

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 (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(2) or 196(2) 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 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 the 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 193 of the Ordinance and includes an act or omission relating to the carrying on of any regulated activity for which a person is licensed or registered 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.

“Misconduct” may, depending on its nature and characteristics, consist of a number of culpable acts or culpable omissions. Even if they are of the same generic nature, they may attract multiple penalties.¹

The SFC may use the number of persons affected by the misconduct as the multiplier in assessing the appropriate level of pecuniary penalty. For example, where a regulated person has contravened the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission resulting in a financial product being mis-sold to three persons, the SFC may impose a fine not exceeding HK\$10 million for each affected person (i.e. HK\$10 million x 3 culpable

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 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

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, e.g. 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 authorities³

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

