Under Directors and Officers Liability Insurance Policies, the definition of “loss” excludes fines and penalties under the coverage provided. Coverage for Civil Money Penalties brought against officers and directors may be covered by purchasing a Civil Money Penalties Endorsement.

Because the FDIC’s Rules and Regulations and Section 18K of the FDIC’s Federal Deposit Insurance Act prohibit the indemnification of “institution affiliated parties” by the bank, it is necessary for each person desiring coverage under a Civil Money Penalties (CMPs) Endorsement to pay for their portion of the premium for such an endorsement.

The bank’s primary regulator has the power to assess civil money penalties against financial institutions and its “institution affiliated parties.” “Institution affiliated parties” may include, among others, directors, officers, employees and controlling shareholders of a depository institution. As of the deadline for this magazine, the FDIC’s website noted 33 instances of CMPs being assessed throughout the country year-to-date for 2009. This compares to 96 instances for the entire year in 2008. These numbers have been on the rise, making many aware of this possibility who were not before.

While some cases are minimal as far as the amount of the penalty is concerned, the public nature of an assessment of a CMP can be a tremendous source of embarrassment to the individual and the institution he or she serves. This negative publicity can be particularly costly due to the potential loss of trust in the community served by the bank once the assessment becomes public.
Typically this process begins when an examiner of a bank’s supervisory agency recommends a CMP. After review by the agency, a letter is issued to the target of the potential penalty. It informs the institution or affiliated party of the possibility of an assessment, outlining the basis for it and providing an opportunity for the affected person to submit relevant information bearing on the agency’s determination.

Factors included in recommending a CMP and determining the dollar amount of the assessment include:

- Whether, upon notice of the violation, the violation continues or is immediately ceased and corrected
- Level of cooperation
- Whether the violation was concealed or voluntarily disclosed
- Degree of harm to the depository institution
- Evidence of financial gain or benefit
- Evidence of restitution
- History of prior violations
- Previous regulatory criticism for similar actions
- Presence or absence of a compliance program and its effectiveness
- Tendency to commit violations
- Existence of agreements, commitment orders, or conditions imposed in writing to prevent the violation.

If the bank receives notice that CMPs are being considered against it or an affiliated party, it should work closely with legal counsel to respond accordingly and appropriately to the regulatory agency. When an individual is being investigated, his or her interest may be different from and actually opposed to those of the bank. In this case, it would be prudent for the individual to use separate legal counsel to best protect his or her individual interest.

An endorsement to the directors and officers liability policy for CMP is recommended for both officers and directors. This coverage is available for individuals only, not for the institution itself.