

An IAP is (1) any director, officer, employee, or controlling shareholder (other than a bank holding company or savings and loan holding company) of, or agent for, an IDI; (2) any other person who has filed or is required to file a change-in-control notice; (3) any shareholder (other than a bank holding company or savings and loan holding company), consultant, joint venture partner; or any other person who participates in the conduct of the affairs of an IDI; or (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in violations, breaches of fiduciary duty, or unsafe or unsound practices, which caused or are likely to cause more than a minimal financial loss to, or a significant adverse effect on, the IDI.

Provisions

Provisions are specific corrective measures an IDI or IAP is required to take or abide by under an enforcement action.

Statute of Limitations

Except where an alternative period is expressly provided for, the FDIC's formal enforcement actions are generally subject to the five-year statute of limitations period imposed by 28 U.S.C. § 2462. The Legal Division should be consulted about questions related to this limitations period.

Supervisory Letter

The term "supervisory letter," as used in this manual, refers to correspondence sent by the FDIC to an IAP or IDI to communicate a supervisory concern or to admonish an IDI or IAP without seeking a formal enforcement action. For example, the instructions for the CMP matrix against individuals suggests that the FDIC consider sending a supervisory letter when the resulting matrix score does not suggest that a CMP be considered.

Violation

The term "violation" includes any action (alone or with others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation, which includes a violation of law, rule, regulation, final order, condition imposed in writing, or formal agreement.

Considerations for Appropriate Action

When actionable misconduct is detected early, staff should bring these matters to the attention of IDI management and engage in discussions regarding the problem areas and potential remedial steps. The ability for staff and management to engage in discussions is a vital and longstanding part of the examination process, and often results in the type of early intervention that is necessary to correct problems before they become serious.

If management is able to correct deficiencies within a reasonable timeframe, then supervisory recommendations for corrective action in the ROE could be a sufficient supervisory response, subject to appropriate follow-up during an interim contact, on-site visitation, or the next examination.

Note: The term "supervisory recommendations" refers to FDIC communications with an IDI that are intended to inform the IDI of the FDIC's views about changes needed in its practices, operations or financial condition. (See *Statement of FDIC Board of Directors on the Development and Communication of Supervisory Recommendations*).

If this process does not achieve the desired result, an informal or even formal corrective action may be warranted. Additionally, certain forms of misconduct require enforcement by law, including the assessment of CMPs for certain violations of the Flood Act, restitution for certain TILA violations, and the referral of certain ECOA violations to the U.S. Department of Justice.

Types of Actions

The FDIC may institute a wide range of informal and formal actions against IDIs or IAPs to address weak operating practices, deteriorating financial conditions, or other actionable misconduct. Although a single comprehensive solution is generally preferred, the FDIC may seek more than one of the available remedies to bring about the necessary corrective action, if appropriate to the situation.

Informal Actions

The RO may recommend that the directors of an institution adopt a BBR committing to addressing identified deficiencies. Alternatively, the RO may enter into a MOU with the institution. Chapter 2 – Informal Actions describes instructions for processing BBRs and MOUs. A request for a plan to conform to safety and soundness standards under Section 39 of the FDI Act is an informal action as described in Chapter 10 – Section 39 Actions. Although not considered an informal action, the FDIC may send a supervisory letter to an IDI or IAP as a means of communicating a supervisory concern when circumstances do not warrant a formal action. Chapter 9 – Restitution and Civil Money Penalties discusses supervisory letters as an alternate to assessing a CMP.

Formal Actions

The FDIC may issue various formal actions pursuant to Section 8 of the FDI Act, including termination of federal deposit insurance; cease-and-desist and consent, and personal cease-and-desist; removal, prohibition, or suspension; restitution; and CMPs. The FDIC may also issue formal actions under the Flood Act to impose CMPs for certain flood insurance-related violations.

Additionally, Section 38 of the FDI Act authorizes the FDIC to issue PCA directives to IDIs that are less than adequately capitalized. In certain circumstances, the FDIC also may conduct a formal investigation pursuant to Section 10(c) of the FDI Act to obtain information or evidence that is not available through normal supervisory processes. Chapters 4 through 7, 9, and 11 provide instructions for processing these types of formal actions.

Under Section 39 of the FDI Act, if the IDI fails to submit or materially implement an acceptable plan, the IDI will become subject to a formal action under certain circumstances. Chapter 10 discusses Section 39 actions.

Grounds for Informal and Formal Actions

A risk management composite rating or a consumer compliance rating of “3,” “4,” or “5” will typically result in a formal or informal enforcement action. However, the FDIC may also pursue an enforcement action against a higher rated IDI, if the specific facts and circumstances make such an action appropriate. Composite ratings of “3,” “4,” or “5,” for specialty examination areas, such as Trust or Information Technology, or lack of compliance with AML/CFT[1] statutes and regulations, may also be addressed with informal or formal enforcement actions. The FDIC has broad discretion to determine what form of corrective program to pursue.

[1] The *Anti-Money Laundering Act of 2020* (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the “Bank Secrecy Act” or “BSA”). The AML Act requires FinCEN (in consultation with federal functional regulators) to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA/AML) instead of BSA/AML when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

The belief that the institution's management has recognized the deficiencies and will institute corrective action is not a sufficient basis, in and of itself, to preclude taking corrective action. Generally, the FDIC institutes informal and formal action against institutions under the following conditions.

Informal Actions

Informal action is **generally** appropriate for institutions that receive a composite rating of "3" for safety and soundness or consumer compliance. This rating indicates the institution has weaknesses that, if left uncorrected, could cause the institution's condition to deteriorate. Informal actions may also be appropriate when specialty examination areas are rated "3" or when significant weaknesses are identified in AML/CFT compliance. More severe remedies, including formal actions, may be taken if warranted. In addition, when formal action is considered but ultimately not pursued (e.g., when a CMP matrix score suggests no CMP be assessed) sending a supervisory letter to an IDI or IAP is an alternative action that may be considered.

The FDIC may also pursue an informal enforcement action against a higher rated IDI, if the specific facts and circumstances make such an action appropriate. For example, an action could be targeted to address concerns noted where a component "3" rating is assigned even though the composite rating remains "2" or higher. Or, for example, the asset quality component may be rated "2," but there may be high risk in a particular lending segment that needs to be addressed.

Formal Actions

Formal action is **generally** initiated against an IDI with a composite rating of "4" or "5" for safety and soundness, or for consumer compliance if there is evidence of unsafe or unsound practices and/or conditions or concern over a high volume or severity of violations at the IDI. (Refer also to Chapter 3 – Unsafe or Unsound Practices and Conditions / Violations of Law). However, specific facts and circumstances may warrant the pursuit of a formal action, even if an IDI has a composite rating of "3" or higher for safety and soundness or for consumer compliance. For example, certain actions, such as CMPs and restitution, may be taken based upon actionable misconduct that may be unrelated to the IDI's supervisory ratings or condition.

Detecting Problems Requiring Corrective Action

Most corrective actions directed toward IDIs are initiated as a result of facts and circumstances evaluated by FDIC field staff during examinations, including evaluation of compliance with any existing enforcement actions. Deficiencies may also be identified in the ROE prepared by other financial regulatory agencies, extracted from Reports of Condition and Income filed quarterly by institutions, or identified through reviews of published reports, news releases, or other sources.

In addition, employees or customers sometimes volunteer information concerning irregular activities at IDIs. IDIs may also discover and report suspected misconduct by its own IAPs. Such disclosures may prompt formal FDIC review through an onsite visitation or examination of the institution, or initiation of a formal investigation by the FDIC pursuant to Section 10(c) of the FDI Act. Accordingly, some enforcement actions against IAPs arise out of such supervisory activities outside of the normal examination process.

Documenting Formal Enforcement Actions under Section 8 and Other Laws

Actions under Section 8 of the FDI Act or other applicable laws (e.g., Flood Act) constitute formal proceedings against IDIs or IAPs. At an administrative hearing, the burden of proving by a preponderance of the evidence all charges rests with the FDIC. When an action is based on examination findings, the ROE should generally contain all pertinent facts in support of each charge. For actions based on events outside of an examination, such as a formal investigation, the evidence must, likewise, support the charges. FDIC staff are often called to testify during the adjudication process.

Initiating Actions

The FDIC's first line of supervision is the field staff. The RMS and DCP manuals of examination policy require staff to describe any problems detected during examinations of IDIs and to recommend appropriate corrective action.

Most supervisory recommendations are generally correctable in the normal course of business, and the FDIC will evaluate the effectiveness of an institution's response through routine examination and correspondence. If serious deficiencies exist, staff should discuss appropriate corrective measures (which may include formal or informal action) with the FO management and RO staff before the examination is completed. The Legal Division should also be consulted when enforcement actions are being considered.

Expedited Processing

Depending on the situation, it may be appropriate to expedite the processing of certain actions (for example, to immediately halt practices that could materially impact the safety and soundness of an institution). Complete, effective communication is essential among FO, RO, and WO staff to ensure all parties are aware of the need for expedited processing.

In accordance with pertinent policies and procedures, field staff should inform either the FO management and/or RO Reviewer of situations that appear to require expedited processing. If the RD concurs with the recommendation for expedited processing, the RO Reviewer should provide relevant information about the case to the WO Reviewer, Section Chief, and/or Associate Director.

Modifying and Terminating Actions

When the provisions of a formal or informal action are changed during the life of the action, the action must be **modified** to reflect the change. An action is most often modified following an examination or visitation. **For formal actions, a modification order must be issued to modify an existing order**.

Formal and informal actions may be **terminated** when certain conditions are met. Common reasons for terminating informal actions are listed in Chapter 2 – Informal Actions. Conditions for terminating formal actions are listed in the respective chapters addressing each type of formal action.

Notifying Other Agencies

On June 12, 2018, the FBAs jointly issued the "Policy Statement on Interagency Notification of Formal Enforcement Actions," which is intended to promote notification of and coordination on formal enforcement actions among the FBAs. The policy statement is not intended as a substitute for informal communication that routinely occurs among the FBAs in advance of any possible enforcement action, including verbal notification of pending enforcement matters to officials and staff with supervisory and enforcement responsibility for the affected institution.

Joint Policy Statement Provisions

Under the terms of the joint Policy Statement on Interagency Notification of Formal Enforcement Actions, when an FBA determines it will take a formal enforcement action against any IDI, depository institution holding company, non-bank affiliate, or IAP, it should evaluate whether the enforcement action involves the interests of another FBA (i.e., affecting an institution subject to supervision by the FBA). Examples of such interests include unsafe or unsound practices or significant violations of law by an IDI, non-bank affiliate, or depository institution holding company or misconduct by an IAP that may have significant connections with an institution regulated by another FBA.

If it is determined that one or more other FBAs have an interest in the enforcement action, the FBA proposing the enforcement action should notify the other FBA(s). Notification should be provided at the earlier of the FBA's written notification to the IDI, depository institution holding company, non-bank affiliate, or IAP against which the FBA is considering an enforcement action or when the appropriate responsible agency official, or group of officials, determines that formal enforcement action is expected to be taken.

The scope of the information shared by the notification may depend on the gravity of the interests of the other FBA(s) and be determined on a case-by-case basis by the FBA providing the notification. The information shared, however, should be appropriate to allow the other FBA(s) to take necessary action in examining or investigating the financial institution or IAP over which they have jurisdiction.

If two or more FBAs consider bringing a complementary action (e.g., an action involving an IDI and its parent holding company), those FBAs should coordinate the preparation, processing, presentation, potential penalties, service, and follow-up of the enforcement action.

Note: The joint policy statement is available at http://www.fdic.gov/regulations/laws/rules/5000-700.html.

Memorandum of Understanding on Supervisory Coordination

The MOU on Supervisory Coordination is intended to implement the statutory mandate to establish coordination and cooperation between the CFPB and the FBAs, minimize unnecessary regulatory burden, avoid unnecessary duplication of effort, and decrease the risk of conflicting supervisory directives. Under the MOU, for FDIC-supervised depository institutions over $10 billion and for FDIC-supervised affiliates of IDIs over $10 billion, ROs should:

- Provide scheduling information for targeted reviews outlined in supervisory plans for the coming year;

- Provide a draft copy of any ROE and any related enforcement action, including MOUs, to the CFPB for comment at least 30 days prior to issuance to the institution;
- Consider any concerns raised by the CFPB before issuing the final ROE or any related enforcement action; and
- Provide the CFPB with copies of the transmittal letter and final ROE, any related enforcement action, including MOUs, and any related appeals by the IDI.

Each RO is responsible for coordinating with the CFPB to deliver required documents and to make a record of the information shared and any response received.

Note: The MOU on Supervisory Coordination is available at https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf.

Notification of State Authority

It is the policy of the FDIC to contact the appropriate state regulatory authority when administrative actions are contemplated. The opinion of the state authority regarding the proposed action, as well as any complementary actions which are being undertaken by that agency, should be included in memoranda or other documentation supporting the action.

Section 8(m) of the FDI Act requires that the state authority be contacted in connection with any proceeding under Sections 8(b), (c)(1), or (e) of the FDI Act, and provided with notification of the action to be taken and grounds supporting the action. Unless corrective action is effectuated by action of the state authority within a time specified in the notice mentioned above, the FDIC may proceed. Failure to notify the state authority, however, will not invalidate a notice or order issued under these sections.

Notification of the Financial Crimes Enforcement Network

FinCEN is the administrator of the BSA under delegated authority from the Secretary of the Treasury. FinCEN has the authority to examine financial institutions for compliance with the BSA and regulations promulgated under the BSA at 31 C.F.R. Chapter X, as well as to take enforcement actions for violations of the BSA and its implementing regulations. The Secretary has delegated BSA examination authority, but not enforcement authority, to each FBA with respect to banking organizations supervised by that FBA. The FBAs have separate authority over banking organizations to enforce compliance with all laws and regulations, including the BSA.

Pursuant to an information-sharing MOU, the FDIC notifies FinCEN of significant BSA violations or deficiencies with the intent to improve and enhance the level of interagency cooperation in the area of BSA examination and compliance. The MOU sets forth procedures for the exchange of certain information between the FBAs and FinCEN. From the standpoint of policy, examination, and enforcement, the MOU enables the agencies to maximize their resources in discharging their statutory obligations. For this purpose, the FDIC provides FinCEN with copies of any formal or informal enforcement action and relevant ROE(s) relating to significant noncompliance with the BSA or its implementing regulations. The AML Section in the WO is responsible for coordinating the sharing of this information with FinCEN.

Referral to the U.S. Department of Justice and Notification to the Department of Housing and Urban Development

Whenever the FDIC has reason to believe that an institution has engaged in a pattern or practice of discouraging or denying applications for credit in violation of ECOA, the FDIC is required to refer the matter to the U.S. Department of Justice pursuant to Section 706(g) of ECOA, 15 U.S.C. § 1691e(g). In other fair lending cases where a referral is not made to U.S. Department of Justice, section 706(k) of ECOA, 15 U.S.C. § 1691e(k), requires the FDIC to notify Department of Housing and Urban Development when it has reason to believe that an institution has engaged in conduct that violates both ECOA and the Fair Housing Act. The RO should consult with WO examinations and Legal prior to making any referrals or providing notice under section 706 of ECOA.

Coordinating Related Actions

Complementary actions against affiliated or related institutions need not be issued simultaneously. However, their preparation, processing, service, and follow-up should be coordinated by the appropriate agencies.

Delegations of Authority

The FDIC BOD has delegated authority to RMS and DCP management to issue certain types of formal actions, including those addressed throughout this manual. The delegations chart should be consulted at all times to ensure that the action is authorized at the appropriate level of delegation. Delegated authority requires the receipt of concurrent certification by the appropriate representative of the Legal Division.

The current delegations of authority can be found on the FDIC website at https://www.fdic.gov/regulations/laws/matrix/delegations-enforcement.pdf.

Required Publications of Certain Formal Actions

Section 8(u) of the FDI Act requires the FBAs to publicly disclose certain orders and agreements that the FBA has issued. As required by this law, the FDIC publishes, on a monthly basis, all final administrative enforcement orders against IDIs and IAPs issued during the prior month. The orders are made available in a searchable database at the FDIC's Enforcement Decisions and Orders website at https://orders.fdic.gov/s/.

Each FBA has established a public website to search for and view these actions. The FFIEC's website lists the website address where each agency's enforcement actions publications can be found. These addresses are listed below.

FDIC	https://orders.fdic.gov/s/
FRB	http://www.federalreserve.gov/boarddocs/enforcement
OCC	https://apps.occ.gov/EASearch/
CFPB	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/
NCUA	https://www.ncua.gov/regulation-supervision/enforcement-actions
FFIEC	http://www.ffiec.gov/enforcement.htm

Chapter 2 – Informal Actions

Informal Actions

As noted in chapter 1, regulatory agencies may use informal procedures in a measured effort to address weak operating practices, deteriorating financial conditions, or actionable misconduct. Informal actions are voluntary commitments made by the BOD of an institution or an IAP. Informal actions are neither publicly available nor legally enforceable in a federal administrative enforcement proceeding or in a federal or state court.

Informal actions should be used when discussions with management or findings and recommendations in the ROE will not, by themselves, accomplish the FDIC's goal of attaining timely corrective action from management. However, informal actions generally are not appropriate when an institution's problems present serious concerns and risks, in which case a formal action should be pursued.

Types of Informal Actions

The informal actions most commonly used by the FDIC are BBRs and MOUs. Instructions for processing BBRs and MOUs are provided in the following pages. As noted in chapter 1, a request by the FDIC that an IDI submit a plan to conform to safety and soundness standards under Section 39 is an *informal* action. If the IDI fails to submit or materially implement an acceptable plan, the IDI will become subject to a Section 39 *formal* action under certain circumstances. Chapter 10 provides instructions for processing Section 39 actions.

When Informal Actions Are Used

Informal actions are particularly appropriate when the FDIC has communicated with institution management regarding supervisory concerns and has determined that the institution's managers and BOD are committed to and capable of addressing these concerns with some direction, but without the initiation of a formal enforcement action. These informal actions may be taken based on the findings of examinations, visitations, target reviews, offsite reviews, etc.

Informal vs. Formal Actions

The following criteria, if applicable, are designed to assist examination staff in determining whether to seek informal or formal action. ***This list is not all-inclusive.***

- The bank's condition as reflected by its supervisory composite and component ratings.
- Bank management's commitment toward complying with laws and regulations or correcting unsafe or unsound practices.
- The degree of concern regarding the institution's financial condition and the amount of time it may take to restore areas of concern to a satisfactory condition or level.
- The ability of management and the BOD to address the underlying causes for the institution's weakened financial condition.
- Whether violations or unsafe or unsound practices were willful or intentional, reckless, repetitive, substantive, or numerous.

- The institution's history of violations or unsatisfactory practices, as well as its history of instituting remedial or corrective action in a timely manner once violations or undesirable practices have been identified.

- Whether deficiencies resulted from changes in management or key personnel.

- Whether the institution has already initiated corrective action and established procedures to prevent future deficiencies or violations.

- The extent of financial or other harm caused, or likely to be caused, by the violations or unsafe or unsound practices.

- Whether deficiencies in the AML/CFT program are serious or systemic in nature, or apparent violations result from management's failure to develop and administer an effective AML/CFT program.

- Any other circumstances that, in staff's judgment, may weigh in favor of a formal or informal action.

Bank Board Resolutions

BBRs are informal commitments adopted by an institution's BOD (often at the request of the FDIC) directing the institution's personnel to take corrective action regarding specific noted deficiencies. BBRs may also be used as a tool to strengthen and monitor the institution's progress with regard to a particular component rating or activity.

Institutions that fail to respond to significant issues that require immediate attention, such as Matters Requiring Board Attention included in a ROE, or whose corrective action is insufficient to address supervisory concerns, will be subject to increased supervisory monitoring, which may warrant requesting a BBR.

A BBR may be drafted by the institution's BOD as a proactive measure to address issues noted during an examination or targeted review. However, the FDIC may review the BOD's draft BBR to ensure it accurately addresses the identified supervisory concerns and proposes effective corrective measures. In cases where the BOD's proposed BBR does not effectively address noted concerns, the FDIC may choose to pursue a MOU or other supervisory remedies.

Memoranda of Understanding

A MOU is an informal agreement between an institution and the FDIC, which is signed by both parties. The state authority may also be a party to the agreement. MOUs are designed to address and correct identified weaknesses in an institution's condition, or violations or unsafe or unsound practices at the IDI.

The FDIC generally uses MOUs instead of BBRs when there is reason to believe the deficiencies noted during an examination, visitation, or target reviews need a more structured program or specific terms to effect corrective action.

Use of a MOU does not prevent the FDIC from subsequently pursuing formal enforcement action if such formal action is required by law or if the FDIC believes the institution's management is unwilling or unable to voluntarily take necessary corrective action. A formal enforcement action may also be pursued if efforts to comply with the informal enforcement action have not resulted in sufficient resolution of the identified concerns or improvement in the institution's condition.

Modifying Informal Actions

When subsequent events such as an examination or visitation result in the need to make minor changes to an outstanding informal action, the FDIC may suggest that an institution modify a BBR or agree to modify a MOU. Procedures and standards for modifying an informal action are similar to those for initiating a new action. The RO must coordinate modification of a MOU with the state authority if the state is a party to the action.

Terminating Informal Actions

The FDIC may consider terminating informal actions when any of the following conditions exist:

- The IDI is in significant compliance with the provisions of the action.
- The IDI's condition has improved sufficiently, or the objectionable practices or violations resulting in the informal action have been corrected, so that the action is no longer needed.
- The IDI has partially met the provisions of the action, and a new informal action has been issued to address outstanding provisions or new areas of concern.
- Deterioration or lack of compliance leads to issuance of a new informal or formal action.
- The IDI merges or is closed.

Note: The FDIC does not actually terminate BBRs since it is not a party to these actions. However, if a BBR contains requirements for reporting the IDI's progress to the RO, the RO may send a letter to the IDI's BOD stating that reporting is no longer necessary.

Standards for termination due to substantial compliance are similar to those for initiating an informal action. The outstanding action should remain in effect until the new action is issued.

The RO must coordinate termination of a MOU with the state authority if the state is a party to the action.

Documenting Informal Action Terminations

RO staff should document termination of informal action using one of the following methods:

- A letter from the RD (or designee) informing the IDI's BOD of the termination (for a MOU or other informal action) or that the BBR is considered to have served its intended purpose with the BOD being released from further reporting on the IDI's progress with the BBR. In all cases, any requirement for submitting progress reports will also end upon termination of the informal action. If the informal action is being replaced by a new action, the statement regarding termination of the previous informal action would generally be included in correspondence relating to the issuance of the new action.

- A file memorandum from the RO Reviewer stating the action has been terminated or discontinued due to the IDI’s closing or merger.

Chapter 3 – Unsafe or Unsound Practices and Conditions / Distinguishing Between Laws, Regulations, and Guidance

Unsafe or Unsound Practices

An unsafe or unsound practice is any action or lack of action that is contrary to generally accepted standards of prudent financial institution operation that, if continued, would result in abnormal risk of loss or damage to an IDI, its shareholders, or the DIF.

Because unsafe or unsound practices may involve any area of an IDI's operations, it is impossible to provide an all-inclusive list of such practices. In addition, an activity may be considered an unsafe or unsound practice at one IDI and not at another after all relevant facts and circumstances are considered for each specific institution.

Although the FDI Act does not define unsafe or unsound practices, examples have been established through Section 8 administrative proceedings. Examples of common unsafe or unsound practices are listed on the following pages.

Practices Deemed Unsafe or Unsound

Both an IAP and an IDI may engage or participate in unsafe or unsound practices in connection with any IDI. Actions deemed to be unsafe or unsound practices include, but are not limited to, the following:

- Operating with an inadequate level of capital for the kind and quality of assets held.
- Engaging in hazardous lending and lax collection practices that include, but are not limited to, extending credit without first obtaining complete and current financial information, extending credit that is inadequately secured, extending credit in the form of overdrafts without adequate controls, and extending credit with inadequate diversification of risk.
- Operating without adequate liquidity, in light of the asset and liability mix.
- Operating without adequate internal controls and an adequate audit program.
- Engaging in speculative or hazardous investment practices.
- Paying excessive dividends in relation to capital and earnings.
- Engaging in nominee lending.
- Making misrepresentations to or concealing material information from an IDI's board of directors.

Lack of action deemed to be an unsafe or unsound practice may include the following:

- Failure to provide adequate supervision and direction over the officers of an IDI.
- Failure to provide an adequate allowance for loan and lease losses or credit losses.
- Failure to implement adequate internal controls.

- Failure to effectively manage the IDI's loan portfolio.
- Failure to keep accurate books and records.
- Failure to enforce programs for repayment of loans.
- Failure to implement an adequate CMS.

Unsafe or Unsound Conditions

As with unsafe or unsound practices, it is impossible to define precisely what constitutes an unsafe or unsound condition because an IDI's condition depends on virtually every aspect of its operations. At a minimum, an IDI's capital level, asset quality, management, earnings prospects, liquidity, and sensitivity to market risk must be carefully evaluated to determine whether unsafe or unsound conditions exist. An IDI's financial performance need not deteriorate to a level near insolvency for a condition to be considered unsafe or unsound.

The FDIC BOD has determined the following to be unsafe/unsound conditions:

- Maintenance of unduly low net interest margins.
- Excessive overhead expenses.
- Excessive volume of loans subject to adverse classification.
- Excessive net loan losses.
- Excessive volume of non-earning assets.

Distinguishing Between Laws, Regulations, and Guidance

A framework of federal and state laws and regulations and supervisory guidance (each described below) form the foundation for IDIs' safe and sound operations and the FDIC's safety and soundness supervisory processes. Statutes and regulations have the force of law while supervisory guidance does not.

Statutes and laws. At the federal level, "statutes" and "laws" are interchangeable terms that refer to legislation after it has been passed by Congress and signed into law by the President. States also have legislative bodies and processes to pass state statutes and laws.

Rules and regulations. The FDIC, like other federal agencies, issues rules, after public notice and comment, when appropriate and permitted by statute. As used in this manual, "regulation" and "rule" are generally synonymous terms. Under the Administrative Procedure Act, which governs how federal agencies may propose and establish rules, "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…"(5 U.S.C. § 551(4)) Because regulations implement laws, they are binding, which means that they have the force and effect of law.

Supervisory Guidance. The FDIC and other agencies also issue various types of supervisory guidance through different channels, which may include statements of policy, strategies, questions and answers, frequently asked questions, guidelines, statements, and advisories. Often, supervisory guidance documents are issued in response to industry requests and concerns. Statements of policy are often interagency and are typically published for comment and adopted by the FDIC's BOD. Supervisory guidance may be issued by the FDIC alone or on an interagency basis and is often but not always published for public comment prior to adoption, depending on the subject matter and scope of the guidance. Unlike a statute or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. (See FIL-40-2018 "Interagency Statement Clarifying the Role of Supervisory Guidance," September 11, 2018, at https://www.fdic.gov/news/news/press/2018/pr18059a.pdf.)

Supervisory guidance, as articulated by the FDIC's BOD, sets forth "the FDIC's expectations for FDIC-supervised institutions to operate in a safe and sound manner and comply with applicable laws and regulations, including those designed to protect consumers." According to the FDIC's BOD, "[t]he overarching goal of supervisory guidance is to ensure that risk management and consumer protection standards and supervisory expectations are well understood by financial institution management and stakeholders." (See "Statement of the FDIC Board of Directors on the Development and Review of Supervisory Guidance," July 2016, at https://www.fdic.gov/regulations/examinations/supervisory/guidance/recommendations.html.)

Supervisory guidance also describes various general principles and practices that have proven useful to enable IDIs to operate in a safe and sound manner and to comply with applicable laws, rules, and regulations to promote consistency in supervision. It also provides information intended to assist IDIs in identifying and mitigating risks, and reducing the risk of consumer harm, including establishing and maintaining an effective CMS. Finally, supervisory guidance helps IDIs direct resources to areas representing the highest potential risks.

Supervisory guidance is intended to be flexible, in the sense that the extent to which any particular principle or practice described in supervisory guidance might be appropriate for an IDI to operate soundly and meet its consumer compliance responsibilities is a fact-specific determination. The relevance of the safety and soundness and consumer protection-related principles and practices described in guidance documents will vary according to a particular IDI's circumstances, including its size, complexity, business model, and risk profile.

Chapter 4 – Cease-and-Desist Actions

Cease-and-Desist Orders

The FDIC can issue cease-and-desist orders against an IDI and the IDI's IAPs to stop violations or unsafe or unsound practices. Orders may also require affirmative action (e.g., restitution, as discussed in chapter 9) to correct any conditions resulting from such violations or practices and to prevent them from occurring in the future. Cease-and-desist orders issued by the FDIC are titled "Consent Order" if the respondent stipulates to the issuance of the order, and titled "Order to Cease and Desist" if issued through litigation following the issuance of a notice of charges, an administrative enforcement hearing, an administrative law judge recommended decision, an FDIC BOD decision and order, and any appeal by the respondent to the appropriate federal appellate court. An order issued against a specific person as an IAP is termed a PC&D and is also described in this chapter.

The statutory definition of an IAP is set forth in Section 3(u) of the FDI Act. In certain cases, unaffiliated third parties (e.g., contractors, attorneys, accountants, or technology service providers) may be deemed to be an IAP of an IDI. This determination can be complex and requires extensive legal analysis.

The FDIC also has the authority to issue temporary orders in the most severe situations. Temporary orders become effective immediately, but the IDI or IAP has ten days to file an action in federal district court seeking to set aside the temporary order. Additionally, a temporary order is issued in conjunction with a companion notice seeking an order under Section 8(b). The following pages provide instructions for issuing, modifying, and terminating orders.

By ordering an IDI or IAP to cease and desist from violations or practices and/or to take affirmative actions, the FDIC may prevent the IDI's problems from reaching such serious proportions as to require more severe corrective measures. Essentially, a cease-and-desist order is remedial with the general purpose of assisting the IDI or IAP in resolving its problems that are the basis for supervisory concern.

Statutory Authority

Section 8(b) of the FDI Act authorizes the FDIC to issue a cease and desist order (or consent order, if stipulated). A temporary order to cease and desist is authorized under section 8(c) of the FDI Act.

Grounds

The FDIC may issue an order when the facts reasonably support the conclusion that an IDI or IAP has engaged, or is about to engage, in:

- An unsafe or unsound practice in conducting the business of the IDI, or
- A violation of a law and/or regulation, written agreement with the FDIC, or written condition imposed by the FDIC in connection with the granting of any application or other request.

Consent Orders

An IDI or IAP may elect to stipulate to the FDIC's issuance of an order. By stipulating to the order, the IDI or IAP waives the right to an administrative enforcement hearing and all rights to appeal and consents to the issuance of an order. Eliminating the administrative enforcement hearing allows the IDI or IAP to avoid lengthy and costly legal proceedings. IDIs or IAPs consenting to the issuance of an order are not permitted to deny the alleged misconduct. However, the FDIC may, in appropriate cases, allow them to consent to the issuance of the order without admitting or denying engagement in any unsafe or unsound practice or violation of any laws or regulations. If the IDI or IAP declines to stipulate, the FDIC issues a notice of charges, which starts the formal administrative enforcement proceeding.

Notice and Hearing

The formal administrative enforcement process that may result in the issuance of an order commences with the service of a notice on the IDI or IAP. The notice is a public document that contains a statement of facts constituting the alleged actionable misconduct and schedules the date and location for an administrative enforcement hearing to initially adjudicate by an administrative law judge with the Office of Financial Institution Adjudication the charges against the IDI or IAP. The parties to the administrative enforcement proceeding are the FDIC and the IDI or IAP. The IDI's or IAP's failure to respond to the notice and/or to appear at the administrative enforcement hearing generally results in a default by the respondent.

After the administrative enforcement hearing is conducted, the administrative law judge submits a recommended decision to the FDIC BOD. The FDIC BOD then takes the recommended decision into consideration and will issue a final decision. An order issued by the FDIC BOD becomes final and effective 30 calendar days after the order is served on the IDI or IAP, unless the IDI or IAP appeals an adverse order to the appropriate federal appellate court and the federal appellate court stays the FDIC's final order. If the order is issued with the consent of the IDI or IAP, then the provisions of the stipulated order will state when the final order will become effective, typically on the date of issuance.

The order remains in effect until modified or terminated by the FDIC, or stayed or set aside by a reviewing federal appellate court. An order can be issued against an IDI, any director, officer, employee, agent, or other IAP as defined in Section 3(u) of FDI Act.

Failure to Comply with the Order

Failure to comply with an order that has become final can form the basis for the following actions by FDIC:

- Imposing a CMP against an IDI or any IAP under Section 8(i) of the FDI Act,
- Petitioning a U.S. District Court to enforce the order,
- Removing and Prohibiting any IAP officials under Section 8(e) of the FDI Act, and
- Terminating an IDI's federal deposit insurance under Section 8(a) of the FDI Act.

Evidence Required

Under Section 8(b), the FDIC may issue an order based on the opinion that an institution is engaging, has engaged, or is about to engage in unsafe or unsound practices or violations. However, mere suspicion does not constitute sufficient grounds for instituting the enforcement action.

The FDIC has the burden of proving the allegations contained in the notice of charges by a preponderance of the evidence. Even when a respondent has agreed to stipulate to the issuance of an order, the evidence must still support the findings in the notice of charges and establish a basis for the provisions of the order.

Relevant documentation or similar evidence of the following is required to support the notice of charges and to establish a basis for the provisions of the order:

- FDIC requests made of the IDI’s BOD and/or officers,
- Promises regarding actions to be taken by the IDI's BOD and/or officers,
- Conferences and meetings held with the IDI's BOD or officers, or
- Institution records.

Examination Report Not Required

When sufficient evidence is otherwise available, it is unnecessary to wait for completion of an examination or preparation of a ROE or Target Conclusion Letter before recommending and issuing an order. However, all unsafe or unsound practices or violations should be carefully addressed and documented. Any ROE, Target Conclusion Letter, or memorandum to the RD should include as many detailed facts about the alleged practices or violations as possible.

Commission of Practice or Violation Not Required

A final order may be issued before a violation or unsafe or unsound practice occurs in order to prevent a developing situation from reaching serious proportions.

Example: Four banks are owned by the same individuals, and the owners have misused three of the banks (but not the fourth) through self-dealing transactions. In this situation, the FDIC could issue an order against the owners banning all loans and fees to the owners. The prohibition could apply to all four banks even though no self-dealing had occurred at the fourth IDI. The basis for the order against the fourth IDI could be the FDIC's reasonably held belief that, because of abuse at the related banks, similar unsafe or unsound practices are likely to occur at the remaining IDI.

Requiring Affirmative Action

In addition to prohibiting unsafe or unsound practices and violations, the FDIC may require affirmative action to correct any conditions resulting from violations or practices. The authority to require affirmative action includes the authority to require an IDI or IAP to make restitution or provide reimbursement, indemnification, or guarantee against loss if such IDI or IAP was unjustly enriched, or if the violation or practice involved a reckless disregard for the law or applicable regulations.

Corrective Provisions

The following table lists possible unsafe or unsound practices or violations and the potential corrective measures that may be included in an order. ***This list is not all-inclusive.***

Practice or Violation	**Corrective Provisions and Additional Considerations**
Inadequate capital	State amount of required capital and/or the adoption of a capital plan. Capital ratios should be used in the formulation and recommendation of capital level provisions. For example, restore the leverage ratio to X% or increase total capital by $XXX.
Inadequate allowance for loan and lease losses (ALLL) or allowance for credit losses (ACL)	Review current ALLL/ACL and make such entries as are necessary to provide an appropriate ALLL/ACL, considering the condition of the loan portfolio. Adjustments to the ALLL/ACL should be documented and provided to the regulatory authorities for review. Review and amend the methodology for determining the ALLL/ACL balance. Prospectively maintain an appropriate ALLL/ACL and require the IDI to amend prior Reports of Condition and Income to correct previous inaccuracies in the ALLL/ACL balance.
Hazardous lending and collection policies	Direct the IDI to cease and desist from such practices. The provision usually includes one or more of the following conditions for extending credit: • Obtaining documents necessary to perfect the institution's lien and evaluate the lien's priority; • Obtaining and maintaining current financial information on secured and unsecured credits; • Establishing a repayment program consistent with the loan's purpose, security, and source of repayment; or • Adopting adequate policies, procedures, and information systems.
Excessive concentrations with inadequate risk management practices	Develop appropriate policies and establish risk management practices to identify, measure, monitor, and control concentrations of credit to any individual extension of credit or to any group of extensions of credit based on the type of collateral pledged, industry, and/or product line. The concentrations should be measured based on a specific percentage of the institution's capital. The provision may also direct the IDI to maintain comprehensive economic and market analysis on any identified industry concentration of credit.
Operating without adequate liquidity	Develop appropriate policies and procedures to identify, measure, monitor, and control funding and liquidity risk, including effective corporate governance. The provision may also direct the IDI to develop a written plan that details primary and contingency courses of action for returning liquidity to an adequate level. The plan should define the institution's liquidity measure and establish a prudent limit for that measure. The plan should also address the importance of cash flow projections; diversified funding sources; stress testing; a cushion of liquid assets; and a formal, well-developed contingency funding plan as primary tools for measuring and managing liquidity risk. Where applicable, the plan should establish specific timelines for meeting established liquidity goals.
Inadequate internal controls	Require affirmative action to correct specific weaknesses, hire qualified operations officer(s), and/or contract for an outside audit that will include direct verification. This condition usually includes a requirement that applicable policies be enhanced.
Operating at a deficit/loss	Require formulation and implementation of comprehensive annual budgets for all income and expense categories. The provision may also direct the IDI to appoint a committee that will review and analyze the institution's income and expenses or supervise adherence to budgetary requirements.

Practice or Violation	Corrective Provisions and Additional Considerations
BOD dominated by related individuals or officers, or members' effectiveness compromised by dependence on the IDI for credit or income	Require the IDI to change composition of its BOD to reduce individuals' impact on decision-making. Each situation is unique, but generally a majority of the members of the BOD and of influential committees should be outside directors with sufficient knowledge and expertise to fulfill their assigned responsibilities. Require adoption of mitigating controls (see RMS Manual of Examination Policies, Management Chapter, section titled *Directors of Banks with Dominant Management Officials*).
Inadequate Management	Require the IDI to hire and retain management officials with sufficient ability, experience, and other qualifications, particularly in areas where weaknesses are noted.
Violations of consumer and civil rights laws and regulations and/or failure to substantially comply with informal enforcement actions based on consumer compliance issues	Require correction of all violations of consumer and civil rights laws and regulations noted during the examination. Other provisions may include one or more of the following: • Pay restitution (discussed further in chapter 9); • Adopt appropriate procedures to ensure future compliance; • Retain a qualified consumer compliance officer; • Establish regular, ongoing audit and review programs for consumer compliance; • Establish an ongoing consumer compliance training program for staff; • Review type and number of staff positions needed to manage and supervise consumer compliance program; • Establish procedures for consumer compliance officer to report to institution's BOD at least quarterly; and/or • Ensure institution's BOD provides adequate supervision over consumer compliance program.
Discriminatory lending	Eliminate and prevent discriminatory treatment in institution's lending activities. Additional provisions may include the following: • Review lending policies for prohibited discriminatory guidelines, and eliminate any such guidelines; • Provide additional training to staff; • Establish monitoring and review programs; • Reimburse customers for the effects of discrimination; • Offer a new credit opportunity for persons denied credit due to discrimination; • Advise consumers of their rights under the ECOA; or • Contact credit reporting agencies regarding any change in debt status (such as removing a signor from the obligation).
Inadequate information security program	Require IDI to adopt new or revised information security program. Additional provisions may include the following:

Practice or Violation	Corrective Provisions and Additional Considerations
	• Adopt effective management, technology and access controls for IT systems to protect customer information from cybersecurity attacks and other unauthorized access risks; • Oversee and monitor service providers by obtaining and reviewing audit, examination and other operational reports from service providers; • Undertake business continuity and resiliency risk assessment; • Enhance BOD oversight of audit of information technology and information security program, including BOD's prompt review of, and prompt corrective action responses to, all exception items; • Report periodically to the BOD regarding the IDI's implementation of the information security program; and • Appoint a qualified IT officer and conduct a review of staffing to ensure that the IDI has adequate resources with the required skills.

Issuing Cease-and-Desist Orders

The FDIC's delegations of authority delineate the office or position with authorization for approving the issuance of a notice or consent order. Field staff should consult the RO to discuss possible enforcement actions and prepare a memorandum detailing each type of potentially actionable misconduct. RO staff, including RO Legal, should review the memorandum and ROE, if available, to determine if cease-and-desist action is warranted. RO staff should notify the appropriate federal and state agencies, notify the institution's BOD that a cease-and-desist action is contemplated, and coordinate a meeting with the BOD to discuss the action.

Modifying Section 8(b) Actions

When subsequent events such as an examination or visitation result in the need to make minor changes to an outstanding final order, the final order may be modified. Procedures for modifying a cease-and-desist order are similar to those for initiating a new enforcement action. If an order is modified, the case memorandum should support the changes made to the original order.

Terminating Section 8(b) Actions

Section 8(b) cease-and-desist orders may be considered for termination under any of the following conditions:

- The IDI is in full compliance with all the provisions of the order and has fully corrected the violations of laws and regulations, unsafe and unsound practices, or conditions that led to the issuance of the order.

- Any provisions deemed "not in compliance" have become outdated or irrelevant to the IDI's current circumstances, including situations in which the IDI closed.

- Deterioration or any provisions deemed "not in compliance" leads to issuance of a new or revised formal action.

There may be limited exceptions in which replacing an enforcement action with a less severe or less comprehensive action may be appropriate. Requests for use of this limited exception must be presented to the appropriate Division Director and the General Counsel and require consultation with the Chairman. Use of the limited exception is expected to be rare.

Procedures for termination are similar to those for initiating a cease-and-desist order (and, likewise, an ROE is not required). The RO should document its justification for terminating the order. If a new formal action is being pursued, the existing order should remain in effect until the new action is issued and effective.

Temporary Cease-and-Desist Orders

A temporary order may be issued to halt particularly severe, egregious, and harmful practices or conditions pending a formal hearing on a permanent order.

Statutory Authority

Section 8(c) of the FDI Act authorizes the FDIC to issue temporary orders to cease and desist.

Grounds

A temporary order may be issued if any of the following conditions are met:

- An IDI or IAP has violated or threatens to violate a law, regulation, or written agreement, or threatens to engage in or has engaged in an unsafe or unsound practice (or its continuation); and the violation or threatened violation or practice is likely to result in the insolvency of the IDI, the substantial dissipation of its assets or earnings, a weakening of its condition, or prejudice to the interests of depositors prior to completion of the cease-and-desist proceedings.

- An IDI's accounts and records are so incomplete or inadequate that the FDIC is unable to determine its financial condition or the details or purpose of any transaction or transactions that might have a material effect on an IDI.

- Any person or entity engaged or is engaging in conduct described in 12 U.S.C. § 1828(a)(4), namely false advertising, misuse of FDIC names or logos, or misrepresentation to indicate FDIC-insured status. Pursuant to the statute, a person or entity that violates a temporary cease-and-desist order issued on this basis shall be subject to civil money penalties. The FDIC's authority under 12 U.S.C. § 1828(a)(4)(E) also includes the right to conduct a formal investigation under Section 10(c) of the FDI Act, which authorizes the issuance of subpoenas and the power to take sworn testimony.

Provisions of Temporary Orders

The provisions included in temporary orders vary, depending on the grounds for the action. The order should focus on matters that require immediate action. The following table lists provisions that may appear in temporary orders. ***This list is not all-inclusive.***

Grounds	Provisions of Order
Violations or unsafe/ unsound practices	Cease and desist from violations or practices, and take affirmative action to prevent insolvency, dissipation of assets, weakening of condition, or prejudice to depositors pending completion of Section 8(b) proceedings. The temporary order may also require restitution or reimbursement, indemnification, or guarantee against loss if unjust enrichment is involved, or if the violation or practice involved a reckless disregard for the law or applicable regulations. The IDI may also be required to restrict growth, dispose of the loans or assets involved, rescind agreements or contracts, employ qualified officers or employees, or take other action deemed appropriate by the FDIC.
Incomplete or inaccurate books and records	Cease activity or practice that gave rise to incomplete/inaccurate state of books and records. Restore books and records to a complete and accurate state.

Companion Section 8(b) Action Required

An enforcement action under Section 8(c) of the FDI Act must be accompanied by an enforcement action under Section 8(b) of the FDI Act to establish a permanent order, which can address broader issues in its provisions.

Meeting before Issuance

A meeting with the IDI's BOD may be held before issuing the notice of charges and the temporary order. If the BOD or the respondent consents to issuance of a permanent order under Section 8(b) of the FDI Act, there is no need to proceed with an action under Section 8(c) of the FDI Act. Instead, the RD can issue the permanent order under Section 8(b) of the FDI Act immediately if the RC certifies that the action is legally appropriate.

When Orders Become Effective

Temporary orders are effective upon service and remain effective and enforceable pending completion of Section 8(b) proceedings. As noted above, a respondent served with a temporary order may file an action within 10 days in federal district court seeking to set aside the temporary order.

Issuing Temporary Cease-and-Desist Orders

The FDIC's delegations of authority delineate the office or position with authorization for approving the issuance of a temporary order.

Modifying/Terminating Section 8(c) Actions

Procedures for modifying an order issued under Section 8(c) of the FDI Act are similar to those for initiating a new action. If a Section 8(c) action is modified, the RO should document its justification for the changes made to the original temporary order.

In most cases, it will not be necessary to formally terminate a Section 8(c) action because the temporary order expires by operation of law when the Section 8(b) order becomes final and effective. If an IDI is closed by federal or state authorities or merges into another IDI before a Section 8(b) order is issued, then it will be necessary to terminate the Section 8(c) order. The instructions would be similar to the steps for terminating a Section 8(b) action. The RO should document its justification for terminating the order.

Personal Cease-and-Desist Orders against IAPs

Pursuant to Section 8(b) of the FDI Act, RMS and DCP may pursue PC&Ds against IAPs if the IAP was found to have engaged in an unsafe or unsound practice or violated a law or regulation. A PC&D is a cease-and-desist order against an IAP. Similar to cease-and-desist orders issued against IDIs, PC&Ds are titled “Consent Order” if the IAP stipulates to the issuance of the order, and titled “Order to Cease and Desist” if issued through litigation. Sections 8(b)(6) and 8(b)(7) of the FDI Act allow the FDIC to require affirmative action remedies and to limit the activities of IAPs.

The statute provides the authority to place limitations on activities or functions of an IAP, provided there is a demonstrable connection to the alleged misconduct and the limitations are designed to remedy it. A PC&D should be used when warranted and justified to address behavior that poses undue risk to an IDI and to correct and hold IAPs accountable for actionable misconduct. Also, a PC&D should be considered when there is a risk that the IAP will engage in the misconduct again. A PC&D can require an IAP to cease and desist from certain acts in their current positions, divest themselves of controlling shareholdings in the IDI, or limit their involvement in the conduct of certain aspects of an IDI’s affairs.

The legal requirements for supporting a PC&D may be met if an IAP violates a law or regulation or engages in an unsafe or unsound practice. A PC&D may be pursued against an IAP when a violation or unsafe or unsound practice does not meet the requirements for a permanent prohibition from the banking industry. Thus, RMS or DCP may seek a PC&D against an IAP where remedial action is warranted, but judgment and discretion should be applied in the use of this remedy, and the Legal Division should be consulted.

Key factors to consider when contemplating PC&Ds against IAPs, include, but are not limited to the following:

- The conduct involved dishonesty but does not meet other requirements for a prohibition and removal action.
- The conduct was by a director or officer, rather than a junior employee.
- The IAP had a substantial role in directing the misconduct.
- The IAP engaged in repeated or large-scale misconduct.
- The FDIC sent a supervisory letter to the IAP, but misconduct continued.
- An ROE or enforcement action detailed the misconduct by a specific IAP, putting the IAP on notice of the misconduct, but the misconduct continued.

- Directors or officers abdicated their fiduciary duties or otherwise acted in an unsafe or unsound manner.

- A former director or officer, who engaged in dishonesty or misconduct, is currently working at another IDI or appears reasonably likely to return to banking.

The FDIC has flexibility in determining the types of provisions to include in PC&D orders. For example, if the FDIC determines that a PC&D is warranted to address misconduct by an officer who has originated loans outside permitted authority or on an unsafe or unsound basis, appropriate provisions may include removal or limiting the IAP's authority and prescribe hours of training related to safe and sound practices.

Issuing PC&Ds

The FDIC's delegations of authority delineate the office or position with authorization for approving the issuance of a PC&D. The RO should document the basis for the proposed PC&D action and the recommended provisions. Issuance of a PC&D requires involvement of the WO and the Legal Division.

Terminating PC&Ds

A PC&D is typically issued with a time limit of five years. If the actions of the IAP were particularly egregious, compliance with a specific provision deemed critical, or another important supervisory reason can be articulated, the time limit can be greater than five years or eliminated completely. Justification for a time limit longer than five years should be documented.

PC&D orders with an explicit duration are self-terminating and, therefore, do not require an order to terminate the action. Termination prior to the end of five years, or termination of PC&Ds without a time limit, should be based on full compliance with the provisions of the order. When considering the issuance and provisions of a PC&D, the remedies set forth in a PC&D should lend themselves to measureable and verifiable compliance to permit a reasoned basis for termination. An IAP can request that a PC&D be terminated by submitting a letter with supporting documentary evidence to the appropriate RD once its requirements have been satisfied. Upon receipt, RMS or DCP staff will evaluate the IAP's submission for completeness and ensure the PC&D requirements have been met. The submission should contain documented and verifiable evidence of the IAP's compliance efforts, including any certification or training requirements.

Procedures for termination are similar to those for initiating a PC&D action. The RO should document its justification for terminating the order.

Restitution under Section 8(b)(6)

Appropriateness of Restitution under Section 8(b)(6)

Actions pursuant to Section 8(b)(6) may be appropriate in circumstances where the respondent has been unjustly enriched or where the respondent exhibits reckless disregard for the law. Such actions are usually considered during the CMP process, but restitution actions may be pursued independent of a CMP action or concurrently with any other action. For instructions regarding restitution actions under this section, refer to Chapter 9 – Restitution and Civil Money Penalties.

Cease-and-Desist Orders Based on Noncompliance with Anti-Money Laundering/Countering the Financing of Terrorism Program Requirements

Section 8(s) of the FDI Act directed each of the FBAs to prescribe regulations requiring each FBA-supervised institution to establish and maintain procedures reasonably designed to assure and monitor the institution's compliance with the requirements of the BSA. Section 8(s) also requires that each FBA's examination of an institution include a review of the institution's AML/CFT program and that reports of examination describe any problem with the AML/CFT program. As a result, the FDIC implemented Section 8(s) by promulgating 12 C.F.R. § 326.8 in a joint rulemaking process with the other FBAs. 12 C.F.R. § 326.8 requires each FDIC-supervised institution to establish and maintain an AML/CFT program reasonably designed to assure and monitor the institution's compliance with the requirements of the BSA and its implementing regulations. At a minimum, an AML/CFT program shall have the following components or pillars:

- a system of internal controls to assure ongoing compliance with the BSA,
- independent testing for AML/CFT compliance,
- a designated individual or individuals responsible for coordinating and monitoring AML/CFT compliance, and
- training for appropriate personnel.

In addition, an AML/CFT program must include a customer identification program with risk-based procedures that enable the institution to form a reasonable belief that it knows the true identity of its customers. An AML/CFT program must also include appropriate risk-based procedures for conducting ongoing customer due diligence as set forth in regulations issued by the U.S. Treasury Department (31 C.F.R. Part 1010.210(b)(5)). For the purposes of Sections 8(s), the FDIC evaluates customer due diligence and other AML/CFT monitoring, reporting, and recordkeeping requirements as a part of the internal controls component of the institution's AML/CFT program.

Statutory Requirements

Section 8(s) requires the FDIC to issue a cease-and-desist order against a FDIC-supervised institution if the FDIC determines that the institution has:

- failed to establish and maintain an AML/CFT program, or
- failed to correct any component or pillar problem with the AML/CFT program previously reported to the institution by the FDIC.

Section 8(s) compels the FDIC to pursue an enforcement action in these circumstances. However, the cease-and-desist orders compelled by Section 8(s) are brought pursuant to Section 8(b). In addition, where correction of an AML/CFT problem is mandated or obtained by a cease-and-desist order issued under Section 8(b), a separate action pursuant to Section 8(s) would not be necessary.

Policy Considerations

The first part of Section 8(s) applies when an FDIC-supervised institution fails to establish and maintain a reasonably designed AML/CFT program. An institution would be subject to a cease-and-desist order if the institution failed to implement or maintain an AML/CFT program that adequately covers the required program components or pillars. The first part also applies to individual component or pillar violations if the deficiencies are so severe that they render the program ineffective when viewed as a whole. However, isolated issues with the pillars or components are generally not considered the kinds of problems that would result in a mandatory cease-and-desist order.

The second part of Section 8(s) applies when the institution fails to correct any component or pillar problem with the AML/CFT program previously reported to the institution by the FDIC. The FDIC will only issue a cease-and-desist order if the subsequent problems are substantially the same as those previously reported to the institution. Statements in an ROE or other written document suggesting areas for improvement, identifying less serious issues, or identifying isolated or technical violations or deficiencies generally would not be considered actionable for purposes of Section 8(s). The FDIC also recognizes that certain types of deficiencies may not be fully correctable before the next examination or within the planned timeframes for corrective actions. In addition, certain remedial actions involving multiple lines of business or the adoption or conversion of automated systems may take more time to implement than initially anticipated. In these types of situations, a cease-and-desist order may not be required provided the FDIC determines that the institution has made acceptable substantial progress toward correcting the problem.

Independent of Section 8(s), the FDIC has the authority to take formal or informal enforcement actions for problems with an institution's AML/CFT program, components or pillars, or other AML/CFT requirements. These other AML/CFT requirements include, for example, customer due diligence, beneficial ownership, foreign correspondent banking, and suspicious activity and currency transaction reporting. The form of the enforcement action in each individual case will depend on the severity of the noncompliance or deficiencies; the capability and cooperation of the institution's management; and the FDIC's confidence that the institution will take appropriate and timely corrective action.

Chapter 5 – Prompt Corrective Action

Prompt Corrective Action

Section 38 of the FDI Act authorizes the FDIC to take PCA against IDIs based on their capital levels. The actions may include the following:

- Reclassifying (downgrading) an IDI's capital category.
- Issuing supervisory directives to IDIs in certain capital categories.
- Dismissing directors or senior executive officers of IDIs.

Under certain circumstances, the FDIC may delay resolution of a critically undercapitalized IDI if a determination is made that it is in the best interest of the DIF.

Instructions for processing actions under PCA appear in the following pages. This chapter also provides information regarding the FDIC's authority to appoint itself as conservator or receiver of an IDI under Section 11(c) of the FDI Act.

Purpose of PCA

Based upon specific capital categories, PCA is intended to resolve various issues concerning problem IDIs in an expeditious manner through early intervention in such problem banks.

Capital Categories

Section 38 and Subpart H of 12 C.F.R. Part 324 provide five capital categories, as described below.

PCA Category	Description
Well Capitalized	Total risk-based capital ratio ≥ 10.0% **and** tier 1 risk-based capital ratio ≥ 8.0% **and** common equity tier 1 capital ratio ≥ 6.5% **and** leverage ratio ≥ 5.0% **and** not subject to any action issued by the FDIC under Section 8 of the FDI Act, the International Lending Supervision Act of 1983 (ILSA), the Home Owners' Loan Act (HOLA), or Section 38 of the FDI Act, or any regulations thereunder, to meet and maintain a specific capital level for any capital measure. A bank subsidiary of a covered bank holding company will be deemed well capitalized if it meets the above criteria **and** has a supplementary leverage ratio ≥ 6.0%.
Adequately Capitalized	Total risk-based capital ratio ≥ 8.0% **and** tier 1 risk-based capital ratio ≥ 6.0% **and** common equity tier 1 capital ratio ≥ 4.5% **and** leverage ratio ≥ 4.0% **and** does not meet the definition of a well capitalized IDI. An IDI using advanced approaches will be deemed adequately capitalized if it meets the above criteria **and** has a supplementary capital ratio ≥ 3.0%.
Undercapitalized	Total risk-based capital ratio < 8.0% **or** tier 1 risk-based capital ratio < 6.0% **or** common equity tier 1 capital ratio < 4.5% **or** leverage ratio < 4.0%. An IDI using advanced approaches will be deemed undercapitalized if it has a supplementary capital ratio < 3.0%.
Significantly Undercapitalized	Total risk-based capital ratio < 6.0% **or** tier 1 risk-based capital ratio < 4.0% **or** common equity tier 1 capital ratio < 3.0% **or** leverage ratio < 3.0%.

PCA Category	Description
Critically Undercapitalized	Ratio of tangible equity to total assets ≤ 2.0%. (Note: tangible equity is tier 1 capital plus the amount of outstanding perpetual preferred stock (including related surplus) not included in tier 1 capital.

Community Bank Leverage Ratio

Section 38 and Subpart H of 12 C.F.R. Part 324 also defines a qualifying community banking organization as having less than $10 billion in total consolidated assets, a leverage ratio greater than 9 percent, off-balance sheet exposures of 25 percent or less of total consolidated assets, and trading assets and liabilities of 5 percent or less of total consolidated assets (qualifying criteria). A qualifying community banking organization with a leverage ratio greater than 9 percent is considered to have met:

- the requirements of the generally applicable capital rule;
- the well capitalized capital ratio thresholds under the agencies' PCA framework for IDIs or the well capitalized standards under the Board's regulations for holding companies, as applicable; and
- any other capital or leverage requirements to which the banking organization is subject.

Such qualifying community banking organizations are not required to calculate capital ratios under the generally applicable rule. Additionally, to be considered well capitalized under the community bank leverage ratio framework, and consistent with the agencies' PCA framework, a qualifying community banking organization must not be subject to any written agreement, order, capital directive, or PCA directive to meet and maintain a specific capital level for certain PCA capital measures.

Under the community bank leverage ratio framework, a qualifying community banking organization that has a leverage ratio that is greater than 8 percent and equal to or less than 9 percent is allowed a two-quarter grace period to maintain its well capitalized PCA status under the community bank leverage ratio framework after which it must either:

- again meet all qualifying criteria or
- apply and report the generally applicable risk-based capital rule.

During this two-quarter period, a banking organization that is an insured depository institution and that has a leverage ratio that is greater than 8 percent would be considered to have met the well capitalized capital ratio requirements for PCA purposes. A qualifying community banking organization with a leverage ratio of 8 percent or less is not eligible for the grace period and must comply with the generally applicable risk-based capital rule starting with the quarter in which the banking organization reports a leverage ratio of 8 percent or less. Therefore, the existing PCA framework will apply to qualifying community banking organizations. The community bank leverage ratio framework simply allows a qualifying community banking organization the option to not report risk-based capital ratios.

Mandatory and Other Discretionary Supervisory Actions

Provisions Applicable to all FDIC Supervised Institutions

All IDIs are prohibited from making capital distributions or paying management fees if such distributions or payments would result in the IDI becoming undercapitalized, unless it is shown that the capital distribution would improve the IDI's financial condition or the management fee is being paid to a person or entity without a controlling interest in the IDI.

Note: Section 29 of the FDI Act also places restrictions on certain brokered deposit activity and on deposit rates offered by IDIs as the PCA capital category declines below well capitalized.

Provisions Applicable to IDIs that are less than Adequately Capitalized

An IDI, immediately upon receiving notice or deemed to have received notice due to a Call Report filing or a final ROE, that is undercapitalized, significantly undercapitalized, or critically undercapitalized is subject to the following provisions:

- An IDI cannot approve capital distributions or pay management fees.
- The FDIC will monitor the condition of the IDI and compliance with capital restoration plans, restrictions, and requirements imposed by Section 38.
- An IDI generally must submit a capital restoration plan to the FDIC within 45 days of becoming undercapitalized.
- An IDI's asset growth is restricted unless the asset growth is consistent with the FDIC approved capital restoration plan or both assets and capital increase at a rate that is sufficient for the IDI to become adequately capitalized within a reasonable time.
- An IDI is restricted from engaging in acquisitions, branching, or new lines of business unless the FDIC has provided prior approval.

Provisions Applicable to IDIs that are Significantly Undercapitalized or Critically Undercapitalized, or are Undercapitalized and have Failed to Submit an Acceptable Capital Restoration Plan

IDIs deemed to be significantly undercapitalized or critically undercapitalized, and undercapitalized IDIs that have failed to submit an acceptable capital restoration plan are restricted from paying a senior executive officer any bonus or compensation that exceeds that officer's average rate of compensation for the 12 months prior to the IDI becoming undercapitalized, unless the IDI had obtained prior written approval from its FBA.

In addition, these IDIs are subject to one or more of the following provisions:

- Requiring recapitalization through the sale of voting shares or other obligations;
- Restricting transactions with affiliates;

- Restricting interest rates paid for deposits to the prevailing rates in the IDI's location (as required by Section 29 of the FDI Act and Section 337.6 of the FDIC's Rules and Regulations);

Note: Under 12 U.S.C. § 1831*o*(f)(3), there is a presumption that the FDIC will, at a minimum, take the preceding three actions unless it determines that the actions would not further the purpose of Section 38.

- Further restricting asset growth, including a requirement to reduce total assets;
- Restricting activities that the FDIC determines pose an excessive risk to the IDI;
- Requiring management improvements through election of a new BOD, dismissing directors or senior executive officers, or approving employment of new senior executive officers;
- Restricting the acceptance of deposits from correspondent institutions;
- Requiring an IDI's holding company to obtain prior approval for capital distributions;
- Requiring an IDI to divest of its subsidiary or a parent company to divest of a non-depository affiliate or the IDI itself; and
- Requiring the IDI to take any other action that the FDIC determines will better carry out the purpose of Section 38.

Provisions Applicable to IDIs that are Critically Undercapitalized

When an IDI is deemed to be critically undercapitalized, it is prohibited from engaging in the following activities without prior FDIC approval:

- Enter into any material transaction other than in the usual course of business, including any action for which the IDI is required to provide notice to the FDIC;
- Extend credit for any highly leveraged transaction;
- Amend the IDI's charter or bylaws, except as is needed to carry out any other requirement of any law, regulation, or order;
- Make any material change in accounting methods;
- Engage in any covered transaction (as defined in Section 23A(b) of the Federal Reserve Act);
- Pay excessive compensation or bonus;
- Pay interest on new or renewed liabilities at a rate that would increase the IDI's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the IDI's normal market area (as required by Section 29 of the FDI Act and Section 337.6 of the FDIC's Rules and Regulations); and

- Make any principal or interest payment on subordinated debt beginning 60 days after becoming critically undercapitalized.

The FDIC may further restrict the activities of any critically undercapitalized IDI to carry out the purposes of Section 38.

Reclassifying (Downgrading) a Capital Category

Under certain circumstances, the FDIC may reclassify (downgrade) an IDI to the next lower capital category. To reclassify an IDI, the FDIC issues a NOI to reclassify followed by an order of reclassification.

Criteria

The FDIC may reclassify a well capitalized IDI as adequately capitalized or downgrade an adequately capitalized or undercapitalized IDI to the next lower capital category (except that, a significantly undercapitalized IDI may not be reclassified as critically undercapitalized) in either of the following circumstances:

- An IDI has been determined, after notice and opportunity for a hearing under Section 308.202(a), to be in an unsafe or unsound condition.

- Under Section 8(b)(8) of the FDI Act, "[i]f an insured depository institution receives, in its most recent ROE, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate FBA may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for purposes of this subsection."

Simultaneous Actions

If unsafe or unsound practices or conditions are noted, the FDIC will also generally pursue an order under Section 8(b).

Capital Restoration Plans

FDIC-supervised IDIs must file a written capital restoration plan with the appropriate FDIC RD within 45 days of the date the IDI receives notice that it is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the IDI in writing that the plan is to be filed in a different period. Adequately capitalized IDIs that have been required under 12 C.F.R. 324.403(d) to comply with supervisory actions as if the IDIs were undercapitalized are not required to submit a capital restoration plan solely because of the reclassification.

A capital restoration plan submitted by an IDI undergoing reclassification must describe how an IDI will correct its unsafe or unsound practices or conditions. In particular, the capital restoration plan must:

- Specify the steps the IDI will take to become adequately capitalized,

- Specify the levels of capital to be attained during each year in which the plan will be in effect,

- Specify how the IDI will comply with the restrictions or requirements in effect under Section 38,

- Specify the types and levels of activities in which the IDI will engage, and

- Contain such other information as the FDIC may require.

An acceptable capital restoration plan must be based on realistic assumptions, reflect criteria that are likely to succeed in restoring the IDI's capital, and not appreciably increase the IDI's risk exposure (i.e., credit risk, interest-rate risk, and other types of risk).

Further, if the IDI is undercapitalized, a capital restoration plan cannot be accepted unless each company having control over the IDI has guaranteed that the IDI will comply with the plan until the IDI has been adequately capitalized on average for four consecutive calendar quarters and has provided appropriate assurances of performance.

An IDI that has already submitted and is operating under an approved capital restoration plan is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the IDI under 12 C.F.R. § 324.403 unless the FDIC notifies the FDIC-supervised institution that it must submit a new or revised capital restoration plan.

Reclassification Procedures

A NOI to reclassify has to be issued to initiate a reclassification action against an IDI. The IDI can either consent to the issuance of an order of reclassification or request a hearing to determine the appropriateness of reclassification.

Issuing a Notice of Intent to Reclassify

FDIC delegations of authority delineate the office or position with authorization to approve the issuance of a NOI to reclassify. The issuing office should document the basis for issuing of a NOI to reclassify and address the following relevant items:

- A determination that the IDI is in unsafe or unsound condition or engaged in an unsafe or unsound practice, which has not been corrected.

- A statement of the IDI's capital measures and capital levels and the category to which the IDI would be reclassified;

- The reasons for the reclassification; and

- The date by which the IDI subject to the notice of reclassification may file with the FDIC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the IDI or other relevant circumstances.

Prior to final approval of such a document, the Legal Division must concur with the proposed reclassification action and must prepare all final legal documents. If consumer compliance issues are involved, DCP must also concur with the proposed reclassification action.

Requests for an Informal Hearing

An IDI has 14 calendar days to respond in writing to the NOI to reclassify its capital category, unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the IDI or other relevant circumstances. An IDI's failure to file a response within the specified time period shall constitute consent to the reclassification. The IDI's response may include a request for an informal hearing on the matter. Failure to request a hearing will constitute a waiver of the right to present oral testimony or witnesses.

If a hearing is requested, the FDIC will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless a later date is requested by the IDI. The hearing officer will provide a recommendation to the FDIC within 20 days of the informal hearing. The final decision regarding the reclassification will be communicated to the IDI no later than 60 days from the close of the record for the informal hearing or the date of the response in a case where no hearing was requested.

Modifying or Terminating a Notice of Intent to Reclassify

RMS may *modify* a NOI to reclassify for the following reasons:

- An IDI's condition improves.
- Conditions that existed at the time the notice was issued have changed.

RMS may *terminate* a NOI to reclassify if an IDI substantially fulfills the requirements of the notice, or if the supervisory directive is no longer appropriate for other reasons.

FDIC delegations of authority delineate the office or position with authorization to approve the issuance of a NOI to reclassify. The office that issued the notice of intent to reclassify should prepare a memorandum that sufficiently supports the need for modifying or terminating the NOI to reclassify.

Modifying or Terminating an Order to Reclassify

Requirements for modifying or terminating an order to reclassify are similar to the requirements for issuing an order to reclassify (see above).

Reconsideration Requests

After an IDI has been reclassified to a lower capital category, it may submit a written request for reconsideration. The request may ask that the reclassification be rescinded or that related orders be modified, rescinded, or removed. The request must be based on a change in the circumstances that led to the reclassification.

The request should be sent to the RMS RO where the IDI is headquartered. Unless otherwise ordered by the FDIC, the IDI remains subject to the reclassification and any related orders while the request is pending.

If the request for reconsideration is to be denied, the RO should forward its recommendation and supporting documentation to the WO for final action. The WO will review, process, and issue a final action.

The Legal Division must concur with the request for reconsideration and must prepare all final legal documents. If consumer compliance issues are involved, then DCP must also concur with the proposed reclassification action.

Supervisory Directives

A supervisory directive is a final order issued to an IDI that fails to maintain capital at or above the minimum leverage capital requirement as set forth in Section 38 and Subpart H of 12 C.F.R. Part 324. A supervisory directive, including a plan submitted under a supervisory directive, is enforceable in the same manner and to the same extent as a final cease-and-desist order issued under section 8(b) of the FDI. The FDIC may issue supervisory directives requiring corrective action or compliance with the provisions of Section 38 to IDIs in any of the following capital categories:

- Undercapitalized,
- Significantly undercapitalized, or
- Critically undercapitalized.

Written Notice Generally Required

Before issuing a supervisory directive to an IDI, the FDIC generally must provide written notice to the IDI in the form of a NOI to issue a supervisory directive. The NOI should include the following:

- A statement regarding the IDI's capital measures and capital levels;
- A description of the restrictions, prohibitions, or affirmative actions that the FDIC proposes to impose or require;
- The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and
- The date by which the IDI may file a written response to the notice, and the content required in the response (see below).

The IDI will have at least 14 days to respond in writing to the notice unless the FDIC determines a shorter time period is appropriate given the condition of the IDI or other relevant circumstances. Any such response should include:

- An explanation as to why the FDIC's proposed action is not appropriate under Section 38;
- Modifications the IDI recommends be made to the proposed directive; and
- Any other information, documentation, mitigating circumstances, or other evidence that supports the IDI's position regarding the proposed directive.

The FDIC will evaluate the IDI's written response and may request additional information. Following its review, the FDIC will take one of the following actions:

- Issue the directive as proposed or in modified form,
- Decide against issuing the directive and notify the IDI of this decision, or
- Seek additional information or clarification of information from the IDI or other relevant source.

Note: The IDI's failure to respond constitutes consent to the issuance of a supervisory directive.

Exception to Notice Requirement

FDIC staff may issue a supervisory directive without prior notice if it is considered necessary to carry out the purposes of Section 38. This directive would require the IDI to immediately take actions or follow proscriptions detailed in Section 38, but the IDI may appeal the action.

The appeal must be received within 14 days of the issuance of the directive, unless the FDIC permits a longer period. FDIC staff must consider the appeal within 60 days of receipt. The directive remains in effect throughout the appeal process, unless the FDIC delays the effective date of the directive. All appeals of a supervisory directive should be forwarded to the WO for processing.

Modifying or Terminating NOIs and Supervisory Directives

An IDI, upon a change of circumstances, may request the FDIC to reconsider the terms of the directive and may propose that the directive be rescinded or modified. The directive and plan, however, will continue in effect while such request is pending before the FDIC.

Enforcement of Directives

The FDIC may enforce PCA directives under Section 8(i)(1) of the FDI Act. The FDIC may also seek assessment of CMPs for violation of the directive against an IDI or IAP. The inflation-adjusted maximum CMP amount for such violations is published annually by January 15 in the *Federal Register*.

Dismissing Directors or Senior Executive Officers

As part of its authority to carry out PCAs, the FDIC may issue a directive requiring an undercapitalized or a significantly undercapitalized IDI to dismiss certain directors or senior executive officers from an IDI.

Definitions

The term **senior executive officer** has the same meaning as that established for an executive officer under Section 22(h) of the Federal Reserve Act. Section 22(h) defines an executive officer as an individual who participates or has authority to participate (other than as a director) in major policy-making functions of an IDI or company.

A director may be a trustee of an IDI under the control of trustees, or any person with a representative or nominee serving in this capacity.

Grounds for Dismissal

The FDIC may require the dismissal of any director or senior executive officer who held office for more than 180 days immediately before an IDI became undercapitalized, if any of the following conditions apply:

- An IDI is significantly undercapitalized.
- An IDI is undercapitalized and has failed to submit or implement an acceptable capital restoration plan.
- An IDI is undercapitalized and the FDIC determines dismissal is necessary to carry out the purpose of PCA.

Dismissal Criteria

FDIC delegations of authority delineate the office or position with authorization to approve the issuance of a NOI to issue a PCA directive ordering dismissal. The issuing office should prepare a memorandum that sufficiently supports the need for the issuance of a NOI to issue a PCA directive ordering the dismissal of a director or senior executive officer.

An individual may be subject to a dismissal action even if their employment or association with the IDI has not negatively impacted the IDI. For example, an individual who has been unable to restore the IDI's capital to an adequately capitalized PCA designation may be dismissed to enable the IDI to employ a more-qualified candidate.

Comparison to Section 8(e) Removals

Section 38 specifically states that a dismissal under PCA should not be construed as a removal under Section 8(e) of the FDI Act. However, other enforcement actions, including an 8(e) action could still be recommended against an individual subject to dismissal under PCA.

Note: For information about the differences between Section 38 dismissals and Section 8(e) removals, refer to Chapter 8 – Comparison of Prompt Corrective Actions and Section 8 Actions.

Issuing a Notice of Intent

Before dismissing a director or senior executive officer under Section 38, the FDIC generally sends the appropriate IDI a NOI to issue a PCA directive ordering dismissal. The notice of intent must contain:

1. A statement regarding the IDI's capital measures and capital levels;
2. A description of the restrictions, prohibitions, or affirmative actions the FDIC proposes to impose or require;
3. The proposed date when such restrictions or prohibitions would be effective or by when affirmative actions must be completed; and
4. The date (at least 14 days from the date of the NOI) by which the IDI may file a written response to the notice.

If necessary, the FDIC may issue a directive that, without the issuance of a NOI, would require the IDI to immediately take actions detailed in the directive. The IDI has at least 14 days from its issuance to respond to the NOI, unless the FDIC determines a shorter period is appropriate in light of the IDI's financial condition or other relevant circumstances. In the rare instances in which an immediate suspension or shorter response period is believed appropriate, the reasons for this course of action should be clearly documented.

Note: In those cases in which a Section 38 dismissal and a Section 8(e) removal and prohibition are both being pursued, these actions should be processed separately.

Based on FDIC's delegations of authority, the approving office should prepare a memorandum that supports the need for a dismissal action. The Legal Division must concur with the issuance of NOI and must prepare all final legal documents.

Issuing an Order of Dismissal

After the FDIC issues a NOI, an IDI has at least 14 calendar days to file a response to the notice. If the FDIC does not receive a response to the NOI, an order to dismiss a director or senior executive officer is issued using the same criteria used for issuing the NOI (see above).

If the FDIC receives a response to the NOI from the IDI within the established time frame, the appropriate RMS RO should forward its memorandum and all supporting documentation to the WO for review and processing of the final order of dismissal.

Modifying or Terminating Notices, Immediate Suspensions, and Dismissal Orders

The criteria used to issue a NOI are also used to modify or terminate a NOI. These criteria are also used to issue immediate suspensions and dismissal orders (see above).

Reinstatement Requests

A director or senior executive officer, who has been served with a dismissal order, may file a written request for reinstatement. The request must be filed within 10 calendar days of receipt of the order (unless the FDIC grants additional time at the request of the respondent) and must include reasons for requesting reinstatement (e.g., a dismissed officer must show that his or her continued employment would materially strengthen the IDI's ability to become adequately capitalized or to correct any unsafe or unsound conditions or practices). A request for reinstatement may also contain a request for an informal hearing.

- If a hearing is not requested, the reinstatement request is handled using the same criteria used to issue a NOI. The RO should document the justification for supporting or for terminating the dismissal action.

- If a hearing is requested, the FDIC will hold a hearing within 30 days from the date the request was filed, unless the respondent requests that the hearing be scheduled for a later date. The WO will review and process all requests for reinstatement where an informal hearing is requested. Procedures for informal hearings are detailed in Section 308.203 of the FDIC Rules and Regulations.

Delaying Mandatory Resolution of a Critically Undercapitalized Institution

Section 38 of the FDI Act authorizes the FDIC to delay mandatory resolution of a critically undercapitalized IDI to prevent risk of loss to the DIF.

When a Mandatory Resolution Is Required

Within 90 days after an IDI becomes critically undercapitalized, the appropriate FBA must take one of the following actions:

- Appoint a receiver (or, with FDIC concurrence, appoint a conservator) for the IDI, or

- Take such other action as the agency determines, with the concurrence of the FDIC, would better achieve the purposes of Section 38, after documenting why the action would better achieve that purpose (e.g., an open bank transaction pending regulatory approvals that will result in the IDI's recapitalization).

When Mandatory Resolution Can Be Extended

Any determination made by an appropriate FBA in lieu of appointing a conservator or receiver will cease to be effective not later than 90 days after the date that determination is made. A conservator or receiver will be appointed unless the agency makes a new determination at the end of the effective period of the prior determination.

Final Resolution

The appropriate FBA must appoint a receiver for the IDI if the IDI has been critically undercapitalized on average during the calendar quarter beginning 270 days after the date on which the IDI became critically undercapitalized.

Exception to Mandatory Resolution

The appropriate FBA may continue to take such other action as the agency determines to be appropriate in lieu of appointing a receiver if the agency determines, with the FDIC's concurrence, that:

- An IDI has a positive net worth;

- An IDI has demonstrated substantial compliance with an approved capital restoration plan, which requires consistent improvement in the IDI's capital since the date of the approval of the plan;

- An IDI is profitable or has an upward trend in earnings that the agency projects as sustainable; and

- An IDI is reducing the ratio of nonperforming loans to total loans.

In addition to these factors, the individual in charge of the appropriate FBA and the FDIC Chairman must certify that the IDI is viable and is not expected to fail.

Appointing the FDIC as Receiver or Conservator

Section 11(c) of the FDI Act authorizes the FDIC to appoint itself as receiver or conservator of an IDI. In addition, an IDI’s state or federal supervisory authority may appoint the FDIC as conservator of an IDI, and the FDIC may accept such appointment.

Authority Retained by the FDIC Board

Final decisions to appoint the FDIC as receiver or conservator are made by the FDIC BOD after consultation with the appropriate federal bank regulatory agency and state authority.

Grounds for Self-Appointment

Self-appointment may take place if the appointment is necessary to reduce the risk of loss to the DIF. The FDIC can make a determination under Section 11(c)(4) of the FDI Act if the provisions of Section 11(c)(4)(A) have been satisfied or one or more of the following conditions under Section 11(c)(4)(B) exist at an IDI:

- Assets are less than the IDI’s obligations to its creditors and others, including members of the IDI.
- There is substantial dissipation of assets or earnings due to any violation of any statute or regulation, or any unsafe or unsound practice.
- There is an unsafe or unsound condition to transact business.
- There has been any willful violation of a cease-and-desist order.
- There has been any concealment of the IDI’s books, papers, records, or assets, or any refusal to submit the IDI’s books, papers, records, or affairs for inspection to any examiner or lawful agent of the appropriate FBA or state bank supervisor.
- The IDI is likely unable to pay obligations or meet depositor demands during the normal course of business.
- Losses have been incurred or are likely to be incurred that will deplete all or substantially all of the IDI’s capital, and there is no reasonable prospect for the IDI to become adequately capitalized without federal assistance.
- The IDI has violated any law or regulation, or engaged in any unsafe or unsound practice or condition that is likely to cause insolvency or substantial dissipation of assets or earnings, weaken the IDI’s condition, or otherwise seriously prejudice the interests of the IDI’s depositors or the DIF.
- The IDI, by resolution of its BOD, its shareholders, or its members, consents to the appointment.
- The IDI ceases to be an insured institution.

- The IDI is undercapitalized, and has no reasonable prospect of becoming adequately capitalized, fails to become adequately capitalized when required to do so under Section 38(f)(2)(A) of the FDI Act, fails to submit a capital restoration plan acceptable to its primary federal regulator within the time prescribed under Section 38(e)(2)(D) of the FDI Act, or materially fails to implement a capital restoration plan submitted and accepted under Section 38(e)(2) of the FDI Act.

- The IDI is critically undercapitalized or otherwise has substantially insufficient capital.

- The U.S. Attorney General notifies the appropriate FBA or the FDIC in writing that the IDI has been found guilty of money laundering-related offenses.

Processing Self-Appointment Actions

Self-appointment is a seldom-used remedy that requires coordination with DRR. If the condition or actions of an IDI appear to require use of this authority, the WO should be contacted for guidance on case preparation and timing.

Chapter 6 – Removal, Prohibition, and Suspension Actions

Removal, Prohibition, and Suspension Actions

Section 8(e) of the FDI Act authorizes the FDIC to issue orders removing individuals from state nonmember IDIs or prohibiting their participation in the conduct of the affairs of any IDI. The FDIC may also exercise such powers against IAPs of other IDIs, where the FDIC is not the primary federal regulator, through use of its authority under Section 8(t) of the FDI Act.

Removal or prohibition orders may be based upon conduct at the IDI of which the individual is an affiliated-party or upon conduct at another IDI or other business institution. Temporary suspension orders may be issued in extreme cases (e.g., immediate threat to an IDI) to remove individuals pending a hearing on an order of removal.

Section 8(g) of the FDI Act also authorizes the FDIC to take action against IAPs charged with violations of specific criminal statutes as well as crimes involving dishonesty or breach of trust that are punishable by imprisonment exceeding one year under state or federal law. Under certain conditions, the FDIC may issue a notice to suspend or prohibit an IAP from participating in the affairs of an IDI pending disposition of the criminal charges. A permanent removal or prohibition order may be required if an individual is convicted of or enters into a pretrial diversion or similar program for certain crimes. In other instances, issuance of a permanent order is discretionary.

Removal or Prohibition Actions

Under certain conditions, the FDIC has authority to order removal of an IAP (a director, officer, employee, controlling stockholder, independent contractor, or any other individual referenced in Section 3(u) of the FDI Act) from a state nonmember IDI. The FDIC may also prohibit an individual from participating in the conduct of the affairs of any IDI.

Statutory Authority

Section 8(e)(1) of the FDI Act authorizes the FDIC to issue removal or prohibition orders.

Grounds

The FDIC must establish three distinct and separate grounds to institute an action for removal or prohibition: *misconduct*, the *effect* of the misconduct, and *culpability* for the misconduct.

Misconduct constituting grounds for a removal or prohibition order is established when an IAP has:

- directly or indirectly violated any law or regulation, cease-and-desist order that has become final, written agreement between the IDI and the agency, or condition imposed in writing by a FBA in connection with granting any application or other request by the IDI; or

- engaged or participated in any unsafe or unsound banking practice in connection with any IDI or business institution; or

- committed or engaged in any act, omission, or practice that constitutes a breach of fiduciary duty.

In addition to the misconduct, the *effect* of the misconduct must be such that:

- the institution has suffered or will probably suffer financial loss or other damage; or
- the interests of the IDI's depositors have been or could be prejudiced; or
- the individual received financial gain or other benefit.

In addition to establishing the misconduct and effect described in the previous two paragraphs, the FDIC must establish the individual's *culpability* for the misconduct. Culpability is shown by demonstrating that the misconduct:

- involved personal dishonesty; or
- demonstrated willful or continuing disregard for the safety or soundness of the IDI or business institution.

Section 8(e) removal or prohibition action may be pursued when there is sufficient evidence to meet each statutory element: misconduct, effect, and culpability. For example, if the facts and documentation establish that an IAP violated a law, the violation resulted in financial loss to the institution, and this action involved personal dishonesty on the part of the IAP, then the three-part statutory test for a removal or prohibition action is met.

Evidence Required

The burden of proof in removal or prohibition actions at the administrative hearing rests with the FDIC to establish its charges by the preponderance of the evidence. The evidence must prove the actions or inactions that resulted in the recommendation for removal or prohibition. In some cases, a formal investigation authorized under Section 10(c) of the FDI Act (refer to Chapter 11 – Formal Investigations) may be conducted to obtain additional evidence.

Statute of Limitations

The applicable SOL for actions under Section 8 against IAPs 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 are based upon dates of misconduct.

Other Issues to be Considered

Even if the case appears to meet the statutory criteria, the FDIC may choose not to pursue a Section 8(e) enforcement action depending on the circumstances surrounding the case. For example, in cases involving lower-level employees, the decision must be evaluated in light of the nature and effect of the misconduct, the resources involved in pursuing a case, the risks presented by the individual's continued participation in the affairs of an IDI, and any other relevant factors.

These cases are fact-specific, and actions must be determined on a case-by-case basis. The RO should consult with the WO if there is any question about existing policies and practices.

Removal or Prohibition Cases Based on "Willful or Continuing Disregard"

As previously noted, the FDIC has the authority to seek removal or prohibition from banking of IAPs of IDIs for certain statutorily defined misconduct, when the misconduct results in loss to the IDI, prejudice to depositors, or gain to the IAP, and the misconduct reflects a certain measure of "culpability" on the IAP's part.

Most commonly, culpability is shown by the IAP's personal dishonesty – deception, concealment, fraud, or theft. However, actual dishonesty is not an essential element of a removal or prohibition claim. Under Section 8(e), misconduct undertaken with "willful or continuing disregard for the safety or soundness" of the IDI is also sufficient.

"Willful disregard" generally involves misconduct in which an IAP has deliberately engaged, despite knowledge of abnormal risks of such conduct to the safety and soundness of the IDI. "Continuing disregard" describes misconduct, undertaken repeatedly or over time, notwithstanding the abnormal and obvious risks of such conduct. The standard has been described as akin to "recklessness." "Willful disregard" and "continuing disregard" are alternative bases that can satisfy the "culpability" requirement. Accordingly, the FDIC may take action when the evidence establishes that the IAP's conduct demonstrated either "willful disregard" or "continuing disregard." The FDIC is not required to prove the conduct was both "willful" and "continuing."

Assessing an IAP's "willful or continuing disregard" for the IDI's safety or soundness is fact-intensive, and depends on the totality of the circumstances. These cases, therefore, may require a more fact-intensive analysis.

Staff should consider the IAP's position, role, and authority at the IDI. Directors and officers have different duties and different responsibilities. As the FDIC has publicly explained in its Statement Concerning the Responsibilities of Bank Directors and Officers:

> Directors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.
>
> Officers are responsible for running the day-to-day operations of the institution in compliance with applicable laws, rules, regulations, and the principles of safety and soundness. This responsibility includes implementing appropriate policies and business objectives.
>
> Directors must require and management must provide the directors with timely and ample information to discharge board responsibilities. Directors also are responsible for requiring management to respond promptly to supervisory criticism.

It is important to note that an IAP's title alone is insufficient to evaluate his or her culpability. For example, in some IDIs, certain officers may have substantial individual authority, while others may have none. An IAP might be responsible for preparing a detailed written analysis that evaluates a proposed investment or loan, but that same officer might have no control over the information presented to a committee or the full BOD before it votes on the proposal.

In sum, in evaluating potential cases of willful or continuing disregard, staff's review should consider the totality of the circumstances, including but not limited to the IAP's:

- education, experience, training, and licenses;
- position at the IDI;
- actual role and activities in the actionable misconduct;
- knowledge of adverse factors that should have caused him or her to reject the transactions at issue or take other actions; and
- failure to heed warnings from outside auditors or regulators.

When staff encounters unsafe or unsound banking practices, breaches of fiduciary duty, or violations of law or regulation that caused or were likely to cause loss to an IDI (or gain to the IAP), and the misconduct appears to reflect "willful or continuing disregard," they should initiate discussions with RMS or DCP FO management and CM or RE during the on-site portion of the examination or visitation to determine whether additional analysis is appropriate. Staff in the Legal Division should also be involved in these discussions. RO staff should consult with WO staff in RMS or DCP and Legal. Additional actions may include conducting further investigative research, identifying and obtaining supporting documents, and documenting findings or recommended action in a memorandum.

Effective Date of Orders

Unlike the rules regarding applications where orders "shall become effective immediately upon issuance, unless otherwise stated therein," 12 C.F.R. 303.11(g)(4), the FDIC Rules of Practice and Procedure governing the issuance of enforcement orders do not explicitly specify an effective date for such orders. Section 8(e) orders issued following adjudication are generally given a 30-day delayed effective date to give the IAP time to go to court to seek injunctive relief. As a general rule, however, immediate effectiveness of orders issued pursuant to stipulation where the possibility of legal challenge is remote makes sense in most cases, and the models for the stipulated order to pay and stipulated order of removal or prohibition each specify that such orders shall be "effective upon issuance." Stipulated orders, therefore, are generally effective on the date of issuance, unless an exception is justified by the particular facts of a specific case, which should be documented in detail.

Modifying or Terminating Removal, Prohibition, and Suspension Actions

Any person subject to an order of prohibition issued under Section 8(e) of the FDI Act may not participate in any manner in the conduct of the affairs of any IDI; may not solicit, procure, transfer, attempt to transfer, vote or attempt to vote any proxy, consent or authorization with respect to any voting rights in any IDI; may not violate any voting agreement approved by a FBA; or may not vote for a director or serve or act as an IAP.

However, Section 8(e)(7)(B) of the FDI Act gives the appropriate FBA and the agency that issued the order the authority to modify or terminate an order of prohibition. Under that provision of the statute, the agencies provide written consent to the prohibited person, specifying the extent of the modification of the order of prohibition. Any FBA that grants a modification of the order must report such action to the FDIC and the public.

A person who has been prohibited under Section 8(e) of the FDI Act may request that the order of prohibition be modified or terminated. Requests that invoke Section 8(e)(7)(B) of the FDI Act generally fall into one of four basic categories, which are summarized below.

1. ***Single action:*** An IAP seeks to engage in a prohibited activity on a one-time basis. For example, a major shareholder may seek permission to cast a vote at one meeting for a single transaction.

   Note: Prior approval is not required before the execution of an agreement to sell IDI stock. However, approval must be obtained prior to the consummation of a sale of IDI stock since it would otherwise involve a prohibited transfer of voting rights.

2. ***Series of actions:*** An IAP files a request to modify the order of prohibition so that he/she may engage in a series of actions. An example of this series is when an IDI is in the process of being merged or sold and a majority shareholder, who is subject to an order of prohibition, must perform various actions so the sale or merger can take place.

3. ***Employment in a specific IDI:*** An IAP requests permission to be employed by a specific IDI in a particular position. However, the prohibition will remain in effect pertaining to the applicant's employment at any other IDI or any activities not permitted by the modified order.

4. ***Termination of Order:*** An IAP requests that the order of prohibition be terminated so that the requester may serve in any IDI that he/she wishes in whatever position he/she may obtain. Granting such a request requires a formal termination of the original order of prohibition.

Requests to terminate or modify a prohibition order should be submitted in writing to the RO that supervises the IDI with which the requestor wishes to become affiliated. The written submission must be accompanied by supporting evidence that provides the following information:

- The nature of the requested agency action (for example, modification of the order to permit certain activities, termination of the order, etc.);

- The nature and location of the IDI and the terms of the proposed affiliation (for example, job title, duties, and compensation); and

- The prohibited person's justification for the requested action, which addresses the applicable factors enumerated below. The prohibited person's assertion that the original order of prohibition was inappropriate is NOT sufficient justification to consider requests filed pursuant to Section 8(e)(7)(B).

In all instances, the Legal Division should be consulted.

Enumerated Factors

To determine whether a modification or termination of an order of prohibition is justified, the facts of the particular case must be analyzed and the applicant should demonstrate:

- His/her fitness to participate in any manner in the conduct of the affairs of an IDI,
- That his/her participation would not pose a risk to the IDI's safety and soundness, and
- That his/her participation would not erode public confidence in the IDI.

Specific factors to consider should include, but are not limited to, the following:

1. The nature, extent, and duration of the violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty that led to the issuance of the order;
2. The amount of loss sustained by the IDI and/or the amount of gain received by the prohibited person in connection with the violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty, and whether the prohibited person has reimbursed such loss or returned such gain;
3. Any other violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty committed, caused, or brought about by the party but not charged by the agency in the removal or prohibition case;
4. The period of time that the order has been outstanding, as well as any prior requests made by the individual;
5. Activities of the individual since the order was issued, including evidence of rehabilitation, such as serving in a position of trust or high responsibility;
6. The nature of the position or proposed action the requestor is seeking, and the scope of relief sought;
7. Whether the requestor's future affiliation with an IDI would pose a threat to the safety and soundness of any IDI or the banking system;
8. The likelihood of future violations of law, unsafe or unsound practices, or breaches of fiduciary duty;
9. Any controls, audits, and/or safeguards that the IDI may put in place regarding the position the requestor is seeking;
10. The views and opinions of other federal and state banking agencies, when applicable; and
11. Such other matters as deemed appropriate.

Removal from Office Based on Specific Violations of Law

IAPs may be removed from office for violations of specific regulations regarding monetary instruments recordkeeping. Officers and directors of IDIs may be removed from office for having knowledge, without exhibiting remedial efforts, of another IAPs' violations of certain laws and regulations. Officers and directors may also be removed from office for violating the Depository Institution Management Interlocks Act. Furthermore, IAPs of non-bank subsidiaries of a bank holding company or savings and loan holding company can be removed from office upon conviction or entrance into a pretrial diversion program for certain criminal offenses. Unlike a removal or prohibition action under Section 8(e)(1), there is no requirement to establish the elements of effect or culpability.

Statutory Authority

Section 8(e)(2) of the FDI Act authorizes the FDIC to issue a NOI to remove from office.

Grounds

The FDIC may issue a NOI to remove an IAP from office if it determines that any of the following has occurred:

- An IAP has committed a violation of any provision of subchapter II of chapter 53 of title 31, U.S.C., (Records and Reports on Monetary Instruments Transactions (§§ 5311 – 5332)) and such violation was not inadvertent or unintentional.

- An officer or director of an IDI has knowledge that an IAP of the IDI has criminally violated any provision of:

    - Section 1956 (Money Laundering), 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activities), or 1960 (Conduct of Illegal Money Transmitting Businesses) of title 18, U.S.C. or

    - Section 5322 or 5324 of title 31, U.S.C. (Violations of Monetary Instrument Transactions Recordkeeping and Reporting Requirements).

- An officer or director of an IDI has committed any violation of the Depository Institution Management Interlocks Act.

- An IAP of a subsidiary (other than an IDI) of a bank holding company or of a subsidiary (other than a savings association) of a savings and loan holding company has been convicted of any criminal offense involving dishonesty or a breach of trust or a criminal offense under Section 1956, 1957, or 1960 of title 18, U.S.C., or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense.

In determining whether an officer or director should be removed as a result of the second item listed above, having knowledge that an IAP of the IDI has violated such provisions, the FDIC will consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

Temporary Suspension and Prohibition Actions

The FDIC may order the temporary suspension or prohibition of an IAP pending a hearing on an order of removal if the individual's continued participation poses an immediate threat to the IDI or to the interests of the IDI's depositors.

Statutory Authority

Section 8(e)(3) of the FDI Act authorizes the FDIC to issue temporary suspension and prohibition orders.

Grounds

If the FDIC has issued a written notice of removal under Section 8(e)(1) (Removal or Prohibition Actions) or 8(e)(2) (Removal based on Specific Violation of Law), then the FDIC may seek to suspend or prohibit the individual under Section 8(e)(3). The FDIC must:

- Determine that such action is necessary for the protection of the IDI or the interests of the IDI's depositors and
- Serve such party with written notice of the suspension order.

Any suspension order issued under Section 8(e)(3) is effective upon service to the respondent. The suspension order will remain in effect until:

- the FDIC dismisses the charges contained in the related notice filed under Section 8(e)(1) or (e)(2),
- the final order is issued under the related notice filed under Section 8(e)(1) or (e)(2), or
- a court issues a stay of such order.

Suspension or Prohibition Actions Pending Criminal Proceedings

Under Section 8(g) of the FDI Act, IAPs who are charged with a criminal violation of specific banking-related statutes or a crime involving dishonesty or a breach of trust that is punishable by imprisonment for a term exceeding one year under state or federal law may be suspended and/or prohibited from participation in the affairs of an IDI pending disposition of the criminal charges.

Permanent removal or prohibition may be required if the individuals are convicted of or enter into pretrial diversion or other programs in connection with certain crimes. For additional information, refer to the next section (*Removal or Prohibition Actions Following Conviction*).

Note: Actions under Section 8(g) should only be brought where the respondent (1) was an IAP of the IDI at the time the criminal charge was issued or the IAP was convicted, or (2) *is* an IAP at the time the FDIC issues a notice or order under Section 8(g).

Statutory Authority

Section 8(g)(1)(A) of the FDI Act authorizes the FDIC to issue suspension or prohibition notices pending the outcome of certain criminal proceedings.

Grounds

The FDIC may issue a notice of suspension or prohibition and notice of hearing when the following circumstances are present:

- An IAP is charged with a crime involving dishonesty or breach of trust, and
- The crime is punishable by imprisonment for a term exceeding one year under state or federal law; or
- An IAP is charged with a criminal violation of certain banking-related crime, such as money laundering.

Moreover, the FDIC must determine that the continued service or participation by the IAP might pose a threat to the interests of the IDI's depositors or threaten to impair public confidence in the IDI.

Suspension Actions Affecting Institution's Board of Directors

A suspension or prohibition action may cause an IDI to have less than a full quorum of non-suspended directors. If this occurs, the Legal Division must be consulted to determine what constitutes a quorum under applicable state law for state-chartered banks.

Removal or Prohibition Actions Following Conviction

IAPs who are convicted or enter into a pretrial diversion program or other similar program in relation to a criminal violation of specific banking-related statutes or a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under state or federal law may be removed or prohibited from participation in the affairs of an IDI. The FDIC must determine that the individual's continued service or participation may pose a threat to the interests of the IDI's depositors, or may threaten to impair public confidence in the IDI, in order to use Section 8(g)(1)(C)'s authority. Moreover, the criminal judgment must be final – no longer subject to appellate review.

Note: Any individual who has been convicted of or has entered into a pretrial diversion or similar program for any criminal offense involving dishonesty, breach of trust, or money laundering is automatically barred, pursuant to Section 19 of the FDI Act, from becoming or continuing as an IAP of any IDI absent the written consent of the FDIC. The FDIC may, however, choose to pursue a discretionary removal or prohibition action under Section 8(g)(1)(C)(i) when warranted by specific circumstances.

For IAPs who are convicted or enter into a pretrial diversion program for charges involving violations of certain sections (listed below) of the U.S.C. listed in 12 U.S.C. §1818(g)(1)(A)(ii), the FDIC is required to issue a removal or prohibition order.

Statutory Authority

Section 8(g)(1)(C) of the FDI Act authorizes the FDIC to issue removal or prohibition orders upon conviction or entrance into a pretrial diversion program for certain crimes.

Grounds

Section 8(g) of the FDI Act authorizes the FDIC to issue a removal or prohibition order against an IAP when all of the following circumstances are present:

- The IAP is convicted of an offense that meets the criteria of Section 8(g) or enters into a pretrial diversion program.
- The judgment is not subject to further appellate review.
- The FDIC determines that the individual’s continued service or participation may pose a threat to the interests of the IDI’s depositors, or may threaten to impair public confidence in the IDI.

In addition, the FDIC is *required* to issue removal or prohibition orders against IAPs convicted of violating any of the following sections of the U.S.C.:

- 18 U.S.C. § 1956 (Money Laundering),
- 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activities),
- 18 U.S.C. § 1960 (Conduct of Illegal Money Transmitting Businesses), and
- 31 U.S.C. §§ 5322 or 5324 (Violations of Monetary Instrument Transactions Recordkeeping and Reporting Requirements).

Note: Under to Section 8(g)(3), within 30 days of service of the order of removal or prohibition, the IAP may request a hearing to appear before the agency to show that his/her continued service or participation in the conduct of the affairs of the IDI does not pose a threat to the interests of the IDI’s depositors or threaten to impair public confidence in the IDI. The IAP’s failure to request a hearing may result in a final and unappealable order of prohibition. Within 60 days of a hearing, the agency must notify the IAP whether the order of removal or prohibition from participation will be rescinded or otherwise modified.

Comparison of Section 8(e) and Section 19

By operation of law, Section 19 of the FDI Act automatically bars, except with the prior written consent of the FDIC, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (a covered offense), or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense (a covered individual), from becoming or continuing as an IAP with respect to any IDI; owning or controlling, directly or indirectly, any IDI; or otherwise participating, directly or indirectly, in the conduct of the affairs of any IDI.

A criminal conviction or pretrial diversion for a covered offense is not necessary to establish a basis for a Section 8(e) action. Likewise, the elements of a Section 8(e) action are not necessarily established simply because a person is prohibited from banking by operation of law under Section 19. For example, an individual’s covered offense may have occurred unrelated to any role of the individual as an IAP, in which case there would generally be no basis for a Section 8(e) action, but Section 19 would apply by operation of law.

Issuing Section 19 Letters

An enforcement action under Section 8(e) of the FDI Act generally is the preferred mechanism for removing or prohibiting individuals from banking who have engaged in misconduct that meets all requisite statutory elements for a Section 8(e) action. In certain situations, however, a Section 8(e) action may not be feasible or practical. In such instances, if an IAP has been previously barred by operation of law under Section 19, it may be appropriate to send a “Section 19 letter” to a covered individual to provide notice that Section 19 bars his or her participation in the affairs of any IDI.

When FDIC staff discovers that an IAP is prohibited by Section 19 from continuing to participate in the affairs of an IDI, staff should evaluate the case to determine whether the requisite elements of a Section 8(e) action are established and may pursue such action if applicable. If the FDIC discovers that a covered individual is employed by or serving as an IAP but the requisite elements of a Section 8(e) action are not established, the RO may recommend sending a Section 19 letter to the individual, subject to WO concurrence. If approved, the RO should also send a letter to the applicable IDI indicating that the IDI can be subject to criminal penalties for allowing a covered individual to participate in its affairs or to continue as an IAP.

Handling Disputed Cases

When a Section 19 letter is sent, the covered individual has 30 days (from the date of receipt by certified mail) to respond to the FDIC if he or she disputes the applicability of Section 19. If no response is received within the 30-day period, the Section 19 letter will become publicly available on the FDIC’s website (as described below under *Publication of Section 19 Letters*).

If the individual responds in writing and disputes the applicability of Section 19 in his or her case, the RO (RMS and Legal) will review and evaluate any new information and confirm that Section 19 still applies. Upon confirmation, a second letter should be sent to the individual detailing the offense and how it meets the criteria in Section 19.

If the review and evaluation of any new information results in a determination that individual is not covered by Section 19, the WO should be consulted, and the RO should provide a letter of retraction and inform the individual that the original letter is rescinded and will not be posted on the FDIC’s website. A letter of retraction would also be provided to any IDI that was sent a letter regarding the individual being covered by Section 19.

Publication of Section 19 Letters

Once the 30-day period for the individual to respond has passed, the Section 19 letter will be listed in the FDIC’s monthly of Enforcement Decisions and Orders press release, and the letter will be posted to in a searchable, public database. Publication of such letters on the FDIC’s website may aid IDIs screening potential employees. The FDIC’s Enforcement Decisions and Orders website can be found at https://orders.fdic.gov/s/.

Modification of a Section 8(e) Order versus Written Consent under Section 19

The modification or termination of an order of prohibition issued under Section 8(e) will not waive or otherwise affect any prohibition created by Section 19, including the ten-year ban mandated for conviction of certain criminal offenses listed in Section 19(a)(2)(A) of the FDI Act.

In order for an individual covered by Section 19 to participate in the affairs of an IDI, the individual must obtain the FDIC's prior written consent.

Enforcement Case Coordination

In order to facilitate the timely resolution of enforcement actions, staff is expected to contact the responsible FO and RO as soon as misconduct possibly warranting enforcement action is identified. Timely notification allows for RO Legal 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 the 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. Generally, straightforward cases that require less investigation should be processed in a short timeframe. More complex cases with extensive investigations or AUSA involvement may take longer. RO management should develop a processing timeframe and milestones that are appropriate for the situation.

Pursuing Multiple Actions against Individuals

CMPs or Restitution in Conjunction with Removal or Prohibition Actions

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 the issuance of a CMP under Section 8(i)(2) and/or a restitution order under Section 8(b)(6). While a CMP or restitution proposal is not expected to accompany every removal or prohibition action, it is expected that CMPs and/or restitution will be considered in all appropriate cases. While these are distinct avenues to address the misconduct, insofar as removal or prohibition is intended to prevent future misconduct, restitution is intended to recover losses or obtain disgorgement of unjust enrichment, and CMPs are intended to be punitive, they are considered companion actions, and therefore the RO's documentation supporting the action should specifically address each course of action.

Enforcement Actions against Accountants

The circumstances of some IDI failures have highlighted the importance of high-quality audits of IDIs. Since the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 expanded the jurisdiction of the banking agencies, the definition of IAP under 12 U.S.C. 1813(u)(4) has included "any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in – (A) any violation of law or regulation; (B) any breach of fiduciary duty; or (C) any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution." Although Congress established a high standard of proof, Section 8 cases against accountants can and should be pursued when appropriate.

The FDIC and the other federal banking regulatory agencies have each adopted regulations that provide an additional enforcement mechanism applicable to accountants. The FDIC's final rule, at 12 C.F.R. Part 308, Subpart U, amends the FDIC's rules of practice to establish procedures for the removal, suspension, or debarment of independent public accountants from the performance of audit and attestation services required by Part 363 of the FDIC Rules and Regulations. Action under this rule is narrower in effect than action under Section 8 (the prohibition applies only to the provision of Section 36 audit and attestation services to large institutions). However, the good cause standard established by the rule includes violations of law and certain negligent conduct consistent with Rule 2e of the Securities and Exchange Commission, a much lower standard than the “knowing or reckless” standard applicable to Section 8 actions against accountants. In addition, the basis for accountant debarment under the rule is not limited to conduct occurring in connection with the provision of Section 36 audit services. Thus, accountant debarment may provide an alternative remedy to a Section 8(e) removal/prohibition action that should be considered in appropriate circumstances.

Chapter 7 – Termination of Deposit Insurance

Termination of Federal Deposit Insurance

Termination of federal deposit insurance may be accomplished either involuntarily (through action initiated by the FDIC) or voluntarily (through request or stipulation by the IDI). General instructions for initiating and processing termination actions appear in the following pages.

Involuntary Insurance Termination under Section 8(a)(2)

Involuntary termination of federal deposit insurance is a drastic remedy seldom applied by the FDIC since the enactment of the Federal Deposit Insurance Corporation Improvement Act of 1991 and the implementation of PCA. Because deposit insurance coverage is required for all national banks and most state banks, termination of insured status will likely result in the chartering authority closing the IDI. Involuntary insurance termination proceedings can take a significant amount of time to complete from the initial stages to actual termination of insurance. As an alternative mechanism to protect the DIF, the FDIC has authority under Section 11(c) of the FDI Act to appoint itself as receiver or conservator of an IDI in certain circumstances (refer to Chapter 5 – Prompt Corrective Action).

Grounds

Section 8(a)(2) of the FDI Act allows the FDIC BOD to involuntarily terminate an IDI's deposit insurance when any of the following conditions are found:

- The IDI or its BOD or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of the IDI;

- The IDI is in an unsafe or unsound condition; or

- The IDI or its directors or trustees have violated a law, rule, regulation, order, condition imposed by the FDIC in connection with the approval of an application or other request by the IDI, or written agreement with the FDIC.

When Insurance Should Be Terminated

The FDIC generally terminates deposit insurance under Section 8(a)(2) when other administrative remedies have proved ineffective.

Insurance termination should not replace court enforcement of other administrative remedies. Consideration should be given to Section 38 (PCA) when determining whether insurance termination should be pursued (refer to Chapter 5 – Prompt Corrective Action). When recommending insurance termination based on noncompliance with outstanding actions, RMS staff should explain in detail why this action is being recommended.

When Insurance Should Not Be Terminated

Generally, involuntary termination of deposit insurance under Section 8(a)(2) of the FDI Act should not occur in any of the following situations:

- An IDI's chartering authority determines that closure is imminent (within approximately 90 days); or

- An IDI is actively attempting resolution of its situation through an unassisted merger or the issuance of additional stock, and these efforts have a reasonable chance of success.

Notice to Primary Regulator

Before initiating formal proceedings to terminate an IDI's deposit insurance, the FDIC must provide 30 days' written notice to the IDI's primary federal regulator or the state authority. This notice is accomplished by issuing an NPR. Issuing the NPR gives the primary federal regulator or state authority an opportunity to secure correction of the problems cited in the NPR. As a courtesy, the IDI is also sent a copy of the NPR. Issuing the NPR should occur only if other administrative actions were ineffective.

Notice of Intent

The FDIC BOD may formally institute Section 8(a)(2) insurance termination proceedings if the unsafe or unsound practices, unsafe or unsound condition, or violation specified in the NPR still requires the termination of insured status. This typically occurs when the primary federal regulator or state authority fails to present evidence of correction or improvement at the end of the time period specified in the NPR. Formal proceedings are initiated by issuing a NOI to terminate insured status, findings, and order setting hearing.

Insurance Termination Procedures and Notice to Depositors

The FDIC initiates insurance termination proceedings against an IDI by issuing a NPR. If the primary federal regulator or state authority fails to secure correction of the problems cited in the notice, the FDIC issues a NOI providing the institution with a formal notice of the action. If the FDIC prevails and issues an order of termination of insurance, insurance continues for a period of six months to two years as set forth in Section 8(a)(7). The IDI must also notify its depositors about the termination.

Terminating Section 8(a)(2) Actions

An IDI may remediate the underlying unsafe or unsound practices, unsafe or unsound condition, or violation; merge with another IDI or close before the FDIC issues a formal order of termination of insurance; or show other good cause why the action should be terminated. When this occurs, RMS staff may terminate (or withdraw if not yet issued) a NPR or NOI issued under Section 8(a)(2) of the FDI Act.

Involuntary Insurance Termination under Section 8(w)

Section 8(w) of the FDI Act requires the US Attorney General to provide written notification to the FDIC when an insured state depository institution is convicted of violating any of the following sections of the U.S.C.:

- 18 U.S.C. § 1956 (Money Laundering),
- 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), or
- 31 U.S.C. §§ 5322 (Violating Certain Provisions of 31 U.S.C. subch. II) or 5324 (Structuring Transactions to Evade Reporting Requirements).

Section 8(w) requires that the FDIC BOD issue a NOI to terminate deposit insurance and schedule a hearing when the Attorney General notifies the FDIC that a state institution has been convicted of violating 18 U.S.C. §§ 1956 or 1957.

In addition, Section 8(w) authorizes (but does not require) the FDIC BOD to issue a NOI to terminate deposit insurance and schedule a hearing when the Attorney General notifies the FDIC that a state institution has been convicted of violating 31 U.S.C. §§ 5322 or 5324.

Note: The FDIC simultaneously forwards a copy of the NOI to the appropriate state authority. However, the FDIC does not issue NPRs as described in Section 8(a)(2) when processing Section 8(w) actions based on convictions involving 18 U.S.C. §§ 1956 or 1957. The FDIC may issue NPRs when processing Section 8(w) actions against institutions convicted of violating 31 U.S.C. §§ 5322 or 5324.

Required Notification from Attorney General

If an insured state depository institution is convicted of any criminal offense under 18 U.S.C. §§ 1956 or 1957 or 31 U.S.C. §§ 5322 or 5324, the Attorney General must notify the FDIC. The following table lists the notification required for each type of conviction.

Convictions Involving 18 U.S.C. §§ 1956 or 1957	Convictions Involving 31 U.S.C. §§ 5322 or 5324
Written notification and certified copy of order of conviction.	Written notification only.

Factors to Be Considered

In determining whether to terminate insurance under Section 8(w), the FDIC BOD takes into account the following factors:

- The extent to which directors or senior executive officers of the IDI knew of, or were involved in, the commission of the money laundering offense of which the institution was found guilty;
- The extent to which the offense occurred despite the existence of policies and procedures within the IDI that were designed to prevent the occurrence of any such offense;
- The extent to which the IDI has fully cooperated with law enforcement authorities with respect to the investigation of the money laundering offense of which the institution was found guilty;
- The extent to which the IDI has implemented additional internal controls (since the commission of the offense of which the IDI was found guilty) to prevent the occurrence of any other money laundering offense; and
- The extent to which the interests of the local community in having adequate deposit and credit services available would be threatened by the termination of insurance.

Notice to the State Supervisor, the Public, and Depositors

When an order of termination of insurance under Section 8(w) is final, the FDIC must:

- Notify the state authority at least ten days prior to the effective date of the order of termination of insurance of the state depository institution or savings association (including state branches of foreign banks).

- Publish notice of termination of the IDI's insured status in the Federal Register.

Following issuance of an order of termination of insurance, insurance continues for a period of six months to two years as set forth in Section 8(a)(7). The FDIC should also ensure that depositors receive advance notice of the termination.

Successor Liability

Section 8(w) does not apply to a successor to the interests of, or a person who acquires, an IDI that violated the previously listed laws if the successor succeeds to the interests of the violator, or the acquisition is made in good faith and not for purposes of evading Section 8(w) or regulations prescribed under that section.

Processing Section 8(w) Actions

Actions under Section 8(w) are **uncommon**. RO staff who obtains information indicating the potential for Section 8(w) action should immediately contact the WO.

Voluntary Insurance Termination

Under certain conditions, an IDI may seek to voluntarily terminate federal deposit insurance. Voluntary termination of deposit insurance is authorized by three subsections of the FDI Act: 8(a)(1), 8(p), and 8(q). Detailed descriptions of each action appear in the following pages.

Types of Voluntary Termination

The table below lists the three types of voluntary termination actions authorized by the FDI Act and the circumstances when they are used.

Type	Used When
Section 8(a)(1)	IDI is in process of self-liquidation, or in other instances of voluntary termination (except Section 8(p) and 8(q) actions).
Section 8(p)	IDI is no longer in business of receiving deposits (other than trust funds) or institution's deposits are assumed by an insured credit union.
Section 8(q)	IDI's deposits are assumed by another IDI.

Section 8(a)(1) Terminations

Voluntary terminations under Section 8(a)(1) of the FDI Act are relatively uncommon and are generally used by institutions in the process of self-liquidation. Institutions initiating Section

8(a)(1) proceedings are required to provide the FDIC with written notice of their intent to terminate deposit insurance at least 90 days before the effective date of the termination.

The following institutions cannot voluntarily terminate deposit insurance under Section 8(a)(1) of the FDI Act:

- National banks,
- State member banks,
- Federal branches,
- Federal savings associations, or
- Any branches required to be insured under Section 6(a) or 6(b) of the International Banking Act of 1978.

Following issuance of an order of termination of insurance, insurance continues for a period of six months to two years as set forth in Section 8(a)(7).

Section 8(p) and 8(q) Terminations

Section 8(p) is used to terminate deposit insurance when an IDI is no longer in the business of receiving deposits (other than trust funds). Section 8(p) is also used to terminate deposit insurance when an insured credit union assumes an IDI's deposits because Section 8(q) is only available when an IDI assumes another IDI's deposits. Although Section 8(p) actions are usually voluntary, with the institution stipulating to the termination of insurance action, they may also be effected involuntarily. Insured status terminates on the last day of the first full quarterly assessment period following issuance of an order of termination of insurance.

Section 8(q) is used to terminate deposit insurance when an IDI's deposits are assumed by another IDI. If the IDI's charter is cancelled, revoked, rescinded, or otherwise terminated within five days of the assumption, then termination takes effect by operation of law, and no order of termination of insurance is required. Otherwise, the FDIC must issue an order of termination of insurance. Termination by operation of law is not available when an IDI's charter is converted to a different charter class.

Insured status terminates on the date the FDIC receives satisfactory evidence of assumption of the deposits. However, separate insurance of deposits continues for six months from the date the assumption takes effect, or until the earliest maturity date after the six-month period for time deposits.

Notice to Depositors

Before voluntarily terminating deposit insurance under Section 8(a), 8(p) or 8(q), an IDI provides advance notice to its depositors.

Chapter 8 – Comparison of Prompt Corrective Actions and Section 8 Actions

Comparison of Prompt Corrective Actions and Section 8 Actions

In some cases, the FDIC may pursue formal action under either Section 38 (PCA) or Section 8 of the FDI Act. Examples include the following:

- Appointing a receiver or conservator under Section 38 or terminating deposit insurance under Section 8(a).
- Issuing a supervisory directive under Section 38 or a cease-and-desist order under Section 8(b).
- Dismissing officials under Section 38, or removing them from office or from participation in the banking industry under Section 8(e).

Determining whether action should be initiated under Section 38 or Section 8 requires careful consideration of both sections of the FDI Act and related references, as well as the specific circumstances facing a particular institution. This chapter provides basic considerations in determining whether action should be based on Section 38 or Section 8, in cases where FDIC staff may pursue action under either authority.

Additional information on the use and processing of enforcement actions under these sections of the FDI Act may be found in chapters 4, 5, and 6, which specifically address these actions.

Appointment of Receiver or Conservator vs. Insurance Termination

Federal law and laws in most states prohibit financial institutions from operating without deposit insurance. For this reason, terminating insurance under Section 8(a) of the FDI Act may result in an IDI's closure and the subsequent appointment of a receiver. Appointment of a receiver/conservator also may be achieved through PCA proceedings under Section 38.

Considerations for determining which section should be used to appoint a receiver/conservator follow.

PCA Requirements

Section 38 states that the appropriate federal financial regulatory agency shall take one of the following actions no later than 90 days after an institution becomes critically undercapitalized.

- Appoint a receiver or conservator.
- Take other action (with FDIC concurrence) that the agency determines will better achieve the purpose of PCA.

However, under certain circumstances, the 90-day period may be extended if it is in the interest of the DIF. (Refer to Delaying Mandatory Resolution in Chapter 5 – Prompt Corrective Action for a list of these circumstances.)

Note: An institution is deemed critically undercapitalized if its ratio of tangible equity capital to total assets is two percent or less. Tangible equity capital includes cumulative perpetual preferred stock and related surplus, which is not included in the calculation of the leverage ratio. Section 324.4(c) states that an institution with a ratio of tier 1 capital to total assets that is less than less than two percent is deemed to be in an unsafe or unsound condition.

Section 8(a) Requirements

Section 8(a) provides three possible grounds for terminating an institution's insured status:

- The institution's officers or directors have engaged in unsafe or unsound practices.
- The institution's officers or directors have violated a law, regulation, order, condition imposed in writing by the FDIC, or written agreement with the FDIC.
- The institution is in an unsafe or unsound condition.

Required Hearings

No formal Administrative Procedure Act hearing is required before appointing a receiver or conservator under Section 38. In contrast, Section 8(a)(2) states that the FDIC may terminate an institution's insured status only after providing the institution with notice of the action and granting the opportunity for a hearing.

Results of PCA and Section 8(a) Action

Both Section 38 and Section 8(a) actions may have the effect of closing institutions that pose a substantial risk to the DIF. A successful Section 8(a) proceeding terminates an institution's insured status. The termination of insured status generally results in the closing of the institution by its chartering authority and the subsequent appointment of a receiver. Section 38 authorizes the automatic appointment of a receiver or conservator for critically undercapitalized institutions.

Selecting the Appropriate Remedy

The choice of whether to use Section 38 or Section 8(a) as a remedy depends on the condition of the institution.

Critically undercapitalized institutions – Section 38 action appears to be appropriate for critically undercapitalized institutions. Due to the delay caused by the need for a formal hearing under Section 8(a), the automatic appointment of a receiver authorized by PCA may achieve the FDIC's purposes in a timelier manner.

Note: the FDIC—if it is the appropriate FBA—must appoint a receiver beginning 270 days after the date on which the IDI became critically undercapitalized, unless the FDIC can document reasons why not appointing a receiver would better serve the purposes of PCA.

Institutions in an unsafe or unsound condition but not critically undercapitalized – Regardless of capital levels, an institution may be in an unsafe or unsound condition. Such an institution may not be subject to the automatic appointment of a receiver under PCA; however, it may be subject to termination of insurance under Section 8(a).

If an institution is less than adequately capitalized, both PCA and Section 8(a) provide the regulatory flexibility needed to protect the DIF as follows:

- For institutions in an unsafe or unsound condition that are not critically undercapitalized, a PCA directive would require that an institution take immediate corrective measures.

- For institutions that remain in an unsafe or unsound condition—despite corrective measures being implemented—but do not become critically undercapitalized, action could be instituted under Section 8(a) to terminate an institution's insurance since Section 8(a) does not tie the FDIC's authority to a certain capital percentage.

Institutions requiring high capital percentages for safety and soundness reasons – To remain in a safe and sound condition, certain institutions may require a capital level that is far higher than the institution needs to be deemed adequately capitalized or well capitalized for PCA purposes.

The FDIC may consider terminating deposit insurance under Section 8(a) for institutions that have engaged in unsafe or unsound practices or violated a law, order, or written agreement, but have high levels of capital and yet are a significant risk to the DIF. Appointment of a receiver under Section 11 may also be warranted in these circumstances.

Note: Section 11 allows the FDIC to appoint itself receiver for reasons not directly related to an institution's capital status; those reasons include, but are not limited to, substantial dissipation of the institution's assets or earnings, the institution's inability to pay its obligations or meet the demands of its depositors, and the willful violation of a cease-and-desist or consent order.

Institutions engaging in unsafe or unsound practices, or violations – The FDIC could consider a Section 8(a) action against institutions that engage in unsafe or unsound practices or violate a law, regulation, written condition imposed by the FDIC, or written agreement with the FDIC. However, other remedies are generally considered and/or attempted prior to initiating such action.

PCA Directives vs. Cease-and-Desist Orders

The FDIC has the option of issuing supervisory directives and/or cease-and-desist or consent orders to institutions in any of the following capital categories:

- Undercapitalized,

- Significantly undercapitalized, or

- Critically undercapitalized.

PCA Requirements

The FDIC may issue supervisory directives requiring corrective action or compliance with the requirements of Section 38 to institutions that are undercapitalized, significantly undercapitalized, or critically undercapitalized. Each capital category carries certain mandatory restrictions, which are automatically imposed upon the institution.

For undercapitalized institutions, PCA directives may include discretionary provisions that are additional actions or restrictions the FDIC could impose if necessary for PCA purposes. However, for institutions that are significantly undercapitalized or undercapitalized without an acceptable capital restoration plan, Section 38 requires that the FBA impose one or more of the applicable discretionary provisions.

Issuance of a supervisory directive is not required if the FDIC determines that only the applicable mandatory provisions of PCA must be imposed. The mandatory provisions become effective immediately by operation of law. However, imposing discretionary provisions onto an institution requires that the FDIC issue a supervisory directive.

Section 8(b) Requirements

Under Section 8(b) of the FDI Act, the FDIC may issue cease-and-desist or consent orders to institutions or IAPs that have engaged or are about to engage in either of the following actions:

- An unsafe or unsound practice in conducting the business of the institution.
- A violation of a law, rule, regulation, written agreement, or condition imposed in writing in connection with the granting of any application or other request by the institution.

Cease-and-desist or consent orders may include provisions requiring an institution or IAP to halt violations or practices, or to take affirmative action to correct any conditions resulting from such violations or practices.

Required Hearings

If an institution is not willing to stipulate to a Section 8(b) action, the FDIC may issue a NOC that may be contested through a hearing before an administrative law judge. However, except as provided below, a hearing is not usually required when the FDIC issues a PCA directive. The FDIC must, however, provide an institution with NOI to issue a PCA directive. The institution has at least 14 days to file a written response to the directive, unless the FDIC determines that a shorter time period is appropriate, given the condition of the IDI or other relevant circumstances. The FDIC's determination, after considering a response, is considered final under Section 308.201 of the FDIC Rules and Regulations. An institution can submit a written request to modify or rescind the directive if the institution has had a change in circumstances that impacts its financial or operating condition.

A hearing is available prior to issuance of a PCA directive in only two situations:

- The institution's PCA capital category is being reclassified based on a less-than-satisfactory rating for asset quality, management, earnings, or liquidity in an ROE (and the deficiency is not corrected) as set forth in Section 308.202 of the FDIC Rules and Regulations, or
- The FDIC intends to dismiss a director or senior executive officer of the institution from office as set forth in Section 308.203 of the FDIC Rules and Regulations.

In either case, the required hearing is more limited than a Section 8(b) hearing.

Considerations in Using PCA Directives and Section 8(b) Actions

For IDIs that are well capitalized and adequately capitalized, the FDIC's cease-and-desist powers under Section 8(b) can be used to halt violations or unsafe or unsound practices, or to take affirmative action to correct any conditions resulting from such violations or practices. For institutions in the three undercapitalized categories, however, the FDIC has the option of issuing a PCA directive, a cease-and-desist order, or both. The following factors should be considered in determining whether to issue PCA directives and/or cease-and-desist orders in these instances.

PCA directives may impose more restrictions than Section 8(b) orders. The purpose of Section 38 of the FDI Act is to resolve the problems of IDIs at the least possible long-term loss to the DIF. Section 38 defines specific mandatory provisions that must be imposed upon an institution if it is deemed critically undercapitalized, significantly undercapitalized, or if it is an undercapitalized institution that has failed to submit an acceptable capital restoration plan or failed to implement an approved capital restoration plan. Additionally, Section 38(f)(2)(J) provides discretionary provisions that the FDIC may require an institution to take, including any other action that will better carry out the purpose of PCA than any of the actions specifically described in Section 38(f)(2).

In contrast, Section 8(b) actions are individually tailored to address supervisory concerns of specific institutions and require that the institution cease and desist from the identified practice or violation and take affirmative action to correct the condition resulting from such practice or violation. There are no specific restrictions contained in Section 8(b). Additionally, Section 8(b) actions (unlike Section 38 actions) do not require the FDIC to demonstrate that unsafe or unsound practices have not been corrected.

PCA-directive provisions may be included in a cease-and-desist order. The PCA restrictions applicable to institutions in the three undercapitalized categories can be included in the provisions of a cease-and-desist order. However, issuing a PCA directive would be faster and simpler if the institution plans to contest the Section 8(b) action because in most cases, a PCA directive does not require a hearing.

PCA directives may not apply after an institution becomes adequately capitalized. Generally, the provisions of a PCA directive no longer apply after an institution has been adequately capitalized for four consecutive calendar quarters (although a termination order is required to formally end the action). However, the FDIC may want an institution to raise its capital to a level higher than that required for adequately capitalized institutions under PCA, or continue to abide by other provisions in the PCA Directive even after the institution reaches the higher capital level. In these instances, a Section 8(b) action would be appropriate.

PCA directive provisions usually do not address violations of laws, regulations, or written agreements or conditions. The provisions included in PCA directives generally do not address correction of violations of laws, rules, regulations, written agreements, or conditions imposed in writing in connection with the granting of any application or other request by an institution. Therefore, in these circumstances, a Section 8(b) action would be more appropriate than a PCA directive.

Selecting the Appropriate Remedy

For institutions in the three undercapitalized categories, the FDIC has three options:

- Issue a cease-and-desist or consent order, which may include PCA-directive provisions;
- Issue both a PCA directive and a cease-and-desist order; or
- Issue a PCA directive only.

If PCA provisions are to be included in a cease-and-desist order, FDIC staff should attempt to obtain the institution's consent to the order. As a matter of procedure, FDIC staff may send the following documents to the institution at the outset of the action: a proposed stipulation and consent to the issuance of an order to cease and desist, an order to cease and desist, and a proposed PCA directive. If the institution consents to the more-inclusive Section 8(b) action, the FDIC may not need to issue the PCA directive.

If an institution is unwilling or unlikely to consent to a Section 8(b) action, the FDIC can proceed with both actions. In most cases, the actions will have similar provisions. However, the PCA directive provisions will become effective in a timelier manner and will remain effective throughout the Section 8(b) hearing process. The Section 8(b) order may, however, contain additional provisions that outlast the limited scope of the PCA directive. Further, the Section 8(b) order will remain effective until formally terminated by the FDIC.

There may be circumstances in which the FDIC's concerns would be fully addressed by a PCA directive alone. For example, a PCA directive would be sufficient if all of the FDIC's concerns were related to an institution's capital, and those concerns would be alleviated once the institution became adequately capitalized.

Note: Section 38(g) offers an informal hearing-process for institutions that are reclassified based on a less-than-satisfactory rating for asset quality, management, earnings, or liquidity in an ROE. The hearing is generally more streamlined than hearings required for Section 8(b) proceedings.

Provisions of PCA Directives and Cease-and-Desist or Consent Orders

In deciding which provisions to include in a PCA directive, FDIC staff should first determine whether there is an existing Section 8(b) order against the institution. If so, a PCA directive (if issued) need only include those provisions not covered in a final cease-and-desist order.

If a Section 8(b) order does not exist, the FDIC should assess the institution's willingness to stipulate to an order. If the institution is willing to stipulate, the FDIC would attempt to incorporate all provisions in a Section 8(b) order. However, if the institution is unwilling or unlikely to consent to a Section 8(b) action, the FDIC may pursue issuance of a PCA directive and initiate cease-and-desist proceedings simultaneously. When both a PCA directive and a cease-and-desist order are issued, FDIC staff must carefully consider the provisions that are included in each document. Both documents should include provisions that require the institution to increase its capitalization. However, the capital requirements for each document differ. Under Section 38, an IDI need only meet or exceed the minimum capital levels prescribed by regulation in order to fall within a certain PCA category (well capitalized, adequately capitalized, etc.). In contrast, a Section 8(b) order, among other provisions, may require an IDI to obtain capital levels that exceed PCA thresholds because the institution's condition and inherent risks threaten its solvency.

The proposed Section 8(b) order may include all provisions included in the PCA directive as well as any additional requirements concerning capital or other unsafe or unsound practices or violations not covered by PCA.

PCA Directives vs. Temporary Cease-and-Desist Orders

PCA Directives and Section 8(c) actions allow the FDIC to act with the utmost speed when the facts so dictate; however, they are often triggered by different events. PCA directives are triggered by capital events, while Section 8(c) actions are most often triggered when violations or unsafe or unsound practices are likely to cause insolvency or substantial dissipation of the assets or earnings of an IDI. A Section 8(c) action is not typically pursued when an institution's capital is the FDIC's primary concern. For these reasons, it is unlikely that PCA directives will affect Section 8(c) actions.

Note: If PCA applies to an institution and if the provisions that would be included in a temporary cease-and-desist order are mandated by PCA, it is not necessary to initiate a Section 8(c) action. The institution is already subject to the PCA provisions by operation of law.

PCA Dismissals vs. Section 8(e) Removals

In certain circumstances, the FDIC has the option of dismissing directors or senior executive officers from an institution under PCA or removing and prohibiting them from office in accordance with Section 8(e).

PCA Requirements

Under Section 38(f)(2)(F)(ii), the FDIC can require an IDI to dismiss directors or senior executive officers if the institution is significantly undercapitalized and, in some circumstances, if the institution is undercapitalized and has failed to submit an acceptable capital restoration plan or fails to implement an approved capital restoration plan.

Section 8(e) Requirements

The FDIC must demonstrate three grounds to institute an action for removal and/or prohibition against any IAP under Section 8(e) of the FDI Act: misconduct, the effect of the misconduct, and the individual's culpability for the misconduct. For a detailed description of the grounds for removal or prohibition under Section 8(e), refer to Chapter 6 – Removal, Prohibition, and Suspension Actions.

Results of Dismissals and Removals

Directors or senior executive officers dismissed under Section 38 are prevented from serving in the same capacity at the institution from which they were dismissed. In contrast, an individual removed from office under Section 8(e) is prohibited from serving as an IAP at any IDI.

Stricter Standards for Removals

Standards for removal under Section 8(e) are stricter than those required for Section 38 dismissals, for two reasons:

- A Section 8(e) removal results in an industry-wide prohibition. A PCA dismissal prohibits a director or senior executive officer from employment in the same position at the institution subject to the directive, and the dismissal is tied to that institution's needs.

- Section 8(e) requires misconduct or malfeasance on the part of the IAP to be removed or prohibited. PCA dismissals do not require misconduct on the part of the individual. Instead, it is sufficient to demonstrate that an individual does not have the capacity to materially strengthen the institution's ability to become adequately capitalized and/or correct unsafe or unsound conditions or practices.

Relation of Dismissals and Removals

If an officer or director of an institution is unwilling to stipulate to a removal and prohibition action due to misconduct under Section 8(e) of the FDI Act, a decision to dismiss under PCA should be seriously considered if the institution is in an undercapitalized or worse capital category under Section 38. When an officer or director of an institution is unwilling to stipulate to a removal and prohibition action, the FDIC may issue an NOI to remove under Section 8(e). The timeframe to effect an individual's removal via a contested administrative proceeding may be protracted. In contrast, a dismissal effected through the issuance of the PCA directive could be implemented immediately.

An individual dismissed from an IDI under Section 38 does not hinder or prevent a subsequent Section 8(e) action to prohibit that individual from further participation in the banking industry.

Justification Required for Dismissals

Section 38 and FDIC regulations regarding Section 38 do not impose any restraints on the FDIC's discretion in making an initial determination to dismiss directors or officers from institutions that are significantly undercapitalized, or undercapitalized institutions that have failed to submit and implement an acceptable capital restoration plan. However, a director or officer dismissed under a Section 38 dismissal order may obtain an administrative review of that order by filing a written petition for reinstatement with the appropriate FBA. In such circumstances, the FDIC would have to show that the officer or director would not materially strengthen the institution's ability to increase capital or to correct unsafe or unsound practices or conditions as set forth in Section 308.203(e) of the FDIC Rules and Regulations.

Considerations in PCA Dismissals

An initial determination to dismiss a director or senior executive officer should be based on an evaluation of the individual's performance at his or her current or any prior institutions. Essentially, this is the same analysis required by Section 32 of the FDI Act and the Change in Bank Control Act (Section 7(j)).

Under Section 32, an IDI that is not in compliance with minimum capital requirements or that is considered to be in a troubled condition (as defined in 12 C.F.R. Section 303.101(c)) must provide the FDIC with advance notice of the addition of directors or the employment of any senior executive officers. FDIC regulations provide that, in assessing such notice, the FDIC will consider the *competence, experience, character,* and *integrity* of the individual. The FDIC will issue a disapproval of the notice if an assessment of these factors indicates the individual's association or employment with the institution would not be in the best interests of depositors or the public.

The FDIC considers the same factors when evaluating applications for ownership or control filed under Section 7(j). Section 7(j) also requires the FDIC to analyze the financial resources of the applicant.

In determining whether to recommend dismissal, FDIC staff should consider the factors specified in the FDIC regulations for Section 32 actions, as described above.

Employment at an Institution after Dismissal

Section 38(f)(2)(F)(ii) authorizes the FDIC to require an institution to dismiss directors and senior executive officers. Refer to the section *Dismissing Directors or Senior Executive Officers* in Chapter 5 – Prompt Corrective Action for additional information on this topic. Section 38(n)(3) provides that an individual who is subject to dismissal or who is requesting reinstatement must demonstrate that his or her continued employment will materially strengthen the institution in specific areas set forth in the statute. If such a request is made, the Legal Division should be consulted.

If the institution is seeking to have the dismissed individual serve as a senior executive officer but in a different capacity, the institution must notify the FDIC in accordance with Section 32. In these circumstances, the FDIC could disapprove a role deemed inappropriate based on the individual's experience, competence, character, or integrity. However, the individual could be placed in a non-senior executive officer position at any institution without any review. If the person is, in fact, performing the duties of a senior executive officer, the appropriate FBA may impose CMPs upon the involved institution for violation of Section 32.

Since it is impractical to monitor each individual's activities, a PCA dismissal-directive should contain a provision requiring FDIC review of the respondent's prospective employment at that institution.

Note: Under Section 38(f)(2)(F)(iii), the FDIC may require an institution to employ qualified senior executive officers who, if the FDIC so specifies, would be subject to approval by the FDIC.

Chapter 9 – Restitution and Civil Money Penalties

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.

<u>Instruction for Determining Asset Size</u>

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. *<u>Pecuniary Gain or Other Benefit to IAP or Related Interest:</u>* 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. *<u>Loss or Risk of Loss:</u>* 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.

<u>Profits or Gains</u>

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.

<u>Supervisory Letter</u>

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.

<u>*Instructions for Scoring the Matrix Factors*</u>

1. <u>*Consumer Harm or Harm to Public Confidence; Unsafe or Unsound Banking Practice; Violation*</u>: 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.

Chapter 10 – Section 39 Actions

Section 39 Actions

Section 39 of the FDI Act requires each FBA to establish certain safety and soundness standards for IDIs. This statute, which was created to meet the provisions of Section 132 of Federal Deposit Insurance Corporation Improvement Act, allowed the FBAs the option of adopting these standards by **regulation** or by **guideline**. The agencies adopted the standards as guidelines rather than regulations in order to grant each institution the flexibility of developing appropriate procedures based on the scope and nature of its activities.

The FDIC has established these standards for insured state nonmember institutions in Appendix A and Appendix B to Part 364 of the FDIC Rules and Regulations. Appendix A to Part 364 sets out the Interagency Guidelines Establishing Standards for Safety and Soundness. Appendix B to Part 364 sets out the Interagency Guidelines Establishing Information Security Standards.

The FDIC may, based upon an examination, visitation, or any other information that becomes available, determine that an institution is in nonconformance with the standards. The FDIC may request that an institution submit a plan describing the steps the institution will take to correct identified deficiencies under Section 39 of the FDI Act and 12 C.F.R. 308 Subpart R. Institutions that fail to submit an acceptable plan, or fail in any material respect to implement the submitted plan, will be subject to an order requiring correction of the deficiencies noted.

Specific operational guidelines and information security guidelines are established in Appendix A and Appendix B in the following areas:

- Internal controls and internal audit systems and information systems;
- Loan documentation;
- Credit underwriting;
- Interest rate exposure;
- Asset growth;
- Asset quality;
- Earnings;
- Compensation, fees, and benefits; and
- Security of customer information.

Grounds

Standards are designed to prompt an IDI to take steps that will help identify emerging problems and correct deficiencies before the safety and soundness of the institution becomes impaired.

The FDIC should consider both the size of the institution as well as the nature, scope, and risk of its activities when evaluating the adequacy of management's controls in each of the respective areas under Appendix A and when evaluating the information security program of the institution under Appendix B. An institution should not be viewed as being in nonconformance with one of the standards due to an isolated error or inconsistency. Instead, the FDIC should assess the institution's overall practices and performance in each area when determining whether the institution satisfies the standards.

Section 39 actions may be initiated for non-problem institutions in which inadequate practices and policies could result in material loss to the institution, or management has not responded effectively to prior criticisms.

Corrective Programs

The enforcement power granted by Section 39 can be a useful means to effect corrective action in institutions that have significant operational problems. The FDIC may request an institution to submit a compliance plan that describes the steps the institution will take to correct identified deficiencies. Institutions that fail to submit an acceptable plan, or fail in any material respect to implement the submitted plan, will be subject to an order requiring correction of the deficiencies noted. Unless the FDIC determines that an order without notice is necessary, the FDIC first will issue a NOI to issue a safety and soundness order. The notice will identify the deficiencies in the plan or in its implementation and outline the provisions of a proposed order, including the effective dates for actions or prohibitions required by the proposed order. The notice will also give the institution a deadline (within 14 calendar days of the issuance of the notice, unless the FDIC permits a longer period) within which it may file a written response to the notice. If the institution fails to file a timely response, the institution will be deemed to have waived its opportunity to respond and will have consented to the issuance of the order (12 C.F.R. § 308.304).

After considering any response submitted by the institution, the FDIC may issue the proposed order or a modified order, seek additional information, or decide not to issue an order. If an order is issued, the FDIC may enforce it in federal district court. Further, the FDIC may assess a CMP against the institution or against an IAP or seek enforcement through any other remedies authorized by law for failure to comply with the order.

Other Concerns Not Specifically Addressed

Consultation with the Legal Division should assist in determining if authority exists to address a particular concern not specifically covered by the interagency standards for safety and soundness.

Other concerns not specifically addressed may include:

- Allowances for Loan and Lease Losses or Credit Losses,
- Budget/Profit Plans,
- Capital,
- Liquidity, and
- Violations of Laws and Regulations.

Section 39 vs. Other Formal Actions

The following criteria should be considered when determining whether to seek action under Section 39 or some other formal action.

Section 8(b)

A stipulated cease-and-desist order under Section 8(b) of the FDI Act potentially can be implemented and enforcement remedies can be available faster than an action under Section 39 of the FDI Act. Additionally, Section 8(b) has the advantage of allowing for a greater degree of regulatory flexibility in the areas of coverage.

Section 8(c)

Under Section 8(c) of the FDI Act, an immediate order can be issued, subject to a ten-day period for the institution to request injunctive relief. Section 8(c) orders can be challenged in federal district court.

Section 39 action

Proceedings under Section 39 have the advantages that:

- A compliance plan can be obtained within 30 days,
- Shorter time frames may be imposed,
- Order is enforceable in federal district court without the need for an administrative hearing, and
- Consent is not required.

However, once a Section 39 action is initiated, the FDIC lacks discretion to avoid issuing an order if the institution fails to submit, or to materially implement, an acceptable plan.

Section 39(e)(3) specifies mandatory restrictions for certain institutions.

There is a longer time frame to get an enforceable Section 39 order in place than a stipulated 8(b) order for the following reasons:

- If the institution's compliance plan is acceptable, time must be allowed for implementation.
- If the institution's compliance plan is unacceptable or not implemented, time may be needed to issue a notice and allow for a response before issuing the Section 39 order. Circumstances may dictate the immediate issuance of a final Section 39 order.

The deadlines for implementation of corrective actions contained in the Section 39 order will generally be later than the deadlines originally set out in the compliance plan.

Chapter 11 – Formal Investigations

Formal Investigations

Section 10(c) of the FDI Act authorizes the FDIC to conduct a formal investigation to obtain needed information or evidence.

Note: All information obtained as part of the investigation is to be kept confidential pursuant to Section 308.147 of the FDIC Rules of Practice and Procedure.

Grounds

A Section 10(c) investigation may be appropriate when any of the following conditions are present:

- The FDIC believes matters are being misrepresented or inadequate documentation exists to determine the amount of risk to the DIF.
- Affiliates or IAPs have information required to establish whether potential unsafe or unsound practices, breaches of fiduciary duties, or violations of laws or regulations exist.
- Unaffiliated third parties have documentation or other information that relates to the affairs of an IDI.

Note: An existing or potential enforcement action is not a requirement for use of the FDIC's Section 10(c) investigation authority. If any of the above grounds are met, the FDIC may conduct an investigation to develop information from sources other than IDI records.

Statutory Authority

Section 10(c) explicitly authorizes the exercise of powers set forth in Section 8(n). Section 8(n), in turn, authorizes the FDIC to administer oaths; to take or cause to be taken testimony under oath; and significantly, to issue, revoke, quash or modify subpoenas and subpoenas duces tecum. Subpart K of Part 308 of the *FDIC Rules of Practice and Procedure* (Sections 308.144 through 308.150) establishes procedures for investigations under Section 10(c).

Part 308 of the FDIC Rules of Practice and Procedure

The individuals named to conduct an investigation (generally FDIC examiners, investigators, and attorneys) may perform the following actions:

- Subpoena witnesses and compel their attendance.
- Administer oaths and affirmations.
- Examine witnesses and take and preserve testimony under oath.
- Take evidence.
- Require the production of any books, papers, correspondence, memoranda, or other records deemed relevant to the inquiry with respect to the affairs and ownership of any institution or IAP.

- Perform all other duties in connection with the investigation as deemed necessary or as prescribed by law.

When conducting investigations, RMS and DCP staff must work closely with attorneys from the Legal Division.

Rights of Witnesses

Any person who testifies during the course of an investigation is entitled to have legal counsel present. Witnesses also have the right to receive a transcript of their testimony at the conclusion of an investigation or at an earlier time at the discretion of the FDIC.

Order of Investigation

To initiate a formal investigation under Section 10(c), the FDIC issues an order of investigation. The document indicates the purpose of the investigation and designates the FDIC representative(s) who will conduct the investigation. A copy of this order of investigation may be provided to any person or entity that is served with a subpoena pursuant to a Section 10(c) Order of Investigation.

Modification/Termination Orders

A modification order must be issued to change the provisions of an order of investigation. For example, a modification order is needed to expand the scope of the investigation or to include individuals whose involvement was discovered after the issuance of the initial order of investigation. A modification order would also be needed to include additional FDIC staff to be empowered under Section 10(c). When an investigation is completed, the FDIC issues an order terminating the order of investigation.

Enforcement of Order of Investigation

If necessary, the FDIC may apply to the U.S. District Court to enforce the order of investigation (e.g., to compel a witness to testify or produce documents).