

Guideline on Exercising Power to Impose Pecuniary Penalty

A guideline issued by the Monetary Authority under Section 23(1) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Chapter 615)

Introduction

1. Under section 21 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Chapter 615) (the “Ordinance”), the Monetary Authority (“MA”) may impose a pecuniary penalty either on its own or together with other disciplinary sanctions on an authorized institution if the authorized institution contravenes a specified provision as defined by section 5(11) of the Ordinance. Section 23(1) of the Ordinance requires the MA to publish guidelines to indicate the manner in which he proposes to exercise the power to impose a pecuniary penalty under section 21(2)(c) and section 23(2) requires the MA to have regard to such guidelines in exercising such power.
2. This guideline is published under section 23(1) of the Ordinance to indicate the manner in which the MA will exercise the fining power under section 21(2)(c). The MA will have regard to this guideline when exercising the fining power under section 21(2)(c) of the Ordinance.

Factors to be considered in exercise MA’s fining power

3. As a matter of policy, the MA will usually publicise all his decisions to impose pecuniary penalty.
4. When considering whether to impose a pecuniary penalty and the amount of the penalty, the MA will consider all of the circumstances of the particular case, including the factors described below that are relevant.
5. A pecuniary penalty imposed by the MA should act as a deterrent to the authorized institution concerned from contravening a specified provision as defined by section 5(11) of the Ordinance and should also act as a general deterrent to other authorized institutions from contravening the same or similar specified provisions.

6. Although section 21(2)(c)(ii) states that one alternative maximum level of fine that can be imposed is three times the amount of the profit gained, or costs avoided, by the financial institution concerned as a result of the contravention in question, the MA will not automatically link the fine imposed in any particular case with the profit gained, or costs avoided.
7. A fine should not have the likely effect of putting the authorized institution concerned in financial jeopardy. In considering this factor, the MA will take into account the size and financial resources of the authorized institution.
8. The more serious the contravention, the greater the likelihood that the MA will impose a pecuniary penalty and that the size of the penalty will be larger.
9. In determining the seriousness of a contravention, the MA will consider all of the circumstances of the case and take into account the factors set out below that are relevant. The factors listed below are not exhaustive. Some of them may not be applicable in a particular case and there may be other factors which are relevant but are not listed below.
 - (a) *The nature, seriousness and impact of the contravention, including:*
 - (i) whether the contravention is intentional or reckless or negligent – a contravention caused merely by negligence or conduct which only results in a technical breach is generally regarded as less serious;
 - (ii) the duration and frequency of the contraventions;
 - (iii) whether the contravention is potentially damaging or detrimental to the integrity and stability of the banking system and/or the reputation of Hong Kong as an international financial centre;
 - (iv) whether the contravention caused or potentially caused loss to, or imposed costs on, any other person;
 - (v) whether the contravention was committed by the authorized institution alone or whether as part of a group and the role the authorized institution played in that group;

- (vi) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls in respect of the customer due diligence and record-keeping procedures relating to all or part of that authorized institution's business;
 - (vii) whether the contravention was indicative of a pattern of contraventions;
 - (viii) whether there are a number of smaller issues, which individually may not justify a pecuniary penalty, but which do so when taken collectively; and
 - (ix) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention.
- (b) *The conduct of the authorized institution after the contravention, including:*
- (i) whether the authorized institution attempted to conceal its contravention;
 - (ii) any remedial steps taken since the contravention or the possible contravention was identified, and any action taken by the authorized institution against those involved and any steps taken to ensure that similar contraventions will not occur in future;
 - (iii) the degree of cooperation with the MA, other relevant authorities and/or law enforcement agencies during the investigation of the contravention; and
 - (iv) the likelihood that the authorized institution will commit the same type of contravention in the future if no or a lighter penalty is imposed.
- (c) *The previous disciplinary record and compliance history of the authorized institution, including:*
- (i) the relevant previous disciplinary record of the authorized institution, including its previous similar contraventions particularly that for which it has been disciplined before;
 - (ii) whether the authorized institution has previously undertaken not to engage in that particular conduct that results in the contravention; and

- (iii) any punishment imposed or regulatory action taken or likely to be taken by other relevant authorities on the same incident.
- (d) *Other relevant factors, including:*
 - (i) whether the MA has issued any guideline in relation to the conduct in question – generally the MA will not take disciplinary action against an authorized institution for conduct that is in line with the guidance which was current at the time of the conduct in question;
 - (ii) what action the MA and/or other relevant authorities have taken in previous similar cases – in general similar cases should be treated consistently;
 - (iii) the amount of any benefit gained or costs avoided by the authorized institution or any of its directors or employees as a result of the contravention; and
 - (iv) as a mitigating factor, whether the authorized institution has promptly, effectively and completely brought the contravention or possible contravention to the attention of the MA.

June 2012
Hong Kong Monetary Authority