

**Bills Committee on
Anti-money Laundering and Counter-terrorist Financing
(Financial Institutions) Bill**

**Further Information on the Provisions Relating to
Supervisory Sanctions**

This note provides further information on the provisions relating to supervisory sanctions under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill (“the Bill”).

Notice for the Imposition of Supervisory Sanctions

2. Clause 22(2) of the Bill requires the relevant authority to inform the financial institution of its decision when exercising its power under clause 21 to impose supervisory sanctions. The clause is modelled on section 198(3) of the Securities and Futures Ordinance (Cap571) (“SFO”). The Securities and Futures Commission (“SFC”) issues “Notice of Decision” to its regulated entities when it decides to impose sanctions provided under sections 194 and 196 of SFO. The exact content and the level of the details set out in the Notice of Decision under section 198 of the SFO depend on the circumstances of each case and will reflect SFC’s findings and decision. Essentially, the Notice of Decision contains SFC’s findings which specify the provision(s) of the code, regulation or law that have been breached; the representations from the person concerned; a detailed response to the representations; SFC’s view on whether and why the conduct in question contravenes the provision(s) in the code, regulation or law, with explanation of the relevant regulatory standards; the decision on penalty and the reasons for such decision and a statement that the person concerned may apply to the Securities and Futures Appeals Tribunal for a review of SFC’s decision.

Maximum Supervisory Fine

3. Under Clause 21(2)(c), the maximum pecuniary penalty that may be ordered by the relevant authority is stated to be an amount not exceeding the greater of \$10,000,000 or three times the amount of the profit gained, or costs avoided by the financial institution as a result of the contravention. At the Bills Committee meeting on 24 January 2011, a Member requested the Administration to consider whether it is necessary to include the profit gained or cost avoided by a third party as a result of the contravention as a factor to be taken into account in determining the maximum level of fine.

4. The purpose for imposing the penalty is disciplinary in nature, which is to prevent non-compliance by the financial institution. Taking into account the profit gained or costs avoided by a third party in determining the maximum penalty would not be fair to the financial institution. In cases where the financial institution has an interest or a share in the profit gained or costs avoided by a third party due to a contravention by the financial institution, this can be captured by clause 21(2)(c)(ii).

Fining Guidelines

5. The SFC Disciplinary Fining Guidelines gazetted pursuant to section 199(1) of SFO on 28 Feb 2003 is enclosed at **Annex** for Members' reference. The purpose of the statutory requirement under SFO for SFC to publish guidelines on how it will make the decisions before it may use its power to impose fines is to ensure the transparency of the criteria upon which the decisions of SFC regarding fines would be based. This was explained in Paper No.8/01 of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 entitled "Securities and Futures Bill Part IX – Discipline, etc".

Registration of Orders to Pay Pecuniary Penalties

6. Clauses 21(5) and 42(5) provide for the registration of orders to pay pecuniary penalties under clauses 21(1) or (4) and 42(1) or (4) in the Court of First Instance. The registration of orders would enable these orders to be enforced by way of the various means of enforcement available to court orders made by the Court of First Instance, including through a writ of execution carried out by bailiffs. This ensures efficient enforcement of the orders. Without such provision, the relevant authority will have to start a legal proceeding to enforce an order if the financial institution fails to pay a pecuniary penalty imposed by the order, which is more costly and time-consuming.

7. Sections 194(5) and 196(5) of SFO provide for similar arrangement to register orders to pay pecuniary penalties in the Court of First Instance. In enforcing SFO, it is the usual practice of SFC to register an order in the Court of First Instance only when the person whom the order requires to pay a penalty fails to pay. The relevant authorities confirm that they will follow the same approach under the Bill.

Financial Services and the Treasury Bureau
26 April 2011

G.N. 1410

SECURITIES AND FUTURES ORDINANCE (Chapter 571)

Pursuant to section 199(1) of the Securities and Futures Ordinance, the Securities and Futures Commission published the SFC Disciplinary Fining Guidelines in the Schedule for information.

28 February 2003

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Schedule

SFC Disciplinary Fining Guidelines

**Securities and Futures Ordinance
Considerations relevant to the level of a disciplinary fine**

These guidelines are made under section 199(1)(a) of the Securities and Futures Ordinance to indicate the manner in which the Securities and Futures Commission (SFC) will perform its function of imposing a fine on a regulated person under section 194(2) or 196(2). Section 199(1)(b) requires the SFC to have regard to these guidelines in performing its function of fining under section 194(2) or 196(2). Section 199(2) sets out some factors that the SFC should take into account in exercising its fining power among other factors that the SFC may consider. These factors are included in the considerations set out below.

Under section 194 or 196 of the Ordinance, the SFC may impose a fine either on its own or together with other disciplinary sanctions. The SFC regards a fine as a more severe sanction than a reprimand (and a public reprimand more severe than a private reprimand). The SFC will not impose a fine if the circumstances of a particular case only warrant a public reprimand. As a matter of policy, the SFC will publicise all fining decisions. This means that the SFC will never impose both a fine and a private reprimand.

When considering whether to impose a fine under section 194(2) or 196(2) and the size of any fine, the SFC will consider all the circumstances of the particular case, including the Specific Considerations described below.

A fine should deter non-compliance with regulatory requirements so as to protect the public.

Although sections 194(2)(ii) and 196(2)(ii) state that one alternative maximum level of fine that can be imposed is three times the profit made or secured, or loss avoided or reduced, the SFC will not automatically link the fine imposed in any particular case with the profit made or secured, or loss avoided or reduced.

The more serious the conduct, the greater the likelihood that the SFC will impose a fine and that the size of the fine will be larger.

In determining the seriousness of conduct, in general, the SFC views some considerations as more important than others. The General Considerations set out below describe conduct that would be generally viewed as more or less serious. In any particular case, the General Considerations should be read together with the Specific Considerations in determining whether or not the SFC will impose a fine and, if so, the amount of the fine.

General considerations

The SFC generally regards the following conduct as more serious:

- conduct that is intentional or reckless
- conduct that damages the integrity of the securities and futures market
- conduct that causes loss to, or imposes costs on, others
- conduct which provides a benefit to the firm or individual engaged in that conduct or any other person.

The SFC generally regards the following conduct as less serious and so generally deserving a lower fine:

- negligent conduct – however, the SFC will impose disciplinary sanctions including fines for negligent conduct in appropriate circumstances
- conduct which only results in a technical breach of a regulatory requirement or principle in that it:
 - + causes little or no damage to market integrity and
 - + causes little or no loss to, or imposes little or no costs on, others

- conduct which produces little or no benefit to the firm or individual engaged in that conduct and their related parties.

These are only general considerations. These considerations together with the other circumstances of each individual case including the Specific Considerations described below will be determinative.

Specific considerations

The SFC will consider all the circumstances of a case, including:

The nature and seriousness of the conduct

- the impact of the conduct on the integrity of the securities and futures market
- whether significant costs have been imposed on, or losses caused to others, especially clients, market users or the investing public generally
- whether the conduct was intentional, reckless or negligent, including whether prior advice was sought on the lawfulness or acceptability of the conduct either by a firm from its advisors or by an individual from his or her supervisors or relevant compliance staff of the firm or group that employs him or her
- the duration and frequency of the conduct
- whether the conduct is widespread in the relevant industry (and if so, for how long) or there are reasonable grounds for believing it to be so widespread
- whether the conduct was engaged in by the firm or individual alone or whether as part of a group and the role the firm or individual played in that group
- whether a breach of fiduciary duty was involved
- in the case of a firm, whether the conduct reveals serious or systematic weaknesses, or both, in respect of the management systems or internal controls in relation to all or part of that firm's business
- whether the SFC has issued any guidance in relation to the conduct in question

The amount of profits accrued or loss avoided

- a firm or individual and related parties should not benefit from the conduct

Other circumstances of the firm or individual

- a fine should not have the likely effect of putting a firm or individual in financial jeopardy. In considering this factor, the SFC will take into account the size and financial resources of the firm or individual. However, if a firm or individual takes deliberate steps to create the false appearance that a fine will place it, him or her in financial jeopardy, eg by transferring assets to third parties, this will be taken into account
- whether a firm or individual brings its, his or her conduct to the SFC's attention in a timely manner. In reviewing this, the SFC will consider whether the firm or individual informs the SFC of all the conduct of which it, he or she is aware or only part, and the manner in which the disclosure is made and the reasons for the disclosure
- the degree of cooperation with the SFC and other competent authorities
- any remedial steps taken since the conduct was identified, including any steps taken to identify whether clients or others have suffered loss and any steps taken to sufficiently compensate those clients or others, any disciplinary action taken by a firm against those involved and any steps taken to ensure that similar conduct does not occur in future
- the previous disciplinary record of the firm or individual, including an individual or firm's previous similar conduct particularly that for which it, he or she has been disciplined before or previous good conduct
- in relation to an individual, his or her experience in the industry and position within the firm that employed him or her

Other relevant factors, including

- what action the SFC has taken in previous similar cases – in general similar cases should be treated consistently
- any punishment imposed or regulatory action taken or likely to be taken by other competent authorities
- result or likely result of any civil action taken or likely to be taken by third parties – successful or likely successful civil claims may reduce the part of a fine, if any, that is intended to stop a person benefiting from their conduct.