



BERMUDA MONETARY AUTHORITY

EXCHANGE CONTROL REGULATIONS ENFORCEMENT GUIDE

Guidance on the Exercise of Enforcement Powers with the Exchange Control
Regulations 1973

June 2023

Issued by the Controller of Foreign Exchange
in conjunction with the Ministry of Finance

TABLE OF CONTENTS

GLOSSARY OF TERMS	3
PREFACE	4
1 THE PRINCIPLES OF ENFORCEMENT	5
2 WHEN WILL ENFORCEMENT ACTION BE CONSIDERED?	7
2.1 Referral to Enforcement by the Controller	7
3 THE ENFORCEMENT DECISION-MAKING PROCESS	9
3.1 Action following a Referral to the Enforcement Team	9
3.2 Information Gathering and Formal Investigations	10
3.3 The Decision to take Enforcement Action	10
3.4 Delegation of Powers	13
3.5 Notice to the Filer	13
4 ENFORCEMENT OPTIONS	17
4.1 Imposition of directions	17
4.2 Imposition of a Civil Penalty	18
4.3 Referral to Police	18
5 APPEALS	19
6 ANNEX A: Process for arriving at amount of civil penalty by the Authority	20
6.1 Process Overview	20
6.2 Discretionary Civil Penalties – Ranges (per breach)	22

GLOSSARY OF TERMS

Authority	The Bermuda Monetary Authority
Controller	Controller of Foreign Exchange as the person designated by the Authority under the BMA Act in accordance with the Exchange Control Act 1972
BMA Act	The Bermuda Monetary Authority Act 1969
Court	The Supreme Court
Enforcement Team	The Enforcement Team within the Legal Services and Enforcement Department of the Authority, which is separate from the Authority's supervisory departments
ECR	Exchange Control Regulations 1973
Individual	A natural person
ECR Guide	Exchange Control Regulations Enforcement Guide 2023
Filer	Relevant individual, company, partnership etc. submitting required notifications/filings under the ECR

PREFACE

The purpose of this Exchange Control Regulations 1973 Enforcement Guide is to:

- Provide guidance under the provisions of Regulation 49B (5) of the ECR with respect to the manner in which the Authority, acting in its capacity as Controller, will exercise its formal enforcement powers¹
- Explain when and in what circumstances the Authority will consider taking enforcement action
- Explain how enforcement action is taken by the Authority
- Ensure consistent, proportionate, effective and dissuasive enforcement outcomes

Part 1 of the ECR Guide sets out the principles on the use of enforcement powers.

Parts 2-6 constitute guidance on the use of enforcement powers.

The ECR Guide is of general applicability and its contents will be taken into consideration by the Authority at all stages when it is considering enforcement action. The Authority's use of its enforcement powers will vary on a case-by-case basis, taking into account legal and factual context. The ECR Guide will not apply where provisions of an ECR address matters other than enforcement.

This ECR Guide takes effect from the date of publication.

¹ All references to the Authority in the ECR Guide shall be read and construed as the Authority acting in its capacity as the Controller pursuant to the provisions of the Exchange Control Act 1972

1 THE PRINCIPLES OF ENFORCEMENT

‘Enforcement’ is the use of formal powers to compel compliance or to penalise non-compliance with statutory or regulatory requirements. Enforcement action that is proportionate, effective and dissuasive enhances the international reputation of Bermuda and thereby contributes to making Bermuda a desirable location in which to do business.

Formal enforcement powers are provided for by the ECR. The Authority will exercise those formal enforcement powers in accordance with the principles set out in Figure 1, below. The overriding consideration is protecting Bermuda’s foreign exchange reserves, promoting the jurisdiction’s economic welfare through compliance with the ECR and, consequently, protecting the reputation of Bermuda as a well-regulated jurisdiction. The Authority will always take enforcement action, where it is necessary to do so, to protect those interests. Accordingly, the Authority expects that all Filers will be compliant with all of their ECR obligations.

The Authority strives to strengthen and improve its enforcement policies and procedures continuously. Enforcement priorities will usually be set out each year in the Authority’s business plan.

Figure 1: The Principles of Enforcement

The Principles of Enforcement

- Enforcement action will be taken with a view to protecting the foreign exchange reserves of Bermuda, promoting the jurisdiction's economic welfare through compliance with the ECR and, consequently, protecting the reputation of Bermuda as a well-regulated financial centre
- The Authority shall exercise its enforcement powers on a risk-based basis, prioritising adverse conduct that poses or could result in the biggest threats to Bermuda
- The Authority will exercise its enforcement powers in service to its statutory objectives
- Enforcement action will be taken to prevent unauthorised activity
- Enforcement action will be taken where it is necessary to prevent fraud, money laundering, terrorist financing or other criminal activity
- The Authority will exercise its enforcement powers in a manner which is proportionate and responsive to the breach
- The Authority will exercise its enforcement powers using processes that are transparent, efficient and fair
- The Authority will exercise its enforcement powers in a consistent manner
- The Authority will exercise its enforcement powers to effect change in behaviour, encourage future compliance and remedy harm

2 WHEN WILL ENFORCEMENT ACTION BE CONSIDERED?

The Authority may not apply its enforcement powers to address every issue of non-compliance with an ECR obligation. Where a Filer has failed to comply with a statutory requirement, it may be appropriate to respond without the need for formal enforcement action. The proactive monitoring of compliance with the ECR and the open, cooperative relationship that exists between them and the Authority will often result in a positive outcome without the need to invoke the more formal use of enforcement powers. Nevertheless, in those cases, the Authority will expect the Filer to act promptly in taking the necessary remedial action to deal with the Authority's concerns. If the Filer fails to adequately do this, the Controller will refer the matter to Enforcement Team.

2.1 Referral to Enforcement by the Controller

A failure by a Filer to comply with the requirements of Part IV of the ECR will be referred to the Enforcement Team. Regarding other matters, if the issue is potentially serious, the Controller will refer the matter to the Enforcement Team for consideration of formal enforcement action. A matter will be potentially serious if it clearly indicates non-compliance with the ECR and, therefore, creates a risk of harm to the reputation of Bermuda as a well-regulated financial centre. In cases of uncertainty, the Controller will discuss the issue with the Director of Legal Services and Enforcement and the Deputy Director of Enforcement. If the matter is referred to the Enforcement Team, the Controller and enforcement officers will work collaboratively and agree upon the most appropriate course of action.

A referral to the Enforcement Team does not operate to suspend on-going filing requirements under the ECR. Enforcement action and ongoing ECR compliance serve different purposes and operate independently of each other. ECR compliance looks at the current conduct of the Filer and the Controller will expect to see that any non-compliance will be remediated within a reasonable time period irrespective of any formal enforcement action that may be taken.²

² What is 'reasonable' will depend on all of the circumstances. Some remedial actions are straightforward and can be completed within a matter of weeks. Others may require significant systemic changes and will require a much longer time to complete.

Enforcement action, however, is designed to address specific failures and to mark them with effective and dissuasive action. Effective remediation by a filer does not preclude the Authority from taking enforcement action with respect to the original failures. Proactive and effective remediation, however, may be a mitigating factor to be considered as part of the enforcement process.

3 THE ENFORCEMENT DECISION-MAKING PROCESS

3.1 Action following a Referral to the Enforcement Team

As set out above, the Controller will refer identified ECR non-compliance issues to the Enforcement Team, a stand-alone group of lawyers and investigators that manages enforcement actions. Although most issues will be identified as part of the usual ECR supervisory process, matters can also come to light as a result of a referral from outside of the Authority, such as from the Registrar of Companies, Financial Intelligence Agency or the Bermuda Police Service.

Following a referral to the Enforcement Team, the Deputy Director of Enforcement will review the available material and consider the following:

- a) Whether there is a *prima facie* failure to comply with an ECR requirement, taking into account relevant statutory obligations and requirements and any associated guidance;
- b) The materiality (gravity) of the breach and its actual or potential impact; and
- c) Whether the matter fits within the Authority's enforcement and strategic priorities.

When a decision has been made to escalate a matter for possible enforcement action, the Enforcement Team will usually advise the Filer of the referral in any correspondence on the matter. If, after referral to the Enforcement Team, a decision is made not to take enforcement action, this will also be communicated to the Filer. Once an issue has been referred to the Enforcement Team and before a final decision is made as to whether enforcement action will be taken, the Authority will usually maintain communication with the Filer. This allows continuous cooperation, which can lead to proactive resolution or reduction of the proposed enforcement actions.

Where there is evidence of criminal conduct, the matter will be referred to the Bermuda Police Service for action. Care is taken in such circumstances to ensure that any action taken by the Authority does not prejudice any criminal investigation.

3.2 Information Gathering and Formal Investigations

In some instances, there may be a need to conduct further enquiries before determining the appropriate response to a suspected breach. If the available information is insufficient for the Authority's purposes, there are various information gathering powers available that can be used either before or after a referral has been made to the Enforcement Team. This process will usually be managed by the Enforcement Team.

There are formal powers in the ECR and in the BMA Act for the Authority to require by written notice the production of such information and documents as it may reasonably require for the performance of its functions, to produce documents. Failure to comply with these provisions without reasonable excuse constitutes a criminal offence.

3.3 The Decision to take Enforcement Action

The Authority will consider all the relevant facts and circumstances of a matter referred for consideration of an enforcement action. An assessment will be made on a case-by-case basis but will also consider the wider context. Figure 3 sets out a non-exhaustive list of the factors that the Authority will consider in determining whether to take enforcement action and in selecting the appropriate outcome. Not all of the factors listed will be relevant to every case and there may be other considerations which are not mentioned in the list, but which may be relevant to a particular case. The Authority's assessment will include consideration of whether using alternative tools is more appropriate given the overall circumstances of the Filer itself, the conduct under review and the wider context.

Figure 3: Examples of factors taken into consideration by the Authority in determining whether to take enforcement action

1. THE NATURE, SERIOUSNESS AND IMPACT OF THE BREACH

- The importance of the regulatory provision or standard of conduct breached, and the extent to which the conduct under review breached the provision or fell below the standard
- Whether there is a risk of money laundering, terrorist financing or financial crime
- Whether the breach was deliberate, dishonest, reckless, negligent or inadvertent
- Whether the breach is symptomatic of serious or systemic weaknesses in management systems or internal controls relating to all or part of a Filer's business
- The duration, complexity and frequency of the breach, and whether the Filer has enjoyed any consequential benefit
- The impact of the breach or conduct and risks created by it, including the impact on customers or stakeholders and on the reputation of Bermuda as a sound financial centre
- A number of smaller issues, which taken individually may not warrant enforcement action, but which taken collectively may warrant action

2. THE CONDUCT OF THE FILER FOLLOWING THE BREACH

- Whether the breach was self-reported
- The degree of cooperation of the Filer during the investigation
- Any remedial steps taken in respect of the breach
- The likelihood that the same type of breach (whether on the part of the Filer or others) will recur if no action is taken
- Whether the Filer concerned has complied with any requirements of the Authority
- The nature and extent of any false or inaccurate information provided by the Filer and whether the information appears to have been provided in an attempt to knowingly mislead the Authority

3. THE COMPLIANCE HISTORY OF THE FILER

- Whether the Authority has taken previous action resulting in adverse findings against the Filer
- Whether the Authority has previously requested the Filer take remedial action, and the extent to which such action has been taken
- The general conduct record of the Filer may be relevant, especially how often the Authority has had to correspond, advise, direct or otherwise intervene in matters of non-compliance with the ECR by the Filer

4. ACTION TAKEN BY THE AUTHORITY IN SIMILAR CASES

- The Authority will consider what action it has taken against Filers in comparable cases. If there are none, the Authority will consider what other regulators have done in similar cases

5. GUIDANCE

- The Authority will not take action against a Filer for conduct that it considers to be consistent with guidance or other material published by the Authority which was current at the time of the conduct under review. Conversely, a failure to adhere to published guidance may weigh in favour of taking action

6. PREVENTION AND DETERRENCE

- When determining whether to take enforcement action, or the appropriate action to take (including the level of civil penalty, if appropriate), the Authority will have regard to the principal purpose for which it takes enforcement action, namely to encourage a high degree of compliance with the relevant legislation and to deter persons from committing breaches

7. ACTION TAKEN BY OTHER REGULATORY OR LAW ENFORCEMENT AUTHORITIES

- Where other regulatory authorities propose to take action in respect of a breach which is under review by the Authority, the Authority will consider whether the other authority's action would adequately address the Authority's concerns, or whether it would be appropriate for the Authority to take its own action

3.4 Delegation of Powers

Under the BMA Act, the functions of the Board of Directors (Board) are to manage the affairs and business of the Authority and to determine the policy objectives and strategy of the Authority. The current position is that the Board has delegated to the Chief Executive Officer (CEO) the power to exercise the various enforcement powers in the ECR. The CEO has, by way of sub-delegation, conferred these powers to the Enforcement Committee (EC) which makes the decision as to what action, if any, is to be taken in respect of such matters that are referred to the EC.

The EC is a standing committee composed of senior officers of the Authority and is convened on a case-by-case basis, with membership dependent upon the matter under consideration. The EC will be comprised of three members which will be chaired by the CEO and at least two other members of the Authority holding any of the following posts that are not conflicted:

- Deputy CEO
- Managing Director
- Chief Operating Officer
- Director
- Senior Advisor

If the EC determines that enforcement action is warranted, the enforcement procedures are commenced and a warning notice will be issued to the Filer concerned.

3.5 Notice to the Filer

While some enforcement actions require no prior notice, most are subject to specific written notifications to the Filer concerned. The ECR provides for a warning notice and decision notice procedure to be adopted in cases where the Authority is exercising its formal enforcement powers. This process will always be used in cases where the Authority is proposing to impose civil penalties. The process does not apply in circumstances where referrals to the police are required.

3.5.1 Warning Notice

The purpose of issuing a warning notice is to afford a reasonable opportunity to Filers and individuals to make written representations to the Authority before a final decision is made in respect to the proposed enforcement action. When the Authority has determined that the above action is appropriate, it will issue a warning notice to alert the recipient to the intention of the Authority to exercise the enforcement power and to inform them of their right to make written representations to the Authority within a specified period (not less than 28 days under the ECR). These periods can be extended with the agreement of the Authority. Such representations should be made in writing, with the reasons stated and any supporting material attached. Given that the matter has warranted enforcement proceedings, only in exceptional circumstances will the Authority consider an extension. Extensions of time due to the ordinary pressures of life, such as workload and overseas travel, are unlikely to be granted.

The warning notice will be in writing, state the proposed action and provide reasons, and confirm the opportunity to respond to the proposal within the specified time. It will include contact details for the receipt of responses.

Service of the warning notice shall be at the registered office of the Filer unless other arrangements have been made between the parties.

If the Authority receives no response or representations within the specified period, the Authority may regard the allegations and conclusions set out in the warning notice as undisputed.

Filers are advised that the content of written representations is a vital part of the process and great care should be given to their preparation. If the Filer accepts a factual assertion, it should state that clearly in the representations. If it disagrees with the Authority's findings, the Filer will need to explain in detail why it disagrees, addressing each and every factual assertion contained in the warning notice. A failure to address any aspect of the facts and circumstances set out in the warning notice may result in the Authority concluding that there is no challenge thereto and it will proceed accordingly. If there is a factual challenge, the Filer should provide

any evidence in support of its position, or risk the Authority concluding that no such material exists.

If it agrees with the findings but considers that an alternative and lesser civil penalty is appropriate, it must state the proposed alternative and explain the reasons why it is considered a more appropriate outcome. For example, if the Filer considers that the amount of a proposed civil penalty is wrong in principle or considers that it would struggle to pay the proposed amount, it should provide persuasive material in support of such contentions. The written representations should address all parts of the warning notice.

Oral submissions and discussion between the Filer and the Enforcement Team lawyers are encouraged. Such discussions are routine and can assist with clarifying issues before the written representations are submitted. In the event that the Filer is legally represented, the Authority is open to such discussions taking place between lawyers on a 'without prejudice' basis, which in the context of regulatory action will mean that anything said during the course of such discussions will not be used against the Filer subsequently by the Authority in the process and will not be referred to during any appeal hearings without the express consent of both parties.

Upon receipt of written representations in response to a warning notice, the Authority will review them carefully. If the Authority is of the view that the concerns set out in the warning notice have not been satisfied by the representations, it may proceed to issue a decision notice. If the concerns have been satisfied by the representations, it may decide to take no further action in relation to those concerns and in such cases, the Authority will advise the Filer or individual accordingly by way of service of a notice of discontinuance.

From time to time the Authority, in considering the matter after receipt of the written representations, may choose a different outcome than that which was originally proposed in the warning notice. In such circumstances, the new outcome will not represent an increase in the nature or severity of the enforcement action proposed. If the Authority is of the view that the Filer has not been afforded an adequate opportunity to address the new and lesser outcome, it will afford it an opportunity to do so by way of further written representations.

Once the EC has directed what action is to be taken, it is the responsibility of the Enforcement Team to implement that decision. Typically, further references to the EC will be necessary during enforcement proceedings. For example, a decision to issue a warning notice will require a further report on receipt of the written representations and a further analysis and advice on the issues. The Enforcement Team also has the responsibility of conducting any correspondence and discussions between the parties but acts at all times on the direction of the EC.

If the Authority concludes that, despite the written representations made in response to the warning notice, it will proceed to take the proposed enforcement action, it will issue a decision notice. As with the warning notice procedure, this decision will be made by the EC.

3.5.2 Decision Notice

The decision notice will be in writing, state the decision, document the reasons for the decision, state the date the decision is to be effective and advise of a right to appeal.

4 ENFORCEMENT OPTIONS

The BMA has multiple enforcement options available to deal with failure to comply with the ECR, which it employs in an effective, proportionate and dissuasive manner. These powers are available to be used to address non-compliance on the part of the Filer.

The enforcement options available to the Authority are:

- a) Imposition of directions;
- b) Imposition of a civil penalty; and
- c) Referral to the police.

If a decision is made to proceed with enforcement action, the Authority will decide which of the enforcement options to impose, taking into account its regulatory objectives and the enforcement principles.

It is not possible to define with any precision the circumstances that will dictate which enforcement option will be selected. In addition to those matters listed in Figure 3 above, the Authority may also consider some or all the matters set out below when choosing an enforcement option:

4.1 Imposition of directions

The Authority has power to give certain Filers (such as exempted and permit companies) directions with respect to the preparation and maintenance of various books, statements and such other information relating to the company's Bermuda business as so directed by the Authority.

These enforcement powers can be tailored to address specific circumstances. The relevant factors in choosing this option, subject to specific statutory criteria, include:

- a) The effect upon the general operations of the Filer;
- b) The effectiveness of the direction to address the issue; and
- c) The likelihood of compliance and the capacity to monitor that compliance.

4.2 Imposition of a Civil Penalty

The Authority possesses the power to impose a civil penalty up to a statutory maximum amount of \$25,000 for each breach of an obligation imposed on the Filer under the ECR. The maximum civil penalty relates to each failure in compliance. It follows that a breach of several obligations may attract a separate penalty for each of those breaches, or one penalty reflecting all of the conduct that constitutes the breaches.

4.2.1 Factors relevant to a decision to impose a penalty

The factors that the Authority will consider in determining whether or not to impose a civil penalty include:

- a) The resources of the Filer;
- b) The need to deter the Filer, and others from similar conduct or practices; and
- c) The action taken by the Authority in previous similar cases.

4.2.2 Factors relevant to a decision on the amount of the civil penalty

Any penalty imposed by the Authority must be appropriate, which is defined in the legislation as being ‘effective, proportionate and dissuasive’. The Authority will consider all the relevant circumstances of a case when it determines the level of a financial penalty and will seek to act consistently.

The Authority will consider the relevant facts, circumstances and impact of each breach. The process by which the level of the penalty will be arrived at is set out in Annex A.

4.3 Referral to Police

The ECR contain provisions that make certain conduct or omissions liable to criminal sanctions.

The factors to be considered in choosing this option include:

- a) Availability of evidence;
- b) Resources and powers of the Authority and other agencies and bodies including the police and the courts;
- c) Whether it will be effective in achieving the regulatory outcome; and
- d) The gravity of the conduct, particularly whether it represents a serious level of dishonesty.

5 APPEALS

The imposition of a civil penalty by the Authority carries a right to appeal to the Supreme Court (Court) under Regulation 49C of the ECR.

The Court, upon hearing such an appeal, has the power to set aside or affirm the civil penalty in whole or in part in addition to being able to give such direction as the Court thinks fit.

The ECR provides at Regulation 49C (2) that the decision of the Authority to impose a civil penalty shall not have effect until either:

- a) The end of the period within which the appeal can be brought; or
- b) If such appeal is brought, until it has been determined or withdrawn.

Order 55 of the Rules of the Supreme Court 1985 will govern the way appeals may be commenced and determined by the Court.

6 ANNEX A: Process for arriving at amount of civil penalty by the Authority

An appropriate penalty is one that is ‘effective, proportionate, and dissuasive’.

6.1 Process Overview

6.1.1 Assess seriousness (culpability and harm)

This will be the key factor in deciding the size of the penalty for each breach. Breaches of notification requirements (Notification) are considered by the Authority as less serious than, for example, breaches of consent requirements (Consent). Adverse results arising from vetting of the Notification and Consent filings will potentially increase the seriousness of the breach, particularly where such results indicate possible financial crime risks as well as reputational risks to the jurisdiction. Another key factor in assessing the seriousness of the breach relates to the length of time the breach was outstanding. The longer the period of non-compliance, the more serious the Authority will consider the breach.

The Authority will consider the Filer’s culpability and any harm caused, or which might foreseeably have been caused and identify the appropriate range by reference to the Table below at 6.2. The Authority will identify the appropriate ‘starting point’ based on a Filer with no previous findings against it and with a reasonably good exchange control record.

6.1.2 Consider the effect of aggravating and mitigating factors

Once the starting point has been identified, the Authority will make adjustments upwards to take account of any specific matter which aggravates the of the matter. These will be matters that are not included in Table at 6.2 but which make the breach more serious. This will primarily take account of any previous ECR breaches.

The Authority will make an adjustment downwards to consider any matters which mitigate the seriousness of the breach. These will be matters not included in Table at 6.2 and may include the nature of changes arising from the ECR requirements (for example, changes in intermediary owners in the ownership chain that did not affect the ultimate beneficial owners).

6.1.3 Consider the ability of the regulated entity to pay the civil penalty

The purpose of a civil penalty is to mark the seriousness of the breach with a penalty that is proportionate and fair. A civil penalty must not be of a size that threatens the solvency of the Filer or threatens its ability to conduct business as a going concern. There will be consideration of the financial health of the Filer, and any representations that the entity may have made in response to the warning notice about its ability to pay.

6.1.4 Determine civil penalty

Having taken the steps outlined above, the Authority will determine the final civil penalty and give short reasons to the Filer.

6.1.5 Multiple breaches

In cases where there are multiple breaches of a similar nature, it may be appropriate to determine a single civil penalty that reflects all the behaviour/conduct rather than impose separate penalties for each breach. This will apply only where the appropriate penalty can be accommodated within the statutory maximum.

In cases where the statutory maximum is insufficient to mark the seriousness of the case overall, it may be necessary to apply the appropriate penalty to each breach separately.

6.2 Discretionary Civil Penalties – Ranges (per breach)

The table below is only a guide and the level of civil penalty recommended in individual cases may differ. Each case will be assessed on its own merits, considering all of the relevant facts. The most important factors will be the reputational risk to Bermuda and any loss, or risk of loss, to clients.

	Minor	Moderate	Major
Nature of the breach	Failure to file Notification	Failure to file several Notifications or one consent	Failure to apply for multiple Consents
Duration of the breach	Notification filing was delayed by up to three months	Filing was delayed in excess of three months	Consent application(s) delayed in excess of three months
Cooperation with the Authority	Filer was open and co-operative with the Authority	Filer was not fully open and cooperative with the Authority	Filer was not open and co-operative with the Authority
Reputational risk to the jurisdiction (per vetting results)	Some risk to reputation of Bermuda	Significant risk to the reputation of Bermuda	Substantial risk to the reputation of Bermuda
Risk of financial crime (per vetting results)	Some risk of financial crime	Significant risk of financial crime or Filer being used to facilitate financial crime	Financial crime committed or Filer used to facilitate financial crime
Conduct of the filer	Filer acknowledged breaches; Filer self-reported	Filer failed to acknowledge breaches; Filer did not self-report	Filer deliberately withheld the breaches from the Authority to obtain a benefit or mitigate loss
Remediation by the filer	Effective steps taken to rectify breach(es) and prevent recurrence	Steps taken to promptly rectify breach(es) but inadequate to prevent recurrence	No steps taken to rectify the breaches nor prevent recurrence
Range of civil penalty (\$25,000 max)	Up to \$6,000	\$6,000 - \$15,000	\$15,000 - \$25,000