

**Minnesota Department of Agriculture
Food and Feed Safety Division**

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Version #: 2	Effective Date: 12/28/2016
Title: Assessing Administrative Penalties SOP	

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1. PURPOSE

The purpose of this procedure is to establish a uniform system for calculating and issuing administrative penalties by the Minnesota Department of Agriculture (MDA) Manufactured and Retail Food Programs for violations of Minnesota statutes, rules and federal laws and regulations referenced by Minnesota statute.

2. SCOPE

This procedure applies to Compliance Unit staff for the assessment of administrative penalties issued under the authority in Minn. Stat. 34A.07.

3. BACKGROUND

The MDA has authority to assess administrative penalties in Minnesota Statute Section 34A.07. All administrative penalties must be assessed with consideration for: (1) the willfulness of the violation; (2) the gravity of the violation; (3) the person's history of violations; (4) the number of violations; (5) the economic benefit from the violation; and (6) other factors identified in the commissioner's citation. Additionally, for a second or succeeding violation, the following must also be considered: (1) similarity between the violations; (2) time elapsed since the last violation; and (3) the person's response to the most recent violation.

To ensure a consistent and equitable assessment of penalties based on the considerations required by MS 34A.07, Table 1 – Penalty Assessment was developed. This document allows for the consistent identification of the gravity and potential economic benefit based on the identified food laws. Considerations for willfulness and history are included in the individual case assessment during the identification of violations to include in the penalty assessment. The number of violations is considered during each individual case assessment as each included violation has a separate assessment that is added to the cumulative penalty total. Succeeding violations are considered during each individual case assessment when identifying the violations that support administrative penalty assessment. Penalties can be assessed for individual violations or combinations of violations when evidence of a Prohibited Act has been established.

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4. RESPONSIBILITY

Division Director – Division Director will approve all administrative penalty assessments.

Compliance Supervisor - The Compliance Supervisor will review the administrative penalty, submit to Division Director for approval, and maintain documentation per the procedure.

Compliance Case Administrator – The Compliance Case Administrator will create invoices, send correspondence related to administrative penalties, and maintain documentation per the procedure.

Compliance Officer – The Compliance Officer will prepare the administrative penalty assessment, draft the Notice of Administrative Penalty letter, issue the final administrative penalty, and maintain documentation per the procedure.

5. DEFINITIONS

Acute Violation: An Acute Violation is a violation of significant public health or regulatory impact as identified in the Acute Violation List.

Administrative Penalty: A monetary penalty assessed to a person through administrative citation using the authority in Minnesota Statute Section 34A.07 due to violations of regulatory requirements. A written order with a compliance date must be issued prior to or in conjunction with an administrative penalty.

Agreement (or Stipulated Agreement): A letter of stipulated agreement is typically when a firm and MDA agrees on terms or conditions of enforcement and wish to settle the compliance issue outside of the Office of Administrative Hearings process. These agreements may include certain consequences if violations are not resolved or continue to occur in the future. They may also include stayed fees or penalties for adherence to the agreement.

Chronic Violation: A chronic violation is a specific violation observed and documented during at least two (2) inspections in a row, also known as a repeat violation.

Civil Penalty: A monetary penalty sought through a district court against a person due to violations of regulatory requirements. Final penalty is determined by the district court

Critical Violation: A Critical Violation is a Major Violation as defined by Minn. Stat. § 28A.03 Subd.9 or a Critical Item as defined by MR 4626.0030 Subd.2 and includes violations of Minn. Stat. §§ 31.121, 31.123, 31.161, 31.165, 31.02, 34A.04 Subd.1, 34A.05, and 34A.11 Subd.1.

Issue, Rule, Application, Conclusion (IRAC): An organizational format for clear and concise legal information delivery that includes the Issue, Rule, Application, and Conclusion.

Non-Critical Violation: A Non-Critical Violation is a violation of Minnesota Statute or Rule that does not meet the definition of CRITICAL VIOLATION.

Preponderance of Evidence: Superiority in weight of an evidence that is more convincing (even if minimally) than the evidence presented by the other party.

Prohibited Act: An act as identified in Minnesota Statute Section 31.02 or the causing of such act(s) within Minnesota.

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6. PROCEDURES

6.1 Review Violation(s) for Assessment – Compliance Officer

- 6.1.1** Select the violation(s) that support ADMINISTRATIVE PENALTY assessment.
- a.** For inclusion in the penalty assessment, the observation must fully and completely support the orders being issued with a PREPONDERANCE OF EVIDENCE.
 - b.** Any observations that are ambiguous, unclear or do not meet the level of preponderance should not be included for penalty assessment.
- 6.1.2** Identify if a PROHIBITED ACT has occurred using the following decision guidance:
- a.** Assess all the violations noted by orders, observations and supporting evidence for the willfulness of the violation, the person's history of violations and the number of violations.
 - b.** Additionally, for a CHRONIC VIOLATION, the following must also be considered: (1) similarity between the violations; (2) time elapsed since the last violation; and (3) the person's response to the most recent violation.
 - c.** Determine if any single order(s) with observation and supporting evidence clearly demonstrates that a PROHIBITED ACT was occurring. Include each single order that independently supports a PROHIBITED ACT violation and charge separately in the *Penalty Assessment Worksheet* for penalty assessment. For example, if an allergen containing product is produced before a non-allergen containing product on the same production line without sufficient sanitation occurring, this would support a PROHIBITED ACT violation as food adulteration. During the same inspection, a leaking roof has allowed water to drip onto a raw ingredient that will not receive a kill-step during processing. This failure to properly protect the ingredient would be charged as a separate PROHIBITED ACT as food adulteration and in this example two (2) separate charges PROHIBITED ACTS of food adulteration would be charged in the *Penalty Assessment Worksheet*.
 - d.** Determine if multiple orders and observations in combination demonstrate that a PROHIBITED ACT is occurring. For each instance when a combination of orders will demonstrate a PROHIBITED ACT has occurred, include that PROHIBITED in the *Penalty Assessment Worksheet* for penalty assessment. For example, the lack of adequate hand-washing coupled with direct bare hand contact with ready to eat foods are two separate observations that together support a Prohibited Act violation of food adulteration. This example would be charged as one Prohibited Act in the *Penalty Assessment Worksheet* supported by two observations.
- 6.1.3** For orders or combination of orders that do not demonstrate a PROHIBITED ACT is occurring, add each chronic issue to the *Penalty Assessment Worksheet* as a critical or non-critical violation (as identified in USAFS) for penalty assessment.

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6.2 Complete Penalty Assessment Worksheet – Compliance Officer

- 6.2.1** Use *Table 1 - Penalty Assessment Table* and the information from Section 6.1 to identify the penalty for each violation in the *Penalty Assessment Worksheet*.
- 6.2.2** Add justifications for violations and penalties and complete the *Penalty Assessment Worksheet*.
- 6.2.3** Add the *Penalty Assessment Worksheet* to the SP enforcement file.

6.3 Draft Notice of Administrative Penalty – Compliance Officer

- 6.3.1** Draft a letter to notify the firm of the assessment of an ADMINISTRATIVE PENALTY.
- 6.3.2** Use the IRAC format to compose content for the letter.
 - a.** Describe the violation or the matter that has not been resolved.
 - b.** Identify the rule, statute, or Code of Federal Regulation (CFR) that was identified as being violated.
 - c.** Explain how the observation applies to violating the rule, statute, or CFR identified.
 - d.** Conclude with the specific penalty that has been assessed.
- 6.3.3** Include the following specific information in the letter:
 - a.** Description of the appeal rights that are available to the firm,
 - b.** The time period for appeal (20 days),
 - c.** The process for submitting an appeal including that it must: be in writing, identify the specific order or citation that is being appealed, and identify the grounds for appeal.
- 6.3.4** Provide a copy of MS 34A.08 Appeal of Administrative Actions or Penalties as enclosures.
- 6.3.5** Include the penalty calculation from the completed *Penalty Assessment Worksheet* as an enclosure in the letter.
- 6.3.6** Add drafted letter to SP enforcement file.
- 6.3.7** Update SP enforcement file with the appropriate status for review prior to sending.

6.4 Review and Approval of Administrative Penalty letter and Penalty Assessment Worksheet – Compliance Supervisor

- 6.4.1** Review the Notice of Administrative Penalty letter and *Penalty Assessment Worksheet*. Send necessary edits to the Compliance Officer.
- 6.4.2** Present the Notice of Administrative Penalty letter and *Penalty Assessment Worksheet* to the Division Director for approval. Commissioner approval is

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required of penalties greater than \$5000.

6.5 Issue Notice of Administrative Penalty – Compliance Case Administrator

- 6.5.1** Create invoice in LIS for penalty.
- 6.5.2** Within two (2) business days of Compliance Unit Supervisor approval, issue final Notice of Administrative Penalty including all enclosures - specifically Invoice, *Penalty Assessment Worksheet*, Administrative penalty statutes, appeal statutes, and copy of inspection report(s).
- 6.5.3** Send Notice to firm or individual using certified mail and email if available.
- 6.5.4** Update SP enforcement file with appropriate status.

6.6 Maintain Documentation – All Staff

- 6.6.1** Maintain all documentation related to the assessment of the administrative penalty in the electronic compliance files.

7. RELATED DOCUMENTS (includes References, Attachments)

Minnesota Statutes 34A
Penalty Assessment Worksheet
Table 1 - Penalty Assessment Table

8. EQUIPMENT/MATERIALS NEEDED

N/A

9. SAFETY

N/A

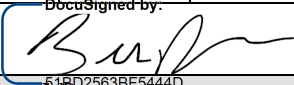
10. CIRCULATION

This policy will be circulated to the following groups: Compliance Officers, Compliance Case Administrator, Compliance Supervisor, Food Program Managers, and Division Director. The current version will be stored electronically on the FFSD document control site.

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11. APPROVAL/DOCUMENT HISTORY

Document History		
Version #	Status (I, R)	Change History
1	I	Initial Policy Drafting.
1.1	R	Removed of previous section 6.6 on closing case – covered in FOOD.60.02
2	R	Removed the following definitions: continuous and reoccurring critical violations and continuous and reoccurring non-critical violations; updated critical violation definition; added chronic violation definition; updated responsibility section to procedure specific roles.
DocuSigned by: 		12/28/2016
Approved By:		Date
Approved By:		Date

I = Initial document; R = Revised document