

Guideline on Exercising Power to Order a Pecuniary Penalty

A Guideline issued by the Monetary Authority under Section 203C(1) of the Securities and Futures Ordinance (Chapter 571) in respect of the OTC Derivatives Regime

Introduction

1. Under section 203A of the Securities and Futures Ordinance (Chapter 571) (the “Ordinance”), the Monetary Authority (“MA”) may order a pecuniary penalty either on its own or together with other disciplinary actions in respect of a person subject to disciplinary action¹ in relation to a contravention of an obligation² by an authorized financial institution or an approved money broker. Section 203C(1) of the Ordinance requires the MA to publish guidelines indicating the manner in which he proposes to exercise the disciplinary power to order a pecuniary penalty under section 203A(1)(c) of the Ordinance and section 203C(4)(b) of the Ordinance requires the MA to have regard to the published guidelines when exercising such power.
2. This guideline is published under section 203C(1) of the Ordinance to indicate the manner in which the MA proposes to exercise the disciplinary power to order a pecuniary penalty under section 203A(1)(c) of the Ordinance. The MA will have regard to this guideline when exercising the disciplinary power under section 203A(1)(c) of the Ordinance.

¹ Section 203A(5) states:

“For the purposes of subsection (1), the persons who are subject to disciplinary action are –

- (a) a person that is, or was, an authorized financial institution at the time of a contravention;
- (b) in relation to a contravention by a person referred to in paragraph (a), a person who is, or was, involved in the management of the business of OTC derivative transactions of the authorized financial institution at the time of the contravention;
- (c) a person that is, or was, an approved money broker at the time of a contravention; and
- (d) in relation to a contravention by a person referred to in paragraph (c), a person who is, or was, involved in the management of the business of OTC derivative transactions of the approved money broker at the time of the contravention.”

² Section 203A(6) states:

“obligation means the reporting obligation, clearing obligation, trading obligation or record keeping obligation.”

Factors to be considered in the exercise of the MA's power to order a pecuniary penalty

3. As a matter of policy, the MA will usually publicise all his decisions to order a pecuniary penalty.
4. When considering whether to order a person subject to disciplinary action to pay a pecuniary penalty and the amount of the penalty, the MA will consider all of the circumstances of a particular case. The MA must take into account the factors set out in paragraph 9 below and will take into account those factors set out in paragraph 10 below that are relevant to a particular case.
5. An order that a person subject to disciplinary action pay a pecuniary penalty should act as a deterrent to the authorized financial institution or approved money broker from contravening an obligation and should also act as a general deterrent to other authorized financial institutions or approved money brokers from contravening the same or other obligations.
6. Although section 203A(1)(c)(ii) states that one alternative maximum level of fine that can be ordered is three times the amount of the profit gained, or loss avoided, by the person subject to disciplinary action as a result of the contravention in question, the MA will not automatically link his order of a pecuniary penalty in a particular case with the profit gained, or loss avoided.
7. An order that a person subject to disciplinary action pay a pecuniary penalty should not have the likely effect of putting the person subject to disciplinary action in financial jeopardy. In considering this factor, the MA will take into account the size and financial resources of the person subject to disciplinary action.
8. The more serious the contravention, the greater the likelihood that the MA will order a pecuniary penalty and the larger the size of the pecuniary penalty.
9. The MA must take into account the following factors when exercising the power to order the payment of a pecuniary penalty:
 - (i) whether the conduct of the person subject to disciplinary action in respect of whom the power is being exercised was intentional, reckless or negligent;

- (ii) whether the conduct of that person subject to disciplinary action damaged the integrity of the securities and futures market or was potentially damaging or detrimental to the integrity of the securities and futures market or the financial stability of Hong Kong;
 - (iii) whether the conduct of that person subject to disciplinary action caused loss to, or imposed costs on, any other person; and
 - (iv) whether the conduct of that person subject to disciplinary action resulted in a benefit to that person subject to disciplinary action or any other person.
10. The MA will also take into account the following factors that are relevant to a particular case. 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.
- (i) Factors related to the nature, seriousness and impact of the contravention:
 - (1) the duration and frequency of the contraventions;
 - (2) the amount or extent of any loss caused to, or costs imposed on, any other person;
 - (3) the amount or extent of any benefit gained, or loss avoided, by the person subject to disciplinary action or any other person;
 - (4) whether the conduct was committed by the person subject to disciplinary action alone or whether as part of a group and the role the person subject to disciplinary action played in that group; and
 - (5) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls in respect of the OTC derivative transactions of the authorized financial institution or approved money broker.
 - (ii) The conduct of the person subject to disciplinary action after the contravention:
 - (1) any remedial steps taken since the contravention or the possible contravention was identified, including any steps taken to identify whether any persons have suffered loss and any steps taken to sufficiently compensate them, any action taken by the person subject to disciplinary action against those involved and any steps taken to ensure that similar contraventions will not occur in the future; and

- (2) the degree of cooperation with the MA and other competent authorities and/or law enforcement agencies during the investigation of the contravention.
- (iii) The previous disciplinary record and compliance history of the person subject to disciplinary action:
- (1) the relevant previous disciplinary record of the person subject to disciplinary action, including previous similar contraventions, particularly those for which the person subject to disciplinary action has been disciplined before; and
 - (2) any punishment imposed or regulatory action taken or likely to be taken by other competent authorities for the same incident.
- (iv) Other relevant factors:
- (1) whether the MA has issued any guidelines in relation to the conduct in question – generally the MA will not take disciplinary action against a person subject to disciplinary action for conduct that is in line with the guidelines which were current at the time of the conduct in question;
 - (2) what action the MA and/or other competent authorities have taken in previous similar cases – in general, similar cases should be treated consistently;
 - (3) 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 widespread;
 - (4) in relation to a person subject to disciplinary action who is an individual, his or her experience in the business of OTC derivative transactions; and
 - (5) as a mitigating factor, whether the person subject to disciplinary action has promptly, effectively and completely brought the contravention or possible contravention to the attention of the MA and the reasons for the disclosure.