



August 17, 2010

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**Updating definition of “pattern of violation” for the penalty matrix**

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**Opportunity for public input:**

Those who would like to provide public testimony may attend a public hearing on August 17, 2010 at 10:00 a.m. The hearing will be located at the Building Codes Division, Conference Room A. Written comments may also be submitted to the contact below. The last day to submit written comments is 5:00 p.m. August 23, 2010.

**Live broadcast via the internet:**

To view the public hearing live, click on “[View live meetings](#)”

**Purpose of the rule:**

This proposed rule amends the definition of “pattern of violation” for the purposes of providing a guideline to assess a maximum penalty. This proposed rule establishes a five-year period from the date of the latest violation to determine whether or not a pattern of violation exists.

This proposed rule will become effective October 1, 2010.

**Citation:**

Amend: OAR 918-001-0036

**History:**

The current advisory board penalty matrix was last revised in 2008 as a combined effort of division Enforcement staff, the Board Chair/Vice-chair group, and the various licensing boards. While in many respects the matrix has been effective in addressing violations and achieving compliance, there have been some unintended developments. After meeting and receiving guidance from the Board Chair/Vice-chair group, the division prepared proposed revisions.

The division has seen an increase in cases going to contested case hearing where the respondent admits the violations, but is seeking relief from the penalty amounts. In some cases, application of the matrix results in substantial fines for first-time violators. The preparation and conduct of contested case hearings results in considerable use of enforcement staff time, and expense to the division for use of the Office of Administrative Hearings administrative law judges.

On February 12, 2010, the Board Chair/Vice-chair group met to discuss questions staff had raised about certain aspects of the current matrix. Based on the guidance the Board Chair/Vice-chair group provided at that meeting, the division prepared a modified penalty matrix.

In developing the proposed changes, the division limited changes to first-time violations, and increased the maximum stay amounts to provide better flexibility. The division did not reduce overall penalty amounts, and the entire penalty is assessed in all cases.

On July 1, 2010, the division adopted a temporary rule implementing the requirements of this proposed rule.

**Contact:**

If you have questions or need further information, please contact Hearing Officer James Hanson at [james.m.hanson@state.or.us](mailto:james.m.hanson@state.or.us) or 503-373-1227.

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Secretary of State  
**NOTICE OF PROPOSED RULEMAKING HEARING\***  
A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer and Business Services, Building Codes Division 918  
Agency and Division Administrative Rules Chapter Number

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Dolores Wagner PO Box 14470, Salem, OR 97309 (503) 373-1258  
Rules Coordinator Address Telephone

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**RULE CAPTION**

Rule updates definition of "pattern of violation" used in enforcement penalty matrix

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**Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.**

August 17, 2010 10:00 a.m. 1535 Edgewater Street NW, Salem, OR 97304 James Hanson  
Hearing Date Time Location Hearings Officer

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*Auxiliary aids for persons with disabilities are available upon advance request.*

**RULEMAKING ACTION**

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

**ADOPT:**

**AMEND:** 918-001-0036

**REPEAL:**

**RENUMBER:**

**AMEND & RENUMBER:**

Stat. Auth.: 446.995 & 455.895

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Other Auth.:

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Stats. Implemented: 446.995 & 455.895

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**RULE SUMMARY**

This rule updates the definition of a "pattern of violation" that is used by the different advisory boards of the State Building Codes Division in applying the civil penalty matrix for enforcement cases. The civil penalty imposed for a violation is increased to the maximum where there is a pattern of violation. The amended rule changes the definition of "pattern of violation" to a five year period for all violations.

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business.

Monday, August 23, 2010 by 5:00 p.m.

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**Last Day for Public Comment** (Last day to submit written comments to the Rules Coordinator)

Patrick Allen

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Signature Printed name Date

\*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15<sup>th</sup> day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday. ARC 920-2005

**STATEMENT OF NEED AND FISCAL IMPACT**

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services, Building Codes Division

918

Agency and Division

Administrative Rules Chapter Number

Rule updates definition of “pattern of violation” used in enforcement penalty matrix

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency’s intended action.)

In the Matter of: Amending 918-001-0036

Statutory Authority: ORS 446.995 & 455.895

Other Authority:

Stats. Implemented: ORS 446.995 & 455.895

Need for the Rule(s):

The matrix used by the different advisory boards of the State Building Codes Division to assess civil penalties as part of enforcement actions delegated to the division by the boards. This penalty matrix and this rule have been updated to address issues raised, including a change to make the period of time used to determine a pattern of violation consistent for all enforcement actions. This requires a change to OAR 918-001-0036. The revisions to the matrix and the need for a change to OAR 918-001-0036 were considered and approved by each of the advisory board.

Documents Relied Upon, and where they are available: Meeting minutes from each of the advisory boards where the matrix and rule changes were considered are available on the Building Codes Division website. Draft rules are available from the division’s rules coordinator located at 1535 Edgewater Street NW, Salem, Oregon, and are available on the division’s Web site at: [www.bcd.oregon.gov](http://www.bcd.oregon.gov).

Fiscal and Economic Impact:

The division has determined these proposed rule change will have a nominal fiscal or economic impact on state agencies and units of local government. It will impact those members of the public or small businesses who are sanctioned for the third time within a five-year period based on finding a pattern of violation, instead of within a three year period under the current rule. The change to the rule will only affect the stayed amount of an imposed civil penalty for this group. This is a very small number of enforcement cases.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

There should be no cost of compliance for state agencies and local government. The cost of compliance to the public and small businesses will be the imposition of larger civil penalties with a smaller amount stayed, resulting in a larger sum due and payable.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

The division is not able to determine the number of small businesses and industries with small businesses because it will include both licensed and unlicensed entities, and only those with prior violations will be subject to the rule amendment.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

There are no projected reporting, recordkeeping, administrative, or professional services required as a result of the proposed rule amendment.

c. Equipment, supplies, labor and increased administration required for compliance:

No additional equipment, supplies, labor, or increased administration are required.

How were small businesses involved in the development of this rule? Each of the advisory boards has members who are small business owners and employees who represent a large cross section of industry..

Administrative Rule Advisory Committee consulted?: No

If not, why? Because this rule amendment implements the decisions made by the advisory boards to modify their penalty matrix.

Patrick Allen

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Signature

Printed name

Date

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007

## 918-001-0036

### Guidelines for Civil Penalties

(1) Scope and Authority. This rule sets guidelines for assessing a civil penalty under ORS 446.995 & 455.895.

(2) Definitions. For the purposes of this rule:

(a) “Continuing offense” or “continuing violation” means violation of a code, rule or law on one or more additional days after having been notified of the violation or ordered to correct the act, or the failure to act. A continuing violation is subject to a civil penalty each day the violation continues after notification.

(b) A “directive” includes, but is not limited to, a notice or warning, citation, order, consent decree or settlement agreement, rule, law, code requirement, or agency interpretation.

(c) “Pattern of violation” means two or more prior violations during a **five-year** given period of any provision of ORS chapter 446, 447, 455, 460, 479, 480, or 693, or the state building code as defined in ORS 455.010, whether or not a penalty was assessed. **A pattern of violation is calculated within a five-year period from the date of the latest violation.**

~~(A) For violations by volunteers performing unlicensed work, supervisor and business violations, and failures to comply with corrective orders, a pattern of violation is calculated within a three-year period from the date of the latest violation.~~

~~(B) For scope of license violations, violations concerning other unlicensed activities, failure to obtain license and permit, failure to comply with a previous directive, or violations resulting in unsafe installations or health and safety hazards, a pattern of violation is calculated within a five-year period from the date of the latest violation.~~

(3) A licensed person or contractor who performs an act resulting in an unsafe installation or a health and safety hazard, structural or financial damage, performs or allows another to perform work requiring a license without an appropriate license, violates a previous directive, or exhibits a pattern of violation may have their license, registration or certificate conditioned, suspended, or revoked.

(4) Civil penalties may be assessed by a board, the Director, or a board’s designee acting as agent for a board. A board or the Director may take into account any appropriate factors, including previous directives, in determining the penalty amount or conditions within an order. The statutorily defined maximum penalty may only be assessed upon a finding of a pattern of violation.

(5) Civil penalties may be assessed in addition to, or in lieu of, the conditioning, suspension, or revocation of a license, certificate of competency, or similar authority issued by the Director.

(6) The Director may, subject to approval of a board, develop a penalty matrix for the board's use to promote equity and uniformity in proposing the amount and terms of civil penalties and conditions under which the penalties may be modified based on the circumstances in individual cases.

(7) If a dispute concerning the application of the state building code as defined in ORS 455.010 is appealed to a local appeals board, to a board under ORS 455.690 or to the program chief under ORS 455.475:

(a) A civil penalty that is being appealed, may be stayed until after resolution of the appeal or interpretation. If corrections are necessary, a civil penalty may be stayed for 30 calendar days or the time frame established in the appeal or in the interpretation process.

(b) An administrative appeal will not stay civil penalties when they were assessed for failure to obtain a permit unless the appeal involves determining whether a permit was necessary.

(c) The person seeking the appeal or interpretation has the obligation to notify the Director of the appeal for the purpose of granting a stay of the civil penalty.

(8) Violations of ORS chapters 446, 447, and 479 and ORS 455.020(2) and 455.610, wherein defects are noted by an inspector in an element of assembly or construction, shall not be considered a violation for the purposes of this section if the violation is corrected and an inspection request made in 20 calendar days unless extended in writing by the building official.

(9) The Building Codes Division shall forward a copy of final orders to the Construction Contractors Board.

Stat. Auth.: ORS 446.995 & 455.895

Stats. Implemented: ORS 446.995 & 455.895

Hist.: BCD 35-2002, f. 12-31-02, cert. ef. 1-1-03; BCD 10-2005, f. 4-29-05, cert. ef. 5-1-05