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Comprehensive Policy for Assessing Financial Condition (Ability to Pay) Final - 11/3/14 Policy # 14-001

I. INTRODUCTION

A. Purpose And Intent

This document presents guidance on how to consider claims of inability to pay brought by individuals, corporations and other entities against which MassDEP has proposed/assessed a civil administrative penalty for violating laws and regulations administered by MassDEP.

B. Applicability and Legal Effect

This policy document provides guidance that applies to all administrative enforcement actions commenced after the effective date of this policy involving the assessment of civil administrative penalties. It does not apply to determinations of ability to fund costs of M.G.L. c. 21E remediation or payment of stipulated or suspended penalties or any other context. This policy supplements the Enforcement Response Guidance (ERG), and should be read in conjunction with it. It is intended solely as guidance for MassDEP managers and staff in the exercise of enforcement authority under the Civil Administrative Penalties Act, M.G.L. c.21A, §16 and 310 CMR 5.00, et seq. and may not be relied upon to create rights, duties, obligations, or defenses, implied or otherwise, enforceable at law or in equity, by any person in litigation with DEP. This policy does not constitute final agency action, and is not “Regulations” as that term is used in M.G.L. c. 30A.

C. Confidentiality of Financial Information

Financial information submitted to MassDEP under this policy shall be deemed to be exempt from public disclosure to the extent allowable under the public records law or other applicable laws or legal guidance from the Secretary of the Commonwealth, Supervisor of Public Records.

II. DEFINITIONS

As used throughout this policy, the following terms shall have the following meanings, unless the context clearly indicates otherwise.

Ability To Pay or ATP means MassDEP's assessment of the claimant's financial condition and resources available to pay a penalty.

Certification means the written verification statement signed by an authorized representative of the claimant, certifying that the information provided is true and correct, under pains and penalties of perjury.

Business Net Assets Available means a legal entity's net assets available to pay the penalty, and shall include, but not be limited to, the equity in all bank accounts, financial investments, stocks, bonds, cash value life insurance, vehicles, vessels, real property, personal property and other tangible assets, less outstanding liabilities.

Notwithstanding the foregoing, where, based upon its review of all Business Net Assets Available, MassDEP deems that certain tangible and intangible assets are necessary for the continuity of claimant's primary business operation, these assets shall not be included in the calculation of Business Net Assets Available if the sale and encumbrance of these assets would eliminate the ability of the business to continue its primary business operation. Furthermore, at the discretion of MassDEP, loans from shareholders or owners, paid-in capital, capital stock, retained earnings and other adjustments to shareholder's equity may not be considered as part of liabilities of the claimant.¹

Civil Administrative Penalty or **Penalty** shall mean a civil administrative penalty that MassDEP seeks to assess pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00, et seq.

Claimant means the individual or legal entity against which the penalty is proposed/assessed and who/that is making a claim of not being able to pay a civil penalty pursuant to this policy. Businesses may be in any legally accepted form, including but not limited to: sole proprietorships; partnerships; corporations; limited liability companies and limited liability partnerships.

Corrective Action Cost (CAC) means the cost to return to and maintain compliance with the requirements violated.

¹ Where the primary business activity is a passive real estate investment, MassDEP may include the real estate in the Net Assets Available.

Individual means a natural person or unincorporated proprietorship; not a corporation, LLC, Trust, or other legal entity.

Individual Financial Data Request Form or IFDRF means the form attached to this policy to request financial information from the individual claimant such as income, assets, living expenses and other relevant information.

Individual Net Assets Available means net assets available to pay the penalty, and shall include, but not be limited to, the equity in all bank accounts, financial investments, stocks, bonds, cash value life insurance, vehicles, vessels, real property, personal property and other tangible assets.

Notwithstanding the foregoing, the following shall not be included in the calculation of Individual Net Assets Available:

- Designated Internal Revenue Service-recognized retirement accounts such as Individual Retirement Accounts established pursuant to §§408 and 408A, and deferred compensation accounts pursuant to §§401(k), 403(b) and 457 of the Internal Revenue Code, unless the claimant is retired;
- Designated Internal Revenue Service-recognized medical spending accounts such those authorized under §125 of the Internal Revenue Code or medical savings accounts authorized by Title III of the Health Insurance Portability and Accountability Act of 1996;
- Designated Internal Revenue Service-recognized Education Savings Accounts such as Coverdell Education Savings Accounts (formerly Educational IRA) or 529 qualified state tuition plan;
- The first five hundred thousand dollars (\$500,000) in equity of the principal residence of an individual (regardless of whether the individual has filed a Declaration of Homestead pursuant to Massachusetts General Laws, Ch. 188, §1-10). This exemption does not apply to property held by a trust or corporation;
- Vehicles necessary for the ordinary use of the claimant and his or her family;
- Clothing and other personal possessions necessary for providing for the ordinary needs of the claimant and his/her family; and
- Tangible property required for the claimant's ongoing primary income generating activities, if the sale and encumbrance of the property would eliminate the ability to continue to generate income.

Legal entity means a lawful or legally standing association, corporation, limited liability company, limited liability partnership, partnership, or trust, but not an individual.

Year means the fiscal year of the claimant, unless the context clearly means that it refers to a calendar year.

III. POLICY STATEMENT

In accordance with M.G.L. c.21A and 310 CMR 5.00 et seq., MassDEP considers financial condition as one of several factors when assessing a civil administrative penalty. MassDEP's consideration is based on the information known to it at the time the penalty is calculated. In the absence of information regarding the violator's financial condition that would support a penalty reduction, MassDEP makes no downward adjustment of the initial penalty calculation for inability to pay. If, during the enforcement process, a claimant asserts that it has a lack of ability to pay the proposed/assessed penalty, MassDEP may reconsider this adjustment factor after reviewing financial documentation of the purported inability submitted by the claimant in accordance with the requirements of this policy. MassDEP may also consider any other available documentation, including, but not limited to, publicly available information. Under this policy, the claimant has the burden of demonstrating to MassDEP that the claimant is unable to pay the proposed/assessed penalty. At any point in applying this policy, MassDEP staff may contact the MassDEP Senior Financial Analysis Manager for consultation or assistance in determining the amount that a claimant is able to pay.

IV. DETERMINING INABILITY TO PAY

For the purposes of considering the financial condition factor under this policy and whether MassDEP will use its discretion to adjust an assessed/proposed penalty, MassDEP will consider, among other factors: the actions necessary to achieve compliance, their associated corrective action costs (CAC) and the effect the proposed penalty will have on the claimant's ability to take the corrective action.

- For individual claimants:
 - MassDEP will consider the income, living expenses, and assets of spouses and dependents (as shown on the federal tax returns) of the claimant.
 - MassDEP generally will consider income and assets of unincorporated businesses owned by the individual or his/her spouse as income available for the individual to pay a penalty.
 - MassDEP generally will not consider the income of incorporated businesses owned by the individual or his/her spouse as income available for the individual to pay a penalty unless the income flows to the owner (as in an "S" corporation, for example). However, MassDEP will consider salaries, dividends, and other benefits and payments passed from the corporation to the claimant and his/her spouse as income available for the individual to pay a penalty and will also consider the value of any ownership interest in the business as available.
- For legal entity claimants, MassDEP may review the business structure of the claimant and the relationship between the claimant and any closely affiliated entities.
 - If a claimant is a wholly owned subsidiary of a corporation, then the finances of the corporation and all of its other subsidiaries and affiliates

may be considered for the purposes of determining financial condition at the sole discretion of MassDEP.

- If the claimant's affiliated legal entities have substantially the same ownership or control, then the claimant and its closely affiliated entities may be considered a single entity for the purposes of determining financial condition, at the sole discretion of MassDEP.
- If a claimant has changed its business structure but maintains substantially similar ownership or control of a predecessor business, the two entities may be considered a single business entity for the purposes of determining financial condition under this policy.
- MassDEP will generally not consider an owner's individual income or assets as available for an incorporated business to pay a penalty unless the facts indicate that the finances of the individual and business are so intertwined that they operate as one entity.

Notwithstanding the foregoing, nothing contained in this policy shall be construed as to deem an individual claimant's spouse or dependents, or a legal entity's other closely affiliated entities, liable for a violation.

A. Information Requirements

MassDEP has determined that certain information is required in order to assess the validity of a claimant's claim of inability to pay. A claimant seeking MassDEP's consideration of its financial condition under this policy must provide the required information in order for MassDEP to evaluate such a claim. Absent the claimant's provision of the necessary information, MassDEP's initial penalty calculation will not be reduced based upon an assertion of inability to pay.

MassDEP may request additional information as necessary to assist it in its evaluation and reserves the right to conduct an independent investigation to confirm the accuracy and completeness of any material submitted.

- a) **Tax Returns:** All Claimants must provide signed and legible complete final copies of their three (3) most recently-filed federal tax returns including all schedules, statements, forms, worksheets and attachments, and an executed copy of IRS Form 4506T. These tax returns should be for the three (3) most recent tax years for which returns were due. Claimants must explain the absence of any year (such as an extension of time to file) and provide supporting documentation to MassDEP. Claimants may provide additional tax returns if they believe such returns provide a more complete picture of their financial condition. MassDEP may request additional federal returns, to assist in its evaluation of an inability-to-pay claim. MassDEP may also request additional information as necessary to provide an adequate understanding of particular items listed on the tax returns. Staff should not request Massachusetts state tax returns, and, if received, should return them uninspected.

- b) **Individual Financial Data Request Form:** Individual claimants must completely and legibly fill out the required Individual Financial Data Request Form(s) attached to this Policy.

All claimants should be prepared to provide reasonable documentation for items submitted pursuant to this policy, such as proof of mortgage amount or receipts for particular expenses.

- c) **Justification for Claim:** In its sole discretion MassDEP may require claimants asserting an inability to pay to provide a written justification for their contention that they have insufficient financial resources to pay the proposed/assessed penalty, with specific reference to the information provided above. MassDEP may also require a formal explanation of any mitigating factors that should be noted when reviewing the financial information. Such factors shall include, but not be limited to, estimates of corrective action cost estimates that the claimant will undertake to return to compliance.
- d) **Certification:** All materials submitted by the claimant shall be accompanied by the following certification statement that is signed by the claimant:

I, [name of person authorized to act on behalf of claimant], attest under the pains and penalties of perjury:

- (a) *that I have personally examined and am familiar with the information contained in this submittal, including any and all documents accompanying this certification statement;*
- (b) *that, based on my inquiry of those individuals responsible for obtaining the information, the information contained in this submittal is to the best of my knowledge and belief, true, accurate, and complete; and*
- (c) *that I am authorized and empowered to act on behalf of the claimant; and*

I am aware that there are significant penalties, including but not limited to, possible fines and imprisonment, for submitting false, misleading, inaccurate, or incomplete information.

A blank copy of the Certification Statement that must be submitted by all claimants is attached to this policy.

B. Initial Analysis of Claim

MassDEP primarily relies upon two possible indicators to determine whether or not to adjust the proposed/assessed penalty based upon financial condition: (a) Estimated Available Cash Flow Projection Analysis (the “Cash Flow Analysis”); and (b) Net Assets Available Analysis (“Asset Analysis”). In conducting the analyses under this process, MassDEP will perform an initial

analysis using the information provided. If circumstances warrant, a Secondary Analysis or Tertiary Analysis may also be performed. If MassDEP determines that it is appropriate, MassDEP shall submit IRS form 4506-T (one of the information requirements listed in section IV.A.a), to the Internal Revenue Service to verify that the information the claimant has submitted to MassDEP is the same information that was submitted to the IRS.

1. Cash Flow Analysis²

The cash-flow analysis is performed using a method that forecasts income and expenses over the next five years (other than for persons who are retired) based upon the information from a minimum of the three most recently filed tax returns. The cash flow analysis determines the claimant's ability to pay a penalty based on the projected surplus available cash flow.

This method involves taking a weighted average of the claimant's net income (gross income minus expenses, excluding depreciation) for the past three (3) years; projecting the total net income over the next five (5) years based on this weighted average, and then allocating a standard percentage of the sum of the projected five year net income to pay for corrective actions and penalties. The details of how to perform this analysis for claimants that are legal entities are included in Appendix A; the details of how to perform this analysis for claimants who are individuals are included in Appendix B.

For claimants who are retirees, the "five year" projection is replaced with a projection that is derived from remaining life expectancy plus five years. For a retired claimant with a spouse, the analysis is based upon the life expectancy of either the claimant or the spouse, whichever is longer.

2. Net Assets Analysis

The Net Assets Available analysis involves quantifying the assets available to pay the assessed penalty. The details of how to perform this analysis are included in Appendix C for claimants that are legal entities and Appendix D for claimants who are individuals.

3. Interpretation of Results of Initial Analysis

If the results of either the Initial Cash Flow Analysis or Initial Asset Analysis indicate that the claimant is able to pay the proposed/assessed penalty, no further analysis is necessary and, unless some special circumstance warrants a tertiary analysis, no adjustment to the penalty will be made based on the claimant's claim of financial condition.

² The analyses under this policy are economic forecasts and not accounting analyses. Therefore, for the purposes of, and as used throughout this policy, the analyses and terms are not meant to adhere to GAAP or any other formalized accounting standards.

If both the Initial Cash Flow Analysis and Initial Asset Analysis indicate that the claimant may be unable to pay the full proposed/assessed penalty, a ‘Secondary Analysis’ will be conducted to determine the amount of penalty that the claimant is able to pay.

C. Secondary Analysis

For the Initial Analysis, all factual information asserted by the claimant on its tax returns and other documentation was accepted as being true, necessary, proper, and reasonable. When performing the Secondary Analysis, staff should more closely scrutinize the information provided by the claimant on the tax returns and IFDRF or other documents and consider its accuracy and appropriateness. Staff will consider the details of the expenses listed on the tax returns and/or IFDRF to judge whether any expenses may be reduced without significantly impacting necessities for the claimant’s family or business operations. Any such reductions should be approved by MassDEP’s Senior Financial Analysis Manager.

Based on this review, staff should make any necessary adjustments and repeat both the Cash Flow and Net Assets analyses as outlined in the Appendices. If this additional review indicates that no adjustments should be made, staff should use the results from the initial analysis to determine the amount the claimant can pay.

1. Interpretation of Results of Secondary Analysis

- a. Cash Flow or Asset Analysis indicates ability to pay:

If the results indicate that the claimant is able to pay the proposed/assessed penalty, no further analysis may be necessary and no adjustment to the penalty should be made based on the claimant’s claim of not being able to pay.

- b. Cash Flow and Asset Analysis indicate inability to pay

The amount of the penalty that the claimant is able to pay based upon the Secondary Analysis is the higher of the value derived from the Net Asset Analysis or the Cash Flow Analysis, rounded down to the nearest one hundred dollars. **The amounts from these two analyses should not be added or combined to determine the amount that the claimant is able to pay.**

D. Tertiary Analysis

After MassDEP staff has evaluated the claimant’s ability to pay based on the Initial Analysis and/or Secondary Analysis, staff should consider whether a Tertiary Analysis is warranted. MassDEP’s analysis calculates a claimant’s ability to pay a penalty based upon past income and expense levels and current available assets. In its sole discretion, MassDEP may determine that a Tertiary Analysis may be appropriate when some underlying change in circumstance has recently occurred, or will occur in the near future, that will significantly change one or more of the

underlying expense or income streams or net assets available that formed the basis of the previous analyses. For instance, a retirement, change in job, job loss, disaster causing significant property damage, extraordinary medical expenses, or change in law or new regulatory requirement resulting in new expenses could affect future income. The burden is on the claimant to propose and document any such changes. Tertiary analysis is also appropriate where less than three years of tax data are available or the applicant is an estate or trust.

In those circumstances, MassDEP staff should contact the General Counsel or Deputy Commissioner of Operations or their designee for guidance tailored to the particular situation.

V. ADJUSTING THE PENALTY

Three possible results flow from the MassDEP's consideration of a claimant's assertion of inability to pay the proposed/assessed penalty:

1. No adjustment is made to the penalty because the analysis indicates that the claimant has the ability to pay the proposed/assessed penalty. (NOTE: MassDEP may, however, adjust a penalty on the basis of the other factors set forth in M.G.L. c. 21A, sec. 16 and the implementing regulations at 310 CMR 5.25 or MassDEP's mitigation policies.)
2. A downward adjustment is made to the penalty because the analysis indicates that the claimant has an inability to pay the proposed/assessed penalty. In some circumstances this could result in no penalty being assessed.

Generally, the determination that the claimant is unable to pay the penalty results in a downward adjustment and the amount assessed is reduced rather than suspended. However, when the reduction results in whole or in part from the consideration of CAC, the penalty reduction may be accomplished by suspending a portion of the penalty to ensure the implementation of the corrective action.

3. No adjustment for financial condition is made even though the analysis shows that the claimant may not be able to pay, due to MassDEP's use of its discretion and other relevant factors. A determination not to reduce the penalty when the analysis indicates an inability to pay requires the approval of the Assistant Commissioner or Regional Director or his/her designee.

Appendix A

Detailed Methodology for Cash Flow Analyses – Legal Entity Claimants

1. Initial Analysis

Staff should use the current version of the MassDEP Cash Flow Analysis spreadsheet to determine the Legal Entity Claimant's ability to pay. For the Initial Analysis, staff should use the information submitted by the claimant on his or her tax returns. The following methodology describes the data entry steps performed by MassDEP staff and explains the calculations and analysis performed by the spreadsheet.

Part 1: Estimated Available Cash Flow

The first part of the analysis determines the **Estimated Available Cash Flow** for each of the three most recently completed tax years by adding the **taxable income before net operating losses or special deductions** to the **depreciation**. MassDEP staff may conduct this analysis using up to the five most recently completed tax years, if available, but should not use data from fewer than three tax years. If the business has been in existence for less than three years, a tertiary analysis will be necessary.

Step 1A

Open the Cashflow Analysis worksheet and read the instructions! This spreadsheet is available on the Intranet through the Office of Enforcement page <http://intranet/OEPA/OEPHome.htm>.

Step 1B

Enter the name of the legal entity, the years for which you have tax returns, and the actual or estimated amount of the corrective action cost (if applicable) in the "Basic Info" tab.

Step 1C

Go to the tab for the type of form the legal entity is using; (e.g., 1120S tab for a corporation that files the 1120S return). (Note: If the business filed different types of returns for different years, you may have to enter data in more than one tab.)

From the tax returns for each year, find the entries for **Net Profit** and **Depreciation** and enter them into the colored cells on the spreadsheet where indicated. Depreciation may be located in any one of a number of places on the tax returns, so staff should review them carefully before concluding that no depreciation has been claimed.

In the Initial Analysis tab that corresponds to the number of years of data you entered, the spreadsheet will add the depreciation to the taxable income to calculate the **Estimated Available Cash Flow** for each of the past three to five years.

Part 2: Smoothing and Weighting Calculation

Using a standard statistical and economic practice called “smoothing”, the estimated available cash flows from the previous calculation are averaged in a way that provides greater weight to the more recent years to arrive at a **Weighted Average Estimated Available Cash Flow**. This calculation smoothes out the year-to-year variability between cash flows and provides the number that forms the basis from which MassDEP calculates the **Five Year Estimated Available Cash Flow**. The calculation uses a smoothing constant of 0.3, which means that for each prior year, the figure is weighted at 70% of the value of the next most recent year (see table below). The weights applied to each year depend on the number of years of recent historical data being used, as shown in the table below.

	Based on 3 years of tax returns	Based on 4 years of tax returns	Based on 5 years of tax returns
Most recent year	46%	39%	36%
1 year older	32%	28%	25%
2 years older	22%	19%	18%
3 years older		14%	12%
4 years older			9%

The spreadsheet will multiply the **Estimated Available Cash Flow** determined in Part 1 by the appropriate weight from the table above and sum up the results. This yields the **Weighted Average Estimated Available Cash Flow**.

Part 3: Determining Five Year Estimated Available Cash Flow Projection

In this part, the **Weighted Average Estimated Available Cash Flow** from Part 2 is projected five years into the future. The spreadsheet will multiply the **Weighted**

Average Estimated Available Cash Flow determined in Part 2 by five to determine the **Five Year Estimated Available Cash Flow**.

Part 4: Determine Ability To Pay Amount

Rather than seek all of the claimant's future cash flow, MassDEP has decided that a claimant should devote thirty percent (30%) of the **Five Year Estimated Available Cash Flow Projection** to paying the penalty and corrective action costs. This does not mean that MassDEP will automatically allow the claimant to pay the penalty to MassDEP over an extended period of time. Claimants have a number of options to raise the funds to pay the penalty, including but not limited to, seeking private financing to pay the penalty and using the future cash flow to pay off the amount financed, delaying or eliminating future capital expenditures, and reducing discretionary expenditures.

The spreadsheet will multiply the **Five Year Estimated Available Cash Flow** by thirty percent (30%) to determine the amount that MassDEP has determined that the claimant is able to pay for corrective actions and penalties and subtract out the estimated corrective action costs.

Step 4A

Go to the Initial Analysis tab that corresponds to the number of years of data you entered for the results of the analysis. The result of the analysis will be shown on that sheet.

2. **Secondary Analysis**

For the Initial Analysis all factual information asserted by the claimant on its tax returns was accepted as being necessary, proper, and reasonable for the operation of the business's primary activity. For the secondary analysis, MassDEP examines the expenses listed on the tax returns to judge whether some expenses may be reduced without significantly impacting the business's ability to operate. If MassDEP determines that adjustments should be made, the disallowed expenses are added to the net income.

Part 1: Estimated Available Cash Flow

Step 1A:

Staff should return to the data entered into the spreadsheet in Steps 1A of the initial analysis and enter the additional data for **Deductions** and **Expenses**. The default calculation adds the total **Deductions** and total **Expenses** to the **Net Profit**.

Step 1B:

This step requires MassDEP Staff to use their judgment to determine the portion of expenses that are in excess of those necessary for the claimant's ongoing business operations. MassDEP staff may request that claimants provide additional documentation to substantiate certain questionable expenses. Staff members are welcome to consult with the Department's financial analyst for this determination. Staff may consider excesses in any types of expenses, but are encouraged to give special consideration to expenses for the following: meals and entertainment; travel; gifts; miscellaneous; and compensation of officers.

Enter the amount of the allowed portion of the claimed expenditures into the spreadsheet in the section titled "Allowed Expenses". If nothing is entered, the calculation will disallow all the expenditures. The spreadsheet will add these expenses to the net income and depreciation to determine a new value for the **Estimated Available Cash Flow**.

Part 2-4: Estimated Available Cash Flow

Step 4A

The spreadsheet will repeat Steps 2 through 4 described in the initial analysis using the revised data and the results will be displayed in the Secondary Analysis tab that corresponds to the number of years of data you entered.

Appendix B

Detailed Methodology for Cash Flow Analyses – Individual Claimants

1. Conducting An Initial Analysis of Estimated Available Cash Flow Projection Analysis – For Individuals

Staff should use the then-current version of the EPA's INDIPAY model to determine the claimant's ability to pay. For assistance with using or interpreting INDIPAY, contact MassDEP's financial analysis manager; training is periodically offered on an as-requested basis. For the Initial Analysis, staff should use the information submitted by the claimant on his or her tax returns and IFDRF. If Corrective Action is required, the estimated CAC should be subtracted from the result of the ability to pay analysis to determine the amount that the claimant is able to pay for the penalty.

2. Conducting A Secondary Analysis of Estimated Available Cash Flow Projections – For Individuals

Staff should consider the reasonableness and necessity of the living expenses listed by the claimant. If some seem excessive, staff can inquire about their appropriateness and make adjustments to the inputs and then conduct the secondary analysis based upon the adjusted figures. Staff should also consider whether other factual pieces of information are supported by other means, such as public records. If staff determine that certain items should be adjusted for the Secondary Analysis, such adjustments should be made and the INDIPAY model should be run again based on the adjusted data. This will result in determining the amount that the claimant is able to pay under the Secondary Estimated Available Projected Cash Flow Analysis. Where an individual claimant generates income or loss from a business or rental property, staff should consult with the Senior Financial Analysis Manager about how to incorporate the income or loss into the analysis.

Appendix C

Detailed Methodology for Legal Entity Net Assets Available Analyses

1. Initial Analysis

In conducting the Initial Analysis of Legal Entity Net Assets Available, MassDEP will rely upon the asset and liability information provided by the claimant. Staff should obtain this information from the balance sheets of the federal tax returns.

Assets: Staff should include all assets except those that are listed as exempt in the definition of Net Assets Available. Therefore, staff should not include any listed assets that are necessary for the continuity of claimant's primary business operation, including those used as collateral for outstanding liabilities.

Liabilities: For the initial analysis staff should include all liabilities.

The Legal Entity Net Assets Available is the value of the assets in excess of the liabilities. The value of all Legal Entity Net Assets Available shall be considered available to allow the claimant to pay the proposed/assessed penalty.

2. Conducting A Secondary Analysis of Business Net Assets Available

If the results of the Initial Analysis of Legal Entity Net Assets Available suggest that the claimant may not have the ability to pay the entire penalty amount sought, staff should conduct a more thorough secondary analysis.

Assets: The Initial Analysis accepted the valuation of assets provided by the claimant on its tax returns. These may not represent the fair market value. For the secondary analysis, staff should look more closely at the valuations to determine their accuracy. For example, the balance sheet may show the value of a building after it has been partially or entirely depreciated. The fair market value of the building may be higher. In such a case, the asset values should be revised to reflect the fair market values.

Liabilities: In the secondary analysis, Owner Equity, Paid In Capital, Loans From Shareholders, or any similar item representing a an owner's interest in the entity should be removed from the liabilities. In addition, staff should examine whether other listed liabilities are owed to bona fide entities separate from and not related to the business or its owner.

After making these adjustments, the process described in the Initial Analysis section should be repeated with such revised values.

Appendix D

Detailed Methodology for Individual Net Assets Available Analyses

1. Conducting An Initial Analysis of Individual Net Assets Available

In conducting the Initial Analysis of Individual Net Assets Available, MassDEP will rely upon the asset and liability information provided by the claimant. Staff should obtain this information from the IFDRF. This analysis looks at the total assets and liabilities, rather than on the net equity of any one item. For example, if a person has a negative overall net worth but owns a vacation home with \$50,000 in equity, the person has no Net Assets Available under this guidance.

To calculate Individual Net Assets Available, staff should use the then-current version of EPA's INDIPAY model, and eliminate from consideration any listed assets that are exempted from the definition of Individual Net Assets Available, as defined in the definitions in section II of this guidance document. The remaining Assets constitute the Individual Net Assets Available for determining ability to pay.

2. Conducting A Secondary Analysis of Individual Net Assets Available

If the results of the Initial Analysis of Individual Net Assets Available suggest that the claimant may not have the ability to pay the entire sought penalty amount, a secondary analysis should be done. For the Initial Analysis all factual information asserted by the claimant was accepted as representing fair market value. For the secondary analysis, staff will look at the details of the values provided for the assets and liabilities to judge whether some items may be listed with a value less than or more than the fair market value.

For example, the IFDRF may show the value of a piece of real estate, but public records (such as tax assessment) may show more realistic values.

If staff determine that such assets/liabilities may exist, the asset values should be revised to reflect the fair market values and the process described in the Initial Analysis section should be repeated with such revised values.