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Handbook: Thrift Activities
Subject: Enforcement Actions

Section: 150
RB 18-3

June 13, 1990

Enforcement Policy Statement on Civil Money Penalties

RESCINDED

Summary: This Regulatory Bulletin describes the Office of Thrift Supervision's (OTS) powers, policies and procedures for the assessment of civil money penalties, and lists the factors to be taken into consideration by OTS in deciding whether a civil money penalty should be imposed and, if so, what amount. This Bulletin supersedes Memorandum SP-3, dated December 29, 1981.

OTS Identification:
Resolution No. 90-332
EP-003
February 12, 1990.

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Regulatory Bulletin 18-3

Purpose

The purpose of this policy statement is to provide a general description of the OTS's powers and policies for the assessment of civil money penalties, which were greatly enhanced in the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA). The policy statement discusses particular statutory sections of FIRREA, the Home Owners' Loan Act of 1933, as amended by FIRREA (to be codified at 12 U.S.C. §§ 1461-1468c) (HOLA), and the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1831d, as amended by FIRREA (FDIA) as well as the factors to be taken into consideration by OTS in deciding whether a civil money penalty should be imposed, and if so, in what amount. The policy statement also discusses the procedures used in assessing civil money penalties and in carrying out OTS supervisory and enforcement objectives with respect to the assessment of civil money penalties. These policies and procedures are guidelines for the use of OTS, its staff and agents; they do not create substantive or procedural rights enforceable at law or in any administrative proceeding.

Summary of Policy

Because OTS's primary objectives are to promote a safe and sound thrift industry and to insure the industry's compliance with applicable laws, rules and regulations, in exercising its civil money penalty authority, OTS expects to place maximum emphasis on upholding the principles of safety and soundness and requiring adherence to laws and regulations related directly to the thrift industry.

The assessment of a civil money penalty provides a strong deterrent to violations of laws, regulations and orders, as well as breaches of fiduciary duty and unsafe or unsound practices.

When assessing a civil money penalty, OTS will consider the size of financial resources and good faith of the person, association or company being assessed, the gravity of the violation, the history of previous violations, and such other matters as justice may require. These considerations along with additional factors are set forth in a civil money penalty matrix attached to this Policy Statement. The civil money penalty matrix is used by OTS as guidance in determining whether and in what amount to assess a civil money penalty, consistent with the three tier scheme created in FIRREA. While the civil money penalty matrix is expected to be used in all cases where an assessment is being considered, it is not a substitute for sound supervisory judgment because individual cases may possess particularly egregious or mitigating characteristics that are not included as factors in the civil money penalty matrix.

This policy statement further outlines the procedures to be followed for the new delegations of authority to the OTS District Offices to negotiate consent civil money penalties and to issue the corresponding consent orders for penalties in amounts of $20,000 or less.

Statutory Authority

Description of Civil Money Penalty Provisions[1]

OTS possesses statutory authority under the FDIA to assess civil money penalties against savings associations,[2] their service corporations or subsidiaries, savings and loan holding companies and institution-affiliated parties[3] for violations of any law or regulation; violations of the terms of any final order or temporary order issued pursuant to Sec. 902 of FIRREA (to be codified at 12 U.S.C. § 1818(b), (c), (e), (g) and (s)); violations of any condition

imposed in writing by OTS in connection with the grant of any application or other request by the association; violations of any written agreement between the association and OTS; breaches of fiduciary duty; and, unsafe or unsound practices. Sec. 907(a) of FIRREA (to be codified at 12 U.S.C. § 1818(i)(2)).

In addition, the FDIA authorizes OTS to assess civil money penalties against associations and institution-affiliated parties for violations of sections 22(h), 23A, 23B, of the Federal Reserve Act, 12 U.S.C. §§ 375b, 371c, 371c-1 (1982) or any regulation issued pursuant thereto. Sec. 907(c) of FIRREA (to be codified at 12 U.S.C. § 1828(j)(4)).

The FDIA also authorizes OTS to assess civil money penalties against persons who violate any provision of the Control Act or any regulation or order issued thereunder. Sec. 907 (d) of FIRREA (to be codified at 12 U.S.C. § 1817(j)(16) (Control Act)).

Under the HOLA, OTS is authorized to assess civil money penalties against associations, holding companies or their subsidiaries that either fail to submit or to publish any report within the time frame required by OTS or that submit or publish any false or misleading information. Sec. 301 of FIRREA (to be codified at 12 U.S.C. § 1464(v) and 12 U.S.C. § 1467a(r)).

In addition, the HOLA authorizes OTS to assess civil money penalties against an association if any affiliate[4] of the association refuses to permit any examiner of OTS to conduct an examination, or, refuses to provide any information required to be disclosed in the course of any examination. Sec. 301 of FIRREA (to be codified at 12 U.S.C. § 1467(d)).

Under the provisions of Sec. 301 of FIRREA (to be codified at 12 U.S.C. § 1467a(i)(3)) (Holding Company Act), the HOLA also authorizes OTS to assess civil money penalties against any company that violates or any person who participates in a violation of any provision of the Holding Company Act or any regulation or order issued pursuant thereto.

Sec. 1120(b) of FIRREA provides for the assessment of a civil money penalty against financial institutions that seek, obtain, or give money or any other thing of value in exchange for the performance of an appraisal by a person the institution knows is not a State-certified or State-licensed appraiser (as defined in Section 1116 of FIRREA) in connection with a federally-related transaction (as defined in Section 1121 of FIRREA). The type of federally-related transaction and the type of appraiser required are described in Sections 1113 and 1114 of FIRREA.

For each of the above provisions (except for 12 U.S.C. § 1464(v) [reports of condition], 12 U.S.C. § 1467 [affiliates' refusal to cooperate], and Sec. 1120(b) of FIRREA [use of non-certified appraisers], in which no definition is given), the respective sections define "violation" or "violates" as including, without limitation, any action (alone, or with another or others) for or toward causing, bringing about, participating in, counseling or aiding or abetting a violation.

Amounts: General Penalty Provisions

The civil money penalty provisions of 12 U.S.C. § 1818(i)(2) (general provisions); 12 U.S.C. § 1828(j)(4) (affiliate transactions); 12 U.S.C. § 1817(j)(16) (Control Act); and, Sec. 1120 of FIRREA (non-certified appraisers) by reference to § 1818(i), contain a three-tiered structure which OTS must use when making an assessment:

The First Tier provides for the assessment of a civil money penalty of not more than $5,000 for each day that any violation of a law, regulation, order, condition imposed in writing or written agreement continues, whether intentional, or not.[5]

The Second Tier provides for the assessment of a civil money penalty of not more than $25,000 for each day during which a violation as described in Tier One, an unsafe or unsound practice that is recklessly engaged in or a breach of fiduciary duty continues if said violation, practice or breach is (1) part of a pattern of misconduct; (2) causes or is likely to cause more than a minimal loss to the institution; or (3) results in pecuniary gain or other benefit to the person being assessed.

The Third Tier provides for the assessment of a civil money penalty against a person (other than an association) of not more than $1,000,000 per day; and, against an institution of not more than the lesser of $1,000,000 or 1% of the total assets of the institution for each day during which a violation, unsafe or unsound practice or breach of fiduciary duty continues if (a) such violation, practice or breach is knowingly undertaken and (b) a substantial loss to the association or a substantial pecuniary gain or other benefit to the party is knowingly or recklessly caused.

Amounts: Reporting Provisions

The civil money penalty provisions of 12 U.S.C. § 1464(v) (reports of condition) and 12 U.S.C. § 1467a(r) (holding company reports) also contain a three-tiered structure that OTS must apply when making an assessment under those sections.

The First Tier provides for the assessment of a civil money penalty of not more than $2,000 per day against a savings association, savings and loan holding company, or any subsidiary of such holding com-

pany ("entity"), that maintains procedures reasonably adapted to avoid an inadvertent and unintentional error; but, notwithstanding such procedures, as a result of an inadvertent or unintentional error, fails to submit or publish any report or information within the time frame required by OTS; and, for the assessment of a civil money penalty of not more than $2,000 for each day that an entity inadvertently or unintentionally submits or publishes any false or misleading report or information, and fails to correct the same, or inadvertently transmits or publishes any report that is minimally late. The entity against which a notice of assessment has been issued has the burden of proving by a preponderance of evidence its inadvertence or lack of intention in the above circumstances.

The Second Tier provides for the assessment of a civil money penalty of not more than $20,000 against an entity for each day that the entity fails to submit or publish any report or information within the time frame required by OTS other than through an error described in the First Tier; and, for the assessment of a civil money penalty of not more than $20,000 for each day that the entity submits or publishes any false or misleading report or information in a manner not described in the First Tier and fails to correct the same.

The Third Tier provides for the assessment of a civil money penalty against an entity of not more than the lesser of $1,000,000 or 1% of an entity's total assets for submitting or publishing any false or misleading report or information either knowingly or with reckless disregard for the accuracy of any information or report described in the Second Tier.

Amounts: Other Provisions

The two other civil money penalty provisions, 12 U.S.C. § 1467(d) (affiliate's refusal to cooperate) and 12 U.S.C. § 1467a(i)(3) (Holding Company Act) do not contain a three-tiered assessment structure. The amount of the penalty for an affiliate's refusal to cooperate is not more than $5,000 per day assessable against the savings association for each day the violation continues. The amount of the penalty for violations of the Holding Company Act is not more than $25,000 per day for each day the violation continues.

Statutory Provisions Concerning Procedures

In the case of an assessment of a civil money penalty under any of the above-mentioned provisions, the person, association or company assessed has the right to challenge the assessment in a hearing conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 554 et seq. (1982), and the provisions contained in 12 U.S.C. § 1818(h).[6] The respondent may exercise this right by filing with OTS within twenty days after the issuance of the Notice of Assessment (as described herein), a written request for an agency hearing. 12 U.S.C. §1818(i). If an order imposing a civil money penalty is entered after an agency hearing, the respondent may obtain review by filing a notice of appeal in the United States Court of Appeals, 12 U.S.C. § 1818(h)(2).

If the respondent fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered a final judgment in favor of OTS, OTS will seek recovery in the appropriate United States district court. This action may be brought directly by OTS or by the Department of Justice acting on behalf of OTS. In any such action in the district court, the validity and appropriateness of the final order are not subject to review. Sec. 907 of FIRREA (to be codified at 12 U.S.C. § 1818(i)(2)(I)).[7]

Procedures

If an examiner[8] discovers a violation of law, regulation or order, violation of a condition imposed in writing or a written agreement, a breach of fiduciary duty, or an unsafe or unsound practice, that examiner should consider recommending the assessment of a civil money penalty. In addition, if an association receives a rating of "3," "4," or "5" under the Compliance, Trust or MACRO Rating System due to violations of laws, regulations, unsafe or unsound practices, reporting requirements or breaches of fiduciary duty, the assessment of a civil money penalty should be considered. The examiner should apply the OTS Civil Money Penalty Matrix (as described in the "Policies" section and attached as Exhibit "A") ("matrix") to aid in his/her determination of whether and in what amount to recommend that a penalty be assessed or other supervisory action taken. Once the examiner discovers that the basis for initiating a referral has occurred, he/she should proceed without waiting for the completion of the examination. As described later, it is expected that District Counsel will provide advice to the examiner and District Director throughout the assessment process with respect to the application of the matrix and the requirements that must be met before assessing a civil money penalty. Under the procedures delineated on page two of the matrix, if the examiner finds that a penalty or other supervisory action should be recommended, the recommendation and supporting information should be sent to the District Director. The District Director should then consider the recommendation, request and consider (under circumstances as described in the matrix) a response from the association, person or company, determine the amount of any unrecovered

financial benefit received by the respondent as a result of the violations, practice or breach and complete the matrix in determining an appropriate supervisory action. Enforcement is available to assist in making these determinations. In those cases involving securities questions, OTS Corporate and Securities Division (CASD) is also available to provide legal interpretations and advice both with respect to the violations and the corrective action appropriate to address them. When calculating the amount of a proposed assessment pursuant to the matrix, the examiner and District Director should recognize that because violations, practices or breaches ordinarily continue for a period of time, it is expected that Districts will normally be able to justify the assessment under Tier One, or Tier Two in the case of unsafe or unsound practices or breaches of fiduciary duties. If the assessment is not justifiable under Tier One, it is expected that District Counsel or Enforcement will be consulted to insure that the statutory requirements of Tiers Two or Three are met. In the event the District Director recommends the assessment of a civil money penalty in an aggregate total amount of $20,000 or less for all violations for which civil money penalties are sought (including the amount sought to recover financial gain, if any), the District Office has been given authority by the ERC (as discussed later) to obtain the consent of the subject individual or entity to the assessment. Uniform civil money penalty documents are to be used by all District Offices when pursuing consent assessments. During the negotiation process they may be completed by the District Office and presented to individuals or institutions against whom penalties are sought. District Offices that encounter problems with or wish to alter the standard documents in a particular case should consult Enforcement. Referrals for the assessment of civil money penalties involving securities disclosure obligations, the Control Act and Holding Company Act generally originate in CASD. CASD referrals should be made to Enforcement, which will forward those referrals for assessments of $20,000 or less to the appropriate District Office for action, unless there is a need for action that Enforcement can address more expeditiously than the particular District. The reasons for such a need must be made clear in the CASD referral to Enforcement. Enforcement will make a case-by-case determination of whether such CASD referrals will be handled in Enforcement or referred to the District Offices. In those cases referred to a District Office, the District Office will inform Enforcement within 15 days of receipt whether it will pursue the referral or prefers that it be handled instead by Enforcement based on resource constraints in the District.

When negotiating a Consent Order of Assessment, the District Office must keep in mind that as of the date that the negotiated Stipulation and Order are approved, the matter is concluded. That is, the violation or practice that constituted the basis for the assessment will not provide a basis for additional civil money penalties at a later time. However, discovery of new acts or omissions may constitute new grounds for the imposition of an additional civil money penalty if the acts or omissions can independently support an assessment. Therefore, the District Office is expected to investigate and document the facts with great care prior to negotiating a Consent Order of Assessment. It is expected that District Counsel will be actively involved in providing advice to both the examiner and the District Director to insure that complete documentation of the subject violation, practice or breach is gathered and to insure that statutory requirements are met before a civil money penalty is assessed. Because a $20,000 assessment could be made pursuant to either a First, Second or Third Tier penalty, particular consideration must be given by District Counsel when Second or Third Tier penalties are assessed that the statutory elements of those tiers are met. In addition, it is expected that District Counsel will provide general guidance with respect to the application of the matrix, participate in the negotiation of consent orders, assist in the preparation of referrals to Enforcement for assessments in amounts greater than $20,000 or in those cases where the District Office has been unable to obtain a consent to the assessment in an amount of $20,000 or less, and compile the information required for the monthly report to Enforcement as described later herein.

The District Directors have been given non-delegable authority by the ERC to issue Consent Orders of Assessment in amounts of $20,000 or less. The issue of delegability will be revisited in six months to determine the desirability of further subdelegation. The District Directors are also directed to provide a report to Enforcement within twenty days of their issuance of a Consent Order of Assessment pursuant to this authority. The report shall include: the signed Stipulation and Consent to an Order of Assessment; the Consent Order of Assessment; a memorandum containing a summary of the offenses that constitute the basis for the assessment; a description of any financial benefit received by the respondent as a result of the violation, practice or breach; a brief discussion of the rationale for the weights given the 13 factors listed in the matrix; the amount in which the penalties were first sought and a discussion of reasons for any reduction; and, a check made payable to the Treasurer of the United States in the amount reflected in the order. If payment is to be made over time, this should be clearly set out in the

order and the first "installment" check attached at the time the report is submitted to Enforcement.

Enforcement has been directed by the ERC to prepare a monthly report to the Director of OTS and the ERC (with copies to the District Directors and CASD) of all civil money penalty referrals made to Enforcement, all civil money penalty consent assessment actions initiated and collected by the District Offices and the reasons for them, as well as a list of all consent assessment negotiations initiated by the District Offices that were subsequently not completed and the reasons therefore. The District Offices will be responsible for supplying the appropriate information to Enforcement for the monthly report within 20 days as provided in the preceding paragraph. It is anticipated that this report will aid in achieving uniformity among the District Offices. In addition, District Offices should give consideration to maintaining their own reporting system for tracking civil money penalty referrals.

Enforcement will also be responsible for publishing Consent Orders of Assessment in accordance with OTS policy on the required publishing of all enforcement orders. It is expected that all assessment orders will be made public, and that appropriate cases will be highlighted by the use of a press release.

If the recommended assessment against any institution or individual exceeds an aggregate total of $20,000 for all violations (including for recovery of financial gain, if any) or if the District Office is unable to obtain a Consent Order of Assessment, a referral should be made to Enforcement. A referral should contain:

- the name and address of the individual or other entity against whom the District Office or CASD is recommending an assessment;
- a description of any actions by or on behalf of the person, association or company that indicates a violation (including reference to the specific regulation or statute violated, if known), or breach or unsafe or unsound practice, together with any supporting documents that support the determination by the District Office or CASD of the violation, practice or breach subject of the recommendation;
- a description of any actual or likely loss to the association and/or any pecuniary gain or other benefit to the person, association or company;
- a discussion of the factors to be considered in assessing a civil money penalty and determining the amount and a completed civil money penalty matrix (See "Policies" section of this statement);
- a listing of the names and identities of the associations, individuals and/or companies believed to be involved in the violation, breach, or practice and their relationship to one another;
- a summary of any communication between the District Office and any person, association or company relevant to the referral;
- a summary of any effort to informally resolve the problem (including any consent negotiations) and whether any part of the effort was successful;
- in the case of recommendations for second tier or third tier civil money penalties, any unsafe or unsound practices by or on behalf of the person, association or company that appear reckless, or indicate a pattern of misconduct, or a breach of fiduciary duty must be specifically discussed; and
- any recommendation for further investigation by Enforcement, including a list of the documents or other information that could not be obtained.

If a formal examination or investigation is performed, the District Offices and Enforcement will be guided by the procedures and policies described in RB 18-4 (EP-004), Use of Formal Examination and Investigation Authority.

For all referrals handled by Enforcement, if Enforcement agrees that a civil money penalty should be assessed, it either begins negotiation jointly with the referring District Office or CASD, or prepares related documentation and recommends to the ERC that a Notice of Assessment ("Notice") be issued. The Notice generally contains a statement of the legal authority for the assessment, the amount of the proposed penalty, a description of the factual or legal basis for the assessment, and advice to the person, association or company of a right to a formal administrative hearing if requested within the time limits. Upon issuance of the Notice by the ERC, the Notice is served pursuant to the provisions of Section 509.9 of the OTS General Regulations (12 C.F.R. § 509.9 republished at 54 Fed. Reg. 49449, November 30, 1989, upon the person, association or company that has engaged in the violation, unsafe or unsound practice, breach of fiduciary duty or other prohibited act that provided the basis for the assessment. If an administrative hearing is requested by the person, association or company, the OTS "Rules of Practice and Procedure in Adjudicatory Proceedings" apply. 12 C.F.R. Part 509.1 -.38. Enforcement will represent OTS at any such hearing or will negotiate a final

Order of Assessment (after consulting with the referring District Office or CASD) with the person, association or company for consideration by the Enforcement Review Committee. In the event that Enforcement does not agree with the District Office or CASD that a civil money penalty should be assessed or there are material disagreements regarding the terms of a proposed negotiated settlement, the referral to Enforcement and Enforcement's response will be presented to the ERC for a decision. Enforcement will assure that appropriate persons from the referring office are notified and available to participate at the ERC meeting.

Policies

OTS recognizes that its primary role as the nation's thrift regulator is to promote the safety and soundness of the thrift industry and to insure the industry's compliance with applicable laws and regulations. The assessment of a civil money penalty is one of the enforcement tools OTS will use in carrying out that role. The primary purpose of a civil money penalty assessment is to provide a strong deterrent to violations of laws, regulations, and orders, as well as breaches of fiduciary duty and unsafe or unsound practices. FIRREA has provided OTS with very broad powers to impose civil money penalties for violations of any law or regulation. In view of the potential breadth with which these penalties could be applied, OTS believes it is both necessary and useful to develop a framework of specific guidance to assist in the implementation of its civil money penalty authority and to indicate to the thrift industry what our intentions are with respect to its use.

Because OTS's primary objectives are to promote a safe and sound thrift industry and to insure the industry's compliance with applicable laws, rules and regulations, in exercising its civil money penalty authority OTS will place maximum emphasis on the enforcement of those laws and regulations directly related to thrifts, their activities and operations, and in addition, will act vigorously to require adherence to the principles of safety and soundness.

A civil money penalty assessed against a person, association or company, may be the sole enforcement action taken or it may be used in tandem with other enforcement or supervisory remedies. OTS will use civil money penalties to address past violative behavior as well as ongoing misconduct. In addition to other enforcement actions, such as cease and desist orders, supervisory agreements or other alternatives that bring about the immediate cessation of proscribed conduct, OTS will also use civil money penalties to deter future violations of law or regulation, breaches of fiduciary duty or unsafe or unsound conduct. However, when violative conduct is ongoing, the prime objective of OTS will be to stop that conduct by using whatever remedy seems best designed to do so.

By statute, when assessing a civil money penalty OTS must consider the size of financial resources and good faith of the person, association or company being assessed, the gravity of the violation, the history of previous violations, and such other matters as justice may require. The Office of the Comptroller of the Currency (OCC), which by reason of its previously broader enforcement powers has substantially more experience in the use of civil money penalties, has incorporated the guidelines of the Interagency Policy Statement into a Civil Money Penalty Matrix. The OCC matrix is used as a tool in determining whether to recommend an assessment, and if so, in what amount. Due to the increase in the number of civil money penalty assessments anticipated by OTS as a result of new powers provided by Congress in FIRREA and the agency's relative inexperience in this area, OTS has adopted a matrix that follows the basic format of the OCC matrix, while changing the way in which the most severe violations are weighed, increasing the amount of the potential penalty and adding a new category applicable to securities-related assessments.

The OTS matrix should be regarded as a living and evolving document. OTS expects to revise the matrix elements as experience is gained in assessing civil money penalties. (The OTS matrix is attached as Exhibit "A.") It indicates the severity of violations of law and noncompliance and provides guidance in determining what level of penalty to recommend. For a reporting or compliance violation, it is particularly important to look at the statutory requirements as described on pages 9-10 herein when applying the matrix. The matrix is applied as follows. The left hand column has 14 factors, the last three of which are mitigating factors. For each factor, the examiner and/or District Director determines what degree is to be assigned under the five numbered vertical columns. Then the number in the vertical column[9] is multiplied by the weight factor in the next to last vertical column to yield the final figure. The final figures for the first 11 factors are totaled, and then those from the three mitigating factors are subtracted from them. The suggested action is then determined by taking the result and finding in what range it falls in the next page. Note that if the respondent has received a financial benefit and it has not been returned to the institution or its receiver or conservator and is not subject to a restitution order, then the amount of the benefit should be added to the penalty sought, as shown in the instructions on the last

page of the matrix. In negotiating Consent Orders of Assessment, it is expected that the total penalty amount (including that required to recover a financial benefit) calculated according to the factors contained in the matrix may be be reduced to reflect the fact that OTS has achieved its goal at a lesser cost; whereas in the case of a contested assessment order, the total penalty amount is less likely to be reduced. The goal of OTS is to provide meaningful training to all examiners in the general area of civil money penalty assessments. In the interim, District Counsel are expected to provide advice to District Directors and examiners on issues related to the assessment of civil money penalties.

It is OTS's intent in devising the matrix to cause assessments to be levied in a consistent and equitable manner. The matrix is offered as guidance and it is expected that the matrix will be used in all cases where a civil money penalty assessment is being considered. The matrix however does not reduce the civil money penalty process to a mathematical equation and should not be a substitute for sound supervisory judgment. Individual cases may possess characteristics that are not set forth as factors in the matrix, in which instances, supervisory discretion should be exercised. For example, the District Office may prefer not to go forward with seeking a civil money penalty against an institution that is expected to be in receivership. The matrix has itself been designed to allow for such supervisory discretion by providing three levels (4-6) in the final numbered vertical column to select from when deciding the importance of the most severe violations and by leaving numerous blank areas for subjective decisions. The District Director is encouraged to stay within the dollar limits justified by the matrix, but has authority to depart from those limits based on particular supervisory concerns. Any such departure should be discussed in the report sent to Enforcement, discussed previously.

After using the matrix, it is necessary to determine whether the amount recommended comes within the three tier scheme that Congress established, as described earlier. Enforcement can determine whether the recommended amount of penalty is available under the statute at the time the District Office's referral is received and is available to provide advice concerning the statute for those matters which may be negotiated without its involvement. In addition, it is expected that District Counsel will provide advice to the examiner and the District Director with respect to issues relating to Second Tier and Third Tier elements, where the First Tier assessment is insufficient to yield the amount of penalty sought or the First Tier is otherwise inapplicable (e.g. where unsafe or unsound practices or breaches of fiduciary duty are charged). A significant consideration in determining the amount of a civil money penalty will be whether the person, association or company obtained a financial or other benefit from the violation, breach or practice. The removal of economic benefit will not, however, generally be considered sufficient by itself to achieve compliance with the statutory provisions.

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1 OTS, as successor to the Federal Home Loan Bank Board, retains authority to impose civil money penalties under statutes in effect prior to the enactment of FIRREA for those acts that occurred prior to August 9, 1989. Such authority is found at: 12 U.S.C. §§ 1464(d)(8), 1464(d)(12)(B), 1730(k)(3), 1730(p)(2), 1730(q)(18) and 1730a (j)(4) (1982).

2 The term "savings association" is defined as: a. Any federal savings association; b. Any state savings association insured by FDIC; c. Any corporation (other than a bank) that the FDIC Board of Directors and the Director of OTS jointly determine to be operating in substantially the same manner as a savings association. Sec. 204(b)(1) of FIRREA (to be codified at 12 U.S.C. § 1813(b)).

3 The term "institution-affiliated party" means: a. Any director, officer, employee or controlling stockholder (other than a savings and loan holding company) of or agent for an insured depository institution; b. Any other person who has filed or is required to file a change-in-control notice with OTS under 12 U.S.C. § 1817(j); c. Any shareholder (other than a savings and loan holding company), consultant, joint venture partner, and any other person as determined by OTS (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and, d. Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in — (A) any violation of any law or regulation; (B) any breach of fiducuary 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. Sec. 204(f) of FIRREA (to be codified at 12 U.S.C. § 1813(u)).

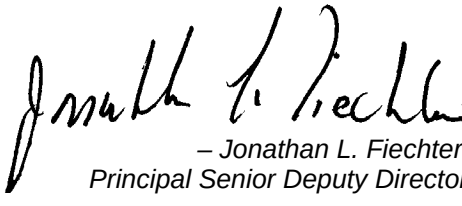
4 The term "affiliate" means any person that controls, is controlled by or is under common control with, a savings association. Sec. 301 of FIRREA (to be codified at 12 U.S.C. § 1462(9)).

5 Unsafe or unsound practices and breaches of fiduciary duty are covered in Tiers Two and Three, but not in Tier One.

6 Hearing procedures are set forth in 12 U.S.C. § 1818(h) and in OTS regulations at 12 C.F.R. Part 509.1-.38 (1989) republished at 54 Fed. Reg. 49446, November 30, 1989.

7 Each of the civil money penalty provisions apply to conduct engaged in after August 9, 1989. However, the maximum penalties of $5,000 and $25,000 per violation per day may apply to such conduct engaged in before August 9, 1989 if such conduct — (1) is not already subject to a notice (initiating an administrative proceeding) issued by an appropriate Federal banking agency; and, (2) occurred after the completion of the last report of examination of the institution before August 9, 1989. Sections 305(c) and 907(1) of FIRREA.

8 The term "examiner" for purposes of this policy statement is defined to include any OTS staff per-



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