

Article

Regulatory Administrative Fines Have Become a Wakeup Call

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Since the enactment of the Monetary Authority (Administrative Fines) (Amendment) Regulations (2022 Revision) (the “Fines Regulations”),¹ the Cayman Islands has witnessed a continuous increase in the number of administrative fines handed down by the Cayman Islands Monetary Authority (the “Authority”). The Authority, in its role as financial sector regulator for the Cayman Islands, is responsible for supervising the financial services of the Islands and for exercising the enforcement powers granted to it by the regulatory acts and regulations. The expansion of the Authority’s enforcement power has become a wakeup call to all persons regulated under the regulatory laws in the Cayman Islands, which include banks and trust companies, insurers/reinsurers/insurance managers/brokers and their clients, securities licensees and registered persons, investment funds, fund administrators and virtual asset providers among many more.

The Authority, acting as a powerful watchdog over the regulation and supervision of financial services within the Cayman Islands, has shown its teeth in the level of fines that it has imposed, the largest of which was in excess of KYD\$4 million.² From a local and international perspective, the role of the Authority demonstrates that the Cayman Islands has a high level of regulation and a careful regulatory watchdog that is actively engaged in protecting the integrity of its regulatory space. With the potential for serious consequences to breaches of the every growing regulatory landscape, it is important that all persons (entities and individuals) regulated under these laws understand their obligations.

Breach and Fine Notices

Part VIA of the Monetary Authority Act (2020 Revision) as amended (the “Monetary Authority Act”) allows the Authority to impose administrative fines upon individuals and entities in respect of breaches of provisions set out in Schedule 1 of the Fines Regulations.³ The administrative fines regime is comprised of the Monetary Authority Act and the Fines Regulations.⁴ Breaches are categorised as being minor, serious or very serious. The Authority has a period of six months from the time it becomes aware of a minor breach, and two years from the time it becomes aware of a serious or a very serious breach, to impose a fine.⁵ There is a sliding scale of fines from KYD\$5,000 for minor breaches to KYD\$100,000 for individuals and KYD\$1 million for entities for very serious breaches.

¹The Fines Regulations in 2020 as amended expanded the power of the Authority to impose administrative fines upon individuals and entities licensed and regulated in the Cayman Islands in respect of breaches of the provisions as set out in Schedule 1 of the Fines Regulations.

²Public Notice 13 May 2021, the Authority fined Intertrust Corporate Services (Cayman) Limited (“Intertrust”) KYD\$4,232,607.50 see

<https://www.cima.ky/administrative-fine-intertrust-corporate-services-cayman-limited>. Pursuant to a Consent Order filed 10 October 2022 (FSD 0158 of 2021), Intertrust will pay the full amount of the fine and a contribution to the Authority’s legal costs totaling KYD\$767,392.50, resulting in a KYD\$5,000,000 settlement payment to the Authority.

³ Schedule 1 of the Fines Regulations lists the “prescribed provisions” and “breach categories” in respect of which administrative fines can be levied.

⁴ See also Enforcement Manual (2018), Enforcement Manual (Procedure for Administering Admin Fines) (2019).

⁵ The limitation periods run from the date on which the Authority became aware of the commission of the relevant breach. The Authority will be deemed to have become aware of a breach when it first received information from which the breach can be reasonably inferred.

Prior to imposing a fine, the Authority is required to give the party a breach notice pursuant to Regulation 11 of the Fines Regulations. The regulated entity thereafter must be given at least 30 days to reply to the breach notice and to rectify a 'minor' breach to the Authority's satisfaction. If the Authority is not satisfied that a minor breach has been rectified, it is required to impose a fine. For "serious" or "very serious" breaches, the Authority has the discretion whether to impose a fine, and in what amount up to the cap for the relevant category. The Authority is required by Regulation 12 of the Fines Regulations to consider all matters raised in the reply before a fine notice is issued. It is only after having delivered a breach notice and considered a regulated entity's reply that the Authority can issue a fine notice. In determining the fine amount for a serious or very serious breach, the Authority is required to consider a number of criteria.⁶

The Criteria for Making an Administrative Fine

In determining the fine amount for breaches described as serious or very serious, the Authority has discretion in deciding whether or not to impose any fine, and the amount of that fine. To the extent that the Authority considers it relevant to the making of a decision, it is required to consider all relevant factors⁷ including the following principles,⁸ in order of importance:

1. the need to promote and maintain a sound financial system in the Islands;
2. the disgorgement principle;⁹
3. the disciplinary principle;¹⁰ and
4. the deterrence principle.¹¹

The Authority is also required, as a public body, to make its decisions in a lawful, rational, proportionate and procedurally fair manner.¹²

Early Settlement of Administrative Fines

Early settlement is available to parties to encourage early resolution through voluntary settlement of administrative fines. A person may enter into an early settlement prior to or after receiving a breach notice. The Authority may, but need not, negotiate with a party to attempt to reach a discount agreement. The Authority is not permitted to discount any component of the usual fine that represents the application of the disgorgement principle. The Authority and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the Authority and the person concerned reached an agreement. In cases where early settlement is agreed upon, a discount may be applied by the Authority up to a maximum of 40%.¹³ Where a person enters into a discount agreement, that person may not appeal against the decision of the Authority to issue the fine or the fine amount, if the fine is no more than the amount agreed to in the discount agreement.

A key factor to be considered by a person intending to make an early settlement agreement is that it is expected to admit the breach and/or breaches at the outset of making a request for an early settlement, and to submit any mitigating factors upon which it seeks to rely. A fully executed discount agreement is thereafter binding on the Authority and the person and the terms of the early settlement will usually be made public (save in exceptional circumstances or at the discretion of the Authority). The public release will further provide an account of the admitted breaches and all relevant details including the name of the person, the breaches, an investigations summary, the fines imposed and discount applied.

Publicity and Confidentiality

⁶ 42F of the Monetary Authority Act

⁷ Regulations 5 and 6 of the Fines Regulations prescribe criteria for exercising fine discretions ("Prescribed Criteria").

⁸ These principles prevail over the factors and the other criteria (including the Prescribed Criteria).

⁹ The principle of ensuring licensees under regulatory laws and those connected to them do not gain from breaching prescribed provisions.

¹⁰ The need to punish intentional, reckless or inappropriately negligent breaches of prescribed provisions.

¹¹ The need to deter financial services businesses and others from breaching prescribed provisions.

¹² Article 19 of the Bill of Rights scheduled to the Cayman Constitution Order 2009

¹³ If a person requests the early settlement of an administrative fine, the process is set out in Part III, section 11 of the Authority's, Regulatory Handbook, March 2019.

The Authority considers the enforcement of the regulatory laws, regulations and rules to be a matter of substantial public importance. Once a fine is imposed, full details of administrative fines imposed, including person names, provisions breached, a summary of facts supporting the breach and any other relevant information are normally made publically available by the Authority.¹⁴

Reviews and Appeals

A person may apply to the Authority for an internal review of a decision to impose a fine notice relating to a fixed fine within 30 days of receipt of the notice. Thereafter, the Authority management committee is required to consider the application within 20 days of receipt and provide a notice of its decision within 10 days after making a decision on the application.

A person may apply to the Grand Court of the Cayman Islands for leave to appeal against a decision by the Authority to impose a discretionary fine within 30 days after receiving the fine notice. The Grand Court may grant leave to appeal if the person has grounds for seeking judicial review of the decision (as considered further below) or if the decision was made with lack of proportionality or was not rational.¹⁵

The Authority may apply to the Grand Court for an order that the appellant provide sufficient security for costs and for a stay of the appeal proceedings until security is provided.¹⁶ After hearing the appeal, the Grand Court may (i) affirm, set aside or vary the original decision; or (ii) set aside the original decision and remit the matter back to the Authority for its consideration, subject to the directions as the Grand Court sees fit.¹⁷

Judicial review procedure for an administrative fine?

The procedures and process for making a judicial review claim for an administrative fine is the same as the standard judicial review procedure in the Cayman Islands as set out in Order 53 of the Grand Court Rules (2022 Consolidation).¹⁸

Conclusion

The level of administrative fines imposed by the Authority make clear that robust measures will continue to be taken by the Authority in an effort to demonstrate its stance on breaches of anti-money laundering requirements and other regulatory laws. The Authority has shown that any compromise to the integrity of the financial services regulatory landscape will be met with action. Such action is expected to continue as the Authority actively seeks to continue to demonstrate to the Financial Action Task Force its forceful actions in protecting and safeguarding the Cayman Islands' financial services regulatory landscape.

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¹⁴ <https://www.cima.ky/administrative-fines>

¹⁵ Leave applications are brought pursuant to Order 53(1) of the Grand Court Rules (2022 Consolidation) and/or Regulation 19 of the Fines Regulations. In the recent decision *Sterling Asset Management International Limited v The Cayman Islands Monetary Authority*, unreported, 3 June 2022 (FSD 0124 of 2022) an application was brought by Sterling Asset Management International Limited to seek leave to apply for judicial review of a \$299,050 fine imposed by the Authority for the investment management firm's anti-money laundering breaches.

¹⁶ Regulation 21 of the Fines Regulation

¹⁷ Regulation 23 of the Fines Regulation

¹⁸ As supplemented by Practice Direction 4 of 2013 entitled Pre-Action Protocol for Judicial Review.

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