1 June 2023

These guidelines are made under section 53ZSS(1) of Part 5B of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Ordinance) to indicate the manner in which the Securities and Futures Commission (SFC) proposes to exercise the disciplinary power to impose a pecuniary penalty (fine) on a regulated person under section 53ZSP(3)(c). Section 53ZSS(3) requires the SFC to have regard to these guidelines in exercising its power of fining under section 53ZSP(3)(c). Factors that the SFC proposes to take into account in exercising its fining power are included in the considerations set out below.

Under section 53ZSP of the Ordinance, where a regulated person is, or was at any time, guilty of "misconduct", or the SFC is of the opinion that a regulated person is or was not a fit and proper person to be or to remain the same type of regulated person, the SFC may, either on its own or together with other disciplinary sanctions, impose a fine up to a maximum of HK$10 million or three times of the profit gained or loss avoided as a result of the misconduct or other conduct which leads the SFC to form the opinion, whichever is the greater.

"Misconduct" is defined in section 53ZSR of the Ordinance and includes a contravention of a material requirement[1], or an act or omission relating to the provision of any VA service[2] by a regulated person which, in the opinion of the SFC, is or is likely to be prejudicial to the interests of the investing public or to the public interest.

Although section 53ZSP(3)(c)(ii) states that one alternative maximum level of fine that can be imposed is three times the profit gained or loss avoided, the SFC will not automatically link the fine imposed in any particular case with the profit gained or loss avoided.

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 cases where the "misconduct" attracts multiple pecuniary penalties, the SFC will look at the totality of the penalties to ensure it is not disproportionate to the gravity of the conduct in question.

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 brings the reputation of Hong Kong as an international financial centre into disrepute
- conduct that facilitates or increases the risks of money laundering or terrorist financing
- conduct that damages market integrity
- 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/or the reputation of Hong Kong as an international financial centre; 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 market integrity and/or the reputation of Hong Kong as an international financial centre
- 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
- whether the conduct has facilitated or occasioned any offence or whether an offence is attributable to the conduct

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[3]
- any remedial steps taken since the conduct was identified, including any steps taken to identify whether clients or others have suffered a 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