



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

Purpose of the rule:

This temporary rule amends the definition of “pattern of violation” for the purposes of providing a uniform time period for a prior violation. This temporary rule establishes a five-year period from the date of the latest violation to determine whether or not a penalty was assessed.

Citation:

Amend: OAR 918-001-0036

This temporary rule became effective July 1, 2010.

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.

Contact:

If you have questions or need further information, please contact Lead Enforcement Officer Brent Griffiths at brent.a.griffiths@state.or.us or 503-508-5673.



Secretary of State
Certificate and Order for Filing

TEMPORARY ADMINISTRATIVE RULES
A Statement of Need and Justification accompanies this form..

I certify that the attached copies* are true, full and correct copies of the TEMPORARY Rule(s) adopted on [Upon Filing] by the
Date prior to or same as filing date

Department of Consumer and Business Services, Building Codes Division	918	
Agency and Division	Administrative Rules Chapter Number	
Dolores Wagner	PO Box 14470 Salem, OR 97309	(503) 373-1258
Rules Coordinator	Address	Telephone

to become effective [upon filing] through [September 30, 2010].
Date upon filing or later A maximum of 180 days including the effective date.

RULE CAPTION

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

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

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

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

ADOPT:

AMEND: 918-001-0036

SUSPEND:

Stat. Auth.: ORS 455.895

Other Auth.:

Stats. Implemented: ORS 455.895

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 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.

Patrick Allen		
Authorized Signer	Printed name	Date

*With this original and Statement of Need, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.
ARC 940-2005

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Consumer and Business Services, Building Codes Division

918

Agency and Division

Administrative Rules Chapter Number

In the Matter of: Amending 918-001-0036

Rule Caption: (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)
Rule updates definition of "pattern of violation" used in enforcement penalty matrix.

Statutory Authority: ORS 455.895

Other Authority:

Stats. Implemented: ORS 455.895

Need for the Temporary 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 making the period of time used to determine repeat violations 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. The change to OAR 918-001-0036 cannot be effected through permanent rulemaking until October 1, 2010 at the earliest.

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. Temporary 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.

Justification of Temporary Rule(s): The current rule has two different time periods used to determine whether a prior violation is considered in assessing a civil penalty for a new violation. This change will correct that difference while the rule goes through the permanent rulemaking process. Failure to make the change now results in inconsistent application of the period of time that is used to determine prior violations, and can cause disparate treatment of respondents through unequal penalty assessment.

Patrick Allen

Authorized Signer

Printed name

Date

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 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.

(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