

Appendix 3

This appendix expands on the international benchmarking described in paragraph 13 of the Consultation Paper.



International Benchmarking

1. Benchmarking in relation to administrative fines was carried out by examining the enforcement regimes of eight regulators, namely, the UK Financial Services Authority (UKFSA), US Office of the Comptroller of the Currency (OCC), Hong Kong Securities and Futures Commission (SFC), Monetary Authority of Singapore (MAS), Australian Securities and Investments Commission (ASIC), US Securities and Exchange Commission (SEC), Ontario Securities Commission (OSC) and the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). The OCC was included to provide an example of a solely prudential regulator.
2. In summary, the benchmarking reveals a broad range of maximum amounts that can be imposed depending on the seriousness of the conduct. The UKFSA, OCC, SFC, SEC, OSC and BaFin can impose fines for both serious and less serious conduct in relation to a broad range of contraventions.

UKFSA

3. The UK FSA has the power to impose unlimited fines in relation to both serious and less serious conduct¹. The UKFSA have imposed financial penalties on individuals as high as US\$1.5 million and for companies, a much higher range has been applied. Although not referred to as an “administrative fine” like the DFSA, the UKFSA through the Regulatory Decisions Committee (RDC) sets the level of the financial penalty. The RDC considers the level of the fine based on a recommendation of UKFSA enforcement team, which prepares the notice of fine. The RDC is an organ of the UKFSA, composed of persons independent of the executive. The RDC must take into account any representations made by a firm or individual in relation to the proposed fine. The firm or individual has the right to take the matter to the Financial Services and Markets Tribunal, for a review of the decision. We note the UKFSA has recently indicated that enforcement fines may treble due to the introduction of their new penalties policy.

OCC

4. The OCC has the ability to impose a “Civil Money Penalty Order” (CMPO) with various limits (up to US\$1 million per day for a “tier 3” CMPO); CMPO’s are issued directly by the OCC in relation to both serious and less serious conduct. The OCC sends a letter of intention to the affected party, and that party has 15 days to either agree with the contents of the letter or to challenge the letter. The OCC considers any response and can either reduce or eliminate the penalty if it is so persuaded or it can move forward to assess it. If there is a challenge, it is referred to an administrative law judge for review. Following the review, the head of the OCC will consider the administrative law judge’s review and make a decision as to whether to issue the CMPO. The recipient of the CMPO can then appeal the decision before the court.

¹ Financial Services and Markets Act 2000, section 206 is a broad fining power and section 66 specifically for breaches of principles. Both provisions state that the UKFSA may set “such amount as it considers appropriate”.

SFC

5. The SFC may, under section 194 of the Securities and Futures Ordinance Chapter 571, impose fines of up to US\$1.3 million or 3 times the amount of the profit gained or loss avoided by the regulated person. These fines can be imposed in relation to both serious and less serious conduct. The SFC through its executive will issue a Notice of Proposed Decision setting out its preliminary findings and proposed fine to a person subject to an enforcement action. The person has the safeguard to refer the matter to the Securities and Futures Appeals Tribunal for review, failing which the decision becomes final. In the past two years according to the HKSF 45 entities (companies and individuals) have been fined.

MAS

6. The Monetary Authority of Singapore (MAS) can fine for a broad range of contraventions. The maximum amount that can be imposed depends on the particular amount referred to in a specific provision. The maximum amounts for individuals and entities range from US\$8,000 to US\$36,000. However, the MAS is only able to impose these fines by way of a settlement, otherwise it must commence proceedings in the court. Furthermore, these offences are subject to approval from the Attorney General's Chambers on a case by case basis except, for example, where there is a high rate of occurrence and the circumstances of the contravention are straightforward.

ASIC

7. ASIC, due to constitutional constraints, is only empowered to impose relatively small fines of up to US\$462 for breaches of minor strict liability contraventions, for example, the failure to lodge annual return. However, recent developments in the law have permitted ASIC to impose more significant fines relating to market misconduct matters where there is agreement with the concerned person.

SEC

8. The SEC has the power to impose a civil penalty in respect of a person on a broad range of contraventions. The maximum amount of the penalty can range from US\$5,000 for an individual and US\$50,000 for a company for less serious conduct to US\$100,000 for an individual and US\$500,000 for a company for more serious conduct. The SEC initiates a public administrative proceeding and refers the matter to the Office of Administrative Law Judges (ALJ). The ALJ is a separate office within the SEC and reports directly to the Chairman/CEO. The ALJ then conducts a hearing and issues an Initial Decision that includes factual findings and legal conclusions and any sanctions. This Initial Decision is published. A person may appeal the Initial Decision to the SEC, which can affirm, reverse, modify, set aside or remand for further proceedings. Appeals from an SEC civil penalty action are available in the Court of Appeal.

OSC

9. The OSC has the power to impose fines for a wide variety of offences, where it is in the public interest to do so. The maximum amount that can be imposed is approximately US\$1 million. The amount imposed depends on the seriousness of the conduct. An order imposing a fine can only be made after a hearing, either made orally or in writing. The hearing is conducted by the OSC's administrative tribunal, which is constituted by members of the Commission. Members of the OSC who have been involved in the investigation of the matter are precluded from sitting on the tribunal which has a quorum requirement of two members. An appeal to the court is available with respect to a tribunal decision.

BaFin

10. BaFin has a broad range of administrative fining powers with respect to the various legislative responsibilities it has, in banking, insurance and securities. BaFin can impose administrative fines in relation to breaches of the legislation it administers that are designated as an 'Administrative Offence'. The maximum amounts that can be imposed vary from US\$67,000 to US\$1.35 million, depending on the seriousness of the contravention as prescribed in the legislation and the conduct that led to the breach.
11. BaFin can itself impose an administrative fine by issuing a notice in accordance with the *Ordnungswidrigkeitengesetz* (OwiG) (the Regulatory Offences Act). The decision to impose an administrative fine is made within the relevant supervisory section of BaFin after providing an opportunity to make representations in writing.
12. In relation to securities supervision, there is a specialised section that deals exclusively with administrative fines. In relation to banking and insurance supervision, the decision to impose an administrative fine is made by the relevant line manager within the section.
13. Once an administrative fine has been issued, the affected person has an opportunity to file an objection. If an objection is not filed, the administrative fine becomes legally valid and payable. If an objection is filed, BaFin will then reconsider the matter (this will involve a reconsideration of any additional representations made by the affected person, including representations concerning his/her ability to pay the proposed fine). If BaFin's reconsideration of the matter does not lead to a change of the decision to impose an administrative fine, BaFin will forward the matter to a competent Court via the Public Prosecutors Office. The Court then decides whether or not to impose the fine. The affected person can appeal the Court's decision to the Court of Appeal.