



CUSTOMS AND EXCISE DEPARTMENT

Disciplinary Fining Guideline

Published under section 23(1) in Part 4 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, Chapter 615

May 2018

Disciplinary Fining Guideline

Introduction

1. Under section 21 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance ('AMLO'), Chapter 615, the Commissioner of Customs and Excise ('CCE') may impose a pecuniary penalty either on its own or together with other disciplinary sanctions on a money service operator ('MSO') if the MSO contravenes a specified provision as defined by section 5(11) of the AMLO. Section 23(1) of the AMLO requires the CCE 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 CCE to have regard to such guidelines in exercising such power.
2. This guideline is published under section 23(1) of the AMLO to indicate the manner in which the CCE will exercise the fining power under section 21(2)(c). The CCE will have regard to this guideline when exercising the fining power under section 21(2)(c) of the AMLO.

Factors to be considered in exercise of CCE's fining power

3. As a matter of policy, the CCE 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 CCE 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 CCE should act as a deterrent to the MSO concerned from contravening a specified provision as defined by section 5(11) of the AMLO and should also act as a general deterrent to other MSOs 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 CCE 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 MSO concerned in financial jeopardy. In considering this factor, the CCE will take into account the size and financial resources of the MSO.
8. The more serious the contravention, the greater the likelihood that the CCE will impose a pecuniary penalty and that the size of the penalty will be larger.
9. In determining the seriousness of a contravention, the CCE 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 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 MSO alone or whether as part of a group and the role the MSO 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 MSO'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 MSO after the contravention, including:

- (i) whether the MSO 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 MSO against those involved and any steps taken to ensure that similar contraventions will not occur in future;
- (iii) the degree of cooperation with the CCE, other relevant authorities and/or law enforcement agencies during the investigation of the contravention; and
- (iv) the likelihood that the MSO 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 MSO, including:

- (i) the relevant previous disciplinary record of the MSO, including its previous similar contraventions particularly that for which it has been disciplined before;

- (ii) whether the MSO 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 CCE has issued any guideline in relation to the conduct in question – generally the CCE will not take disciplinary action against an MSO for conduct that is in line with the guidance which was current at the time of the conduct in question;
- (ii) what action the CCE 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 MSO or any of its directors or employees as a result of the contravention; and
- (iv) as a mitigating factor, whether the MSO has promptly, effectively and completely brought the contravention or possible contravention to the attention of the CCE.

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Commissioner of Customs and Excise