



# **THE BERMUDA MONETARY AUTHORITY**

## **THE PROCEEDS OF CRIME REGULATIONS (SUPERVISION AND ENFORCEMENT) ACT 2008**

# **STATEMENT OF PRINCIPLES**

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## **Statement of Principles**

### **1. Introduction**

Section 7 of the Proceeds of Crime Regulations (Supervision and Enforcement) Act 2008 (the “Act”) requires the Authority to publish a statement of principles in accordance with which it is acting or proposing to act:

- (a) in exercising its power to cancel the registration of a non-licensed person under section 12;
- (b) in exercising its powers in relation to AML/ATF regulated financial institutions to obtain information, to require the attendance of persons and to require production of documents under sections 16 to 18;
- (c) in exercising its powers—
  - (i) to impose penalties against AML/ATF regulated financial institutions under section 20; and
  - (ii) to publish decisions to do so under section 21; and
- (d) in applying any amounts paid to it by way of penalties under Chapter 4 in accordance with the duty in section 24(3).

### **2. Enforcement Measures: General**

- 2.1 Where the Authority in the course of its supervision identifies breaches of the AML/ATF Regulations by an AML/ATF regulated financial institution, (“institution”) the Authority would normally seek remedial action by the institution before resorting to the use of its enforcement powers under the Act. The Authority would work with an institution to assist it in implementing corrective measures and would give advice in relation to any perceived weaknesses in its systems and controls. In circumstances where such actions fail to remedy identified deficiencies or where the alleged breaches are so serious as to warrant the immediate exercise of enforcement powers, then the Authority would not hesitate to do so.

2.2 The powers at the disposal of the Authority are the power to cancel the registration of a non-licensed person and the power to levy a civil penalty on all institutions.

### 3. **Cancellation of Registration of a Non-Licensed Person**

3.1 The Authority recognizes that cancellation of registration is a very serious matter for a non-licensed person. The Authority would not lightly embark on such a course of action, except in cases where the breach is so serious as to warrant the closure of a business. An example would be a case where a business falling within a high risk category has no effective AML/ATF controls thereby presenting a high risk of its being used for money laundering and terrorist financing. Another would be a business that is found to have been established as a front for money laundering operations and is not otherwise serving any legitimate purposes. A business may also be at risk of having its registration cancelled if, having been found to be in serious breach of the Regulations, it pays no heed to Authority requests for remedial action but deliberately continues to flout the Regulations. What may tip the balance in favour of cancellation of its registration would be the risk it presents in relation to money laundering or terrorist financing.

3.2 The Authority is required to follow the procedures laid out at Section 13 of the Act before it could cancel the registration of a non-licensed person. These provide for the giving of a notice to a non-licensed person of its intention to cancel the registration, the reasons for cancellation and the non-licensed person's right to make representations to the Authority about the proposed cancellation. If, having considered any representations, the Authority decides to go ahead and cancel registration, it would give the institution concerned notice of its decision to cancel, its reasons, and the right of appeal to the appeal tribunal.

### 4. **Civil Penalties**

4.1 In relation to the exercise of its powers to impose civil penalties for specified breaches of the Regulations, the Authority is authorised to levy a maximum fine of \$500,000 but the

circumstances in which the maximum amount would be levied would be rare and exceptional.

4.2 The Authority will consider all the circumstances of a suspected breach when determining whether or not to impose a fine. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive and not all of these factors may be applicable in a particular case; and there may be other factors, not listed, that are relevant.

**5. Factors relevant to a decision to impose a penalty**

5.1 The factors that the Authority will take into account in determining whether or not to impose a fine include the following:

- (1) The nature, seriousness and impact of the suspected breach, including:
  - (a) whether the breach was deliberate or reckless;
  - (b) the duration and frequency of the breach;
  - (c) whether the breach reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of an institution's business;
  - (d) the nature and extent of any money laundering or terrorist financing facilitated, occasioned or otherwise attributable to the breach; and
  - (e) whether there are a number of smaller issues, which individually may not justify enforcement action, but which do so when taken collectively.
  
- (2) The conduct of the institution after the breach, including:
  - (a) the degree of co-operation the institution showed during the investigation of the breach;
  - (b) any remedial steps the institution has taken in respect of the breach;
  - (c) the likelihood that the same type of breach (whether on the part of the institution under investigation or others) will recur if no action is taken;
  - (d) whether the institution concerned has complied with any requirements of the Authority; and

- (e) the nature and extent of any false or inaccurate information given by the institution and whether the information appears to have been given in an attempt to knowingly mislead the Authority.
- (3) The compliance history of the institution including:
    - (a) whether the Authority has taken any previous action resulting in adverse findings against the institution;
    - (b) whether the Authority has previously requested the institution to take remedial action, and the extent to which such action has been taken; and
    - (c) whether the institution has previously undertaken not to do a particular act or engage in particular behaviour;
  - (4) Conduct consistent with the Authority’s guidance. The Authority will not take action against an institution for conduct that it considers to be consistent with guidance or other materials published by the Authority which was current at the time of the conduct in question.
  - (5) Action taken by the Authority in previous similar cases.
  - (6) Action taken by other regulatory authorities. Where other regulatory authorities propose to take action in respect of a breach which is under consideration by the Authority, the Authority will consider whether the other authority's action would be adequate to address the Authority’s concerns, or whether it would be appropriate for the Authority to take its own action.

**6. Factors relevant to a decision on the amount of the fine**

- 6.1 Any fine imposed by the Authority must be appropriate. Section 20 of the Act defines this to mean “effective, proportionate and dissuasive”. The Authority will consider all the relevant circumstances of a case when it determines the level of a financial penalty.
- 6.2 The Authority will not apply a tariff of penalties for different kinds of breach. This is because there will be very few cases in which all the circumstances of the case are essentially the same and because of the wide range of breaches in respect of which the Authority may impose a financial penalty. The Authority considers that, in general, the

use of a tariff for particular breaches would inhibit the flexible and proportionate use of its powers.

6.3 The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on institutions. The list of factors outlined is not exhaustive and not all of these factors may be relevant in a particular case, and there may be other factors, not included below that are relevant.

(1) *Deterrence*. When determining the appropriate level of penalty, the Authority will have regard to the principal purpose for which it imposes a financial penalty, namely to encourage a high degree of compliance with the Regulations and deterring persons from committing breaches.

(2) *The nature, seriousness and impact of the breach in question*. The Authority will consider the seriousness of the breach in relation to the nature of the regulation breached.

The following considerations are among those that may be relevant:

- (a) the duration and frequency of the breach;
- (b) whether the breach revealed serious or systemic weaknesses in the institution's procedures or of the management systems or internal controls relating to all or part of an institution's business;
- (c) the nature and extent of any money laundering or terrorist financing facilitated, occasioned or otherwise attributable to the breach.

(3) *The extent to which the breach was deliberate or reckless*. The Authority will regard as more serious a breach which is deliberately or recklessly committed. The matters to which the Authority may have regard in determining whether a breach was deliberate or reckless includes the following:

- (a) whether the breach was intentional, in that the institution intended or foresaw the potential or actual consequences of its actions;
- (b) where the institution has not followed its own internal procedures and/or Authority guidance, the reasons for not doing so; and
- (c) whether the institution has given no apparent consideration to the consequences of the behaviour that constitutes the breach.

(4) *Whether the person on whom the penalty is to be imposed is an individual.* When determining the amount of a financial penalty to be imposed on an individual operating as a sole trader, the Authority will take into account that an individual will not always have the resources of a body corporate; that enforcement action may have a greater impact on an individual; and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The Authority will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

(5) *The size, financial resources and other circumstances of the institution on whom the penalty is to be imposed:*

- (a) the Authority may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the institution were to pay the level of penalty appropriate for the particular breach. The Authority regards these factors as matters to be taken into account in determining the level of a financial penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty;
- (b) the purpose of a penalty is not to render an institution insolvent or to threaten the institution's solvency; where this would be a material consideration, the Authority will consider, having regard to all other factors, whether a lower penalty would be appropriate; this is most likely to be relevant to an institution with lower financial resources; but if an institution reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the Authority will take account of those assets when determining the amount of a penalty;
- (c) the degree of seriousness of a breach may be linked to the size of the institution; for example, a systemic failure in a large institution with a high volume of business, over a protracted period may be more serious than breaches over similar periods in an institution with a smaller volume of business;
- (d) the size and resources of an institution may also be relevant in relation to mitigation, in particular what steps the institution took after the breach had been identified; the Authority will take into account what it is reasonable to expect from an institution in relation to its size and resources, and factors such as what proportion of an institution's resources were used to resolve a problem.

(6) *Difficulty of detecting the breach.* An institution's incentive to commit a breach may be greater where the breach is, by its nature, harder to detect; the Authority may, therefore, impose a higher penalty where it considers that an institution committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the behaviour in question.

(7) *Conduct following the breach.* The Authority may take the following factors into account:

- (a) the degree of co-operation the institution showed during the investigation of the breach by the Authority, or any other regulatory authority; and where an institution has fully co-operated with the Authority's investigation, this will be a factor tending to reduce the level of financial penalty;
- (b) any remedial steps taken since the breach was identified, including whether these were taken on the institution's own initiative or that of the Authority or another regulatory authority;
- (c) whether the institution concerned has complied with any recommendations made by the Authority relating to the breach.

(8) *Compliance history of the institution.* The Authority may take the previous compliance record and general compliance history of the institution into account. This will include:

- (a) whether the Authority has taken any previous enforcement action against the institution;
- (b) whether the institution has previously undertaken not to do a particular act or engage in particular behaviour;
- (c) whether the Authority has previously requested an institution to take remedial action and the extent to which that action has been taken;
- (d) the general compliance history of the institution, including whether the Authority has previously brought to the institution's attention, issues similar or related to the conduct that constitutes the breach in respect of which the financial penalty is imposed; an institution's compliance history could lead to the Authority imposing a higher penalty, for example where the institution has committed similar breaches in the past; in assessing the relevance of an

institution's compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

(9) *Other action taken by the Authority.* Action that the Authority has taken in relation to similar breaches by other institutions may be taken into account; as stated, the Authority does not operate a tariff system; however, the Authority will seek to apply a consistent approach to determining the appropriate level of financial penalty.

(10) *Action taken by other regulatory authorities.* Considerations could include, for example:

- (a) action taken or to be taken against an institution by other regulatory authorities which may be relevant where that action relates to the breach in question;
- (b) the degree to which any remedial steps, required by other regulatory authorities, have been taken (and whether taken promptly).

(11) *Bermuda Monetary Authority guidance and other published materials:*

- (a) an institution does not commit a breach by not following the Authority's guidance; however, where a breach has otherwise been established, the fact that guidance had raised relevant concerns may inform the seriousness with which the breach is to be regarded by the Authority when determining the level of penalty;
- (b) the Authority will consider the nature of the guidance when deciding whether it is relevant to the level of penalty and, if it is, what weight to give it in relation to other relevant factors.

## **7. Relationship Between Prudential and AML/ATF Enforcement Measures**

7.1 As to the relationship between prudential enforcement measures under the regulatory acts and enforcement measures under this Act, where a breach of the Regulations does not in the opinion of the Authority give rise to prudential concerns, the Authority would exercise its powers under this Act to impose a fine, without taking any further action under its prudential powers in the regulatory acts. But where a breach of the Regulations does give rise to prudential concerns, the Authority could take action under both the regulatory acts and this Act. This would be the case for example where the Authority

concludes that there has been a failure in the AML/ATF systems and controls, and that such failure has brought into question the fitness and propriety of the senior manager concerned. In these circumstances the Authority could both fine the institution for breaches of the Regulations under this Act, and take regulatory action by seeking the removal of the senior manager under the regulatory acts.

7.2 Breaches of the Regulations could attract civil or criminal penalties. It is the expectation of the Authority that the normal enforcement action for breaches of the Regulations would be by way of civil penalties, and not by way of criminal penalties. A determining factor may be whether breaches of the Regulations are associated with any criminal conduct, such as fraud, money laundering or terrorist financing.

## **8. Publication of Decision**

8.1 Under section 21 of the Act, the Authority is empowered to publish its decision to impose a civil penalty on an institution. In the event that the Authority decides to publish such a decision, it would notify the institution in question of this before publication.

8.2 If the Authority decides to publish its decision, it would publish its decision on its website and, if appropriate, in the Gazette.

8.3 The Authority will publish the following particulars of the decision-

- (a) the name of the institution concerned;
- (b) the provisions of the Regulations that have been breached;
- (c) a summary of the facts of the breach as they appear in the decision notice;
- (d) the relevant dates; and
- (e) the amount of the penalty.

8.4 In exercising its discretion to publish a decision to impose a penalty, the Authority will have regard, amongst other things, to the matters set out in paragraph 8.5. But in all cases the Authority will consider whether it is in the public interest not to publish its decision.

- 8.5 Those matters are -
- (a) the deterrent effect of publication;
  - (b) the protection of the reputation of Bermuda as a sound and well regulated financial centre;
  - (c) the protection of clients and potential clients of the institution concerned; and
  - (d) the extent to which publication of the decision will assist and inform institutions and the public generally about the relative gravity of the conduct and the penalty felt appropriate for that conduct.

**9. Multi jurisdiction – enforcement action**

- 9.1 Under regulation 12 of the Regulations, a financial institution is required to ensure that its overseas branches and subsidiaries apply, to the extent permitted by the country or territory where the branch is located, measures at least equivalent to the measures imposed by the Regulations with regard to customer due diligence, ongoing monitoring and record keeping. Where an institution breaches these provisions a breach may result not only in action by the Authority, but also action by overseas regulatory authorities or enforcement agencies. The Authority, when deciding how to proceed in such cases, will look at the circumstances of the case and consider, in the light of the regulatory action being taken, whether it is appropriate for it to take action to address the breach. The Authority will have regard to all the circumstances of the case including whether the overseas regulatory authority has adequate powers to address the breach in question or whether it would be appropriate for the Authority to take its own action.
- 9.2 In some cases, it may be appropriate for both the Authority and an overseas regulatory authority to be involved, and for both to take action in a particular case arising from the same facts. For example, a breach of the Regulations so serious as to justify the Authority cancelling the registration of a non-licensed person or revoking the license of a licensed person. In such cases, the Authority will work with the overseas regulatory authority to ensure that cases are dealt with efficiently and fairly, under operating arrangements in place (if any) between the Authority and the overseas authority.

10. **Exercise of powers to obtain information, right of entry and entry to premises under warrant**
- 10.1 Supervision involves the receipt and analysis of a variety of regular and ad hoc financial and other information from institutions. The Authority's standard reporting arrangements are kept under review, agreed with institutions from time to time and amended in the light of developments. Such reports and information are routinely provided by institutions on a voluntary basis.
- 10.2 Certain matters are, however, the subject of specific statutory requirements. Section 16 of the Act provides formal powers for the Authority by notice in writing to require from an institution, such information as it may reasonably require for the performance of its functions under the Act, to produce documents and for its officers to attend before the Authority to answer questions. Formal use of such powers is infrequent as the Authority is able generally to rely on the willingness of institutions to provide information voluntarily. In particular circumstances, however, the Authority must consider whether to make use of these powers – notably, for example, where it has material concerns about the accuracy or completeness of information provided by an institution.
- 10.3 Section 17 of the Act provides the Authority with specific powers to enter the business premises of institutions for the purpose of inspecting the premises, observing the carrying on of business, inspecting and taking copies of any recorded information and for requiring any person on the premises to provide an explanation of any recorded information. These powers enable the Authority to do spot checks on premises of institutions that are carrying on business in high risk areas such as wire transmission of funds.
- 10.4 Under section 18 of the Act, the Authority has the power to apply to a Magistrate for a warrant to enter premises where documents or information is held. The Authority may apply for a search warrant where it has reasonable grounds for believing that if an institution were required to provide information or produce documents, the institution

would fail to comply with such a request. The Authority may also apply for such a warrant when it believes that if such a request were made that information or documentation would be destroyed.

**11. Applying Penalty Amounts Against Cost of AML/ATF Supervision**

- 11.1 The Authority's budget is met from fees based on institutions it regulates. The Authority does not receive any funds from the public purse. The amount each institution pays is determined according to its size and the type of business it undertakes.
- 11.2 Further, under section 24 of the Act, institutions are required to pay to the Authority penalties levied on them for breaches of the Regulations and the Authority is required to apply such amount of penalties towards the cost of supervising institutions and securing their compliance with AML/ATF Regulations.
- 11.2 Monies received in respect of any penalties levied on institutions will be offset against the costs of supervising them.
- 11.3 If the total penalties received exceed the costs of supervision in any year, then the excess amount will be carried forward and offset against the costs of the next year, and, if relevant, any subsequent year.