

## **ENFORCEMENT POLICY**

### **AFSA Policy 2019**

The Board of the Astana Financial Services Authority issues the following policy prepared under the *A/FC Financial Services Framework Regulations*, Section 8, without prejudice to the general power of the AFSA and other Centre Bodies under Section 4 (3) of the Constitutional Statute.

Chairman

## **FOREWARD**

Since the launch of the Astana Financial Services Authority (“AFSA” or “The Regulatory Authority”) in 2018 there has been a continued expansion of activity in the Astana International Financial Centre (“AIFC”). The AFSA has successfully established an effective principles-based regulatory regime which supports such expansion and offers firms, customers and investors a financial services environment in which they can have confidence.

A necessary component of an effective regulatory regime is a framework that allows the AFSA to take appropriate enforcement action where breaches of the Law, Rules and Regulations occur. This serves to reinforce the AFSA’s commitment to maintaining the highest standards of behavior in the AIFC and addressing conduct which may cause damage to the reputation of the AIFC.

While such breaches are rare, unfortunately they do, at times, occur. When they do the AFSA will act swiftly, decisively and in a manner that is consistent with its stated policies and procedures, to achieve an effective and proportionate outcome.

It is, therefore, intended that this Policy will assist those firms and individuals that are subject to enforcement action by the AFSA. Perhaps more importantly, it is intended that this Policy will provide assurance that, irrespective of whether they dislike a particular decision, those affected by enforcement actions will be treated in a way that is fair, consistent and transparent.

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## CHAPTER 1 – INTRODUCTION

### The legal basis of the AFSA and its enforcement powers

- 1.1 The Astana International Financial Centre and its agencies were established by the Constitutional Statute of the Republic of Kazakhstan “On the Astana International Financial Centre” (“AIFC”) Constitutional Statute No. 438-V ZRK dated 7 December 2015. In particular, Section 2 of that law establishes the Astana International Financial Centre as ‘a leading international centre for financial services.’
- 1.2 The AIFC’s mission is to contribute to the sustainable economic development of Kazakhstan and the region by fostering innovative financial solutions and services by establishing an environment that delivers fair and transparent financial markets in which individuals and institutions act with integrity<sup>1</sup>. The objectives of the AIFC are:
  - a. Cooperation in attracting investments in the economy of the Republic of Kazakhstan by creating an attractive environment for investing in financial services;
  - b. Development of the securities market of the Republic of Kazakhstan, ensuring its integration with existing capital markets;
  - c. Development in the Republic of Kazakhstan of the insurance market, banking services and the Islamic finance market;
  - d. Development of financial and professional services based on best international practices; and
  - e. International recognition as a financial center<sup>2</sup>.
- 1.3 The AFSA is established by virtue of Section 12 of the Constitutional Statute as a legal entity responsible for the regulation of financial services and related activities in the AIFC. The AFSA is responsible for the exercise of control and supervision over the activities of AIFC participants and taking appropriate measures in relation to them.
- 1.4 Section 13 of the Constitutional Statute establishes the AIFC Court, consisting of the Court of First Instance and the Court of Appeal. Decisions of the AIFC Court of Appeal are final and not subject to further appeal and are binding on all natural and legal persons. The activities of the AIFC Court are governed by the resolution of the Council ‘*On the Court of Astana International Financial Centre*’, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres.
- 1.5 The authority and procedures of the AFSA in relation to investigation and enforcement are principally set out set out in Part 9 of the AIFC Financial Services Framework Regulations (“FSFR”), in Sections 114 and 116. A reference in this Policy to a section by number is a reference to the section of that number in the FSFR, unless the contrary is stated. The Regulatory Objectives of the AFSA are:
  - a. The regulation, control and supervision of financial activities in the AIFC by Centre Participants with a view to the maintenance of the safety and the soundness of the financial system within the AIFC;
  - b. Ensuring that financial markets in the AIFC are fair, efficient, transparent and orderly;
  - c. Creating fair, transparent and non-discriminatory conditions for Centre Participants;
  - d. Fostering and maintaining confidence in the AIFC’s financial system and regulatory regime;

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<sup>1</sup> Presentation, GLOPAC Program, July 2018, Tokyo.

<sup>2</sup> Article 2 paragraph 2 of the Constitutional Statute “On the AIFC” dated 7 December 2015.

- e. Fostering and maintaining the financial stability of the AIFC’s financial services industry and capital markets, including the reduction of systemic risks;
- f. Preventing, detecting and restraining actions that may cause damage to the reputation of the AIFC or the financial activities carried out in the AIFC by taking appropriate measures, including by imposing sanction;
- g. Protecting interests of users and investors of financial services;
- h. Implementing in the AIFC a regulatory regime that complies with international standards in the sphere of regulated financial services;
- i. Fostering the development of financial technologies in the AIFC; and
- j. Pursuing such objectives as may be specified by AIFC’s Regulations from time to time<sup>3</sup>.

### **The role of the AIFC Court**

1.6 The AFSA may apply to the AIFC Court to assist in the enforcement of the AFSA’s powers under Part 9 of the FSFR. The AIFC Court was established in March 2017 under the Constitution of the Republic of Kazakhstan 1995 as amended by the Parliament of the Republic of Kazakhstan with effect from 14 March 2017 and provides at Article 13.1 for there to be a special legal order in the financial field in Astana in accordance with the Constitutional Statute. Article 13 of the Constitutional Statute “On the Astana International Financial Centre” provides for the establishment of the AIFC Court and provides for the procedures of the AIFC Court to be provided by Resolution of the AIFC Management Council. The AIFC Court Rules 2018 were approved and published by the Chief Justice of the AIFC Court, as provided by Article 30 of the AIFC Court Regulations 2017 and provide the detailed procedures of the AIFC Court.

- 1.7 The AIFC Court’s powers include:
- a. The imposition of a financial penalty for a contravention of AIFC legislation;
  - b. The issue of a search order;
  - c. An order for the seizure of documents or information;
  - d. An order that the AFSA under Section 116 (5) that the AFSA may require a person outside the AIFC to comply;
  - e. An order that the person under investigation shall pay, in whole or in part, the costs of the investigation under Section 115;
  - f. An order for the preservation of assets, books or records;
  - g. An order for the AFSA to recover an unpaid financial penalty as a debt;
  - h. An order restraining a person from paying transferring disposing of, or otherwise dealing with, any assets of which he is reasonably likely to dispose or otherwise deal with;
  - i. An order requiring a person to deliver to the AIFC Court his passport and such other documents as the AIFC Court sees fit; and
  - j. An order prohibiting a person from leaving the Republic of Kazakhstan without the consent of the AIFC Court.

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<sup>3</sup> Section 7 of the Financial Services Framework Regulations (“FSFR”)

## CHAPTER 2 – APPROACH TO ENFORCEMENT

### Risk-based approach

- 2.1 The AFSA adopts a risk-based approach to regulation. This risk-based approach is designed to focus its resources on those areas that present the greatest risk to the achievement of its objectives<sup>4</sup>. As such, it is not considered appropriate or necessary to use AFSA’s enforcement powers in relation to every contravention of relevant legislation.
- 2.2 Enforcement is only one of a range of regulatory tools available to the AFSA, and the principles listed in paragraph 2.4 below will be considered fully before enforcement action will be taken. The rigorous authorization process, the expected culture of compliance, the risk-based approach to supervision and a pro-active approach to prevention and education reduce the risk of conduct requiring enforcement action.
- 2.3 If enforcement action becomes necessary or appropriate, the AFSA exercises its powers only to the extent necessary to achieve its regulatory objectives in a way that intends that the legitimate activities of participants in the AIFC are not interfered with unnecessarily.

### Enforcement Principles

- 2.4 The AFSA’s risk-based approach to enforcement is based on the following principles:
- a. **Proportionality:** The AFSA adopts a flexible approach to enforcement in keeping with its risk-based approach to regulation, focusing on reducing the risk of non-compliance wherever possible and applying its resources in the most efficient way;
  - b. **Acting decisively:** When the AFSA detects conduct that may threaten the integrity of the AIFC, it acts quickly and decisively to stop that conduct, minimize the effects of the conduct, especially for retail consumers and investors, and prevent similar conduct recurring. However, in doing so it acts fairly, openly and in a manner that is accountable;
  - c. **Procedural fairness and integrity:** The AFSA will take enforcement action in accordance with its policies and procedures only when necessary to ensure the AIFC is operating efficiently and transparently, and that its participants are operating in a way that promotes confidence in the financial services community and its customers. The AFSA’s procedures respect the rights of those with whom it deals, and therefore does not generally publicise the commencement of investigations or information on their progress. The AFSA recognizes the rules of procedural fairness and the right of appeal.
  - d. **Keeping the AIFC community informed:** The AFSA ordinarily publicises outcomes from any enforcement action taken. This public accountability and transparency help to maintain the integrity of the AFSA by deterring contraventions of the AIFC Rules and Regulations and ensures the fair and transparent use of the AFSA’s enforcement powers.
  - e. **Cooperation and mutual assistance:** The AFSA works closely with other regulators in Kazakhstan and international regulators<sup>5</sup> and regulatory associations to ensure the effective exchange of information and adherence to the highest common standards. This is of particular significance in respect of enforcement in the light of the increasing importance of being able to obtain information from other jurisdictions to complete an investigation or take disciplinary action.

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<sup>4</sup> The objectives of the AFSA are listed in Section 7 of the AIFC Financial Services Framework Regulations (“FSFR”), and quoted in paragraph 1.5 of this Policy.

<sup>5</sup> These are listed in Section 2.2 of the AIFC Co-operation and Exchange of Information Rules.



## **Principles-based actions for authorised persons and approved individuals**

- 2.5 The law governing the AFSA's approach to regulation is set out in the AIFC Financial Service Framework Regulations ("FSFR") and rules and guidance given in that legislation. Other regulations contain principles<sup>6</sup> to be observed by authorized firms and approved individuals. In particular the principles applicable to authorised firms and approved individuals in the conduct of regulated activities are set out in the AIFC General Rules ("GEN") and the regulations detailing authorized firms and approved individuals duties and responsibilities<sup>7</sup> under the AIFC Anti-Money Laundering and Combating Terrorist Financing Rules ("AML/CFTR").
- 2.6 The AFSA generally takes enforcement action on the basis of contraventions of these high-level principles. For example, where a person has contravened several requirements of relevant legislation and the evidence also supports a contravention of one or more principles, the AFSA tends to use its enforcement power on the basis of the contraventions of principles. AFSA considers that giving more prominence to high level principles in its enforcement actions provides clear examples of how the principles work in practice and emphasizes the importance of having a principles-based enforcement culture in firms that focuses on reducing systemic risks. A principles-based approach to enforcement supports the AFSA in achieving its regulatory objectives.

## **Senior management obligations**

- 2.7 The AFSA expects the senior management<sup>8</sup> of a firm to satisfy their obligations to the firm and the AFSA. The AFSA expects senior managers to ensure the firm's policies, procedures, systems and controls ("PPSC") identify and manage risks to the firm appropriately and adequately, particularly in relation to the firm's regulatory obligations.
- 2.8 Where a firm has been involved in contraventions and its senior management are themselves complicit in the misconduct of the firm, the AFSA, where it considers it's appropriate to do so, takes enforcement actions against individuals as well as the firm. For example, where a firm's compliance systems have failed and approved individuals are complicit in these failures, the AFSA takes action against the firm and the individuals. In such cases, AFSA believes that enforcement action emphasises the importance of the obligation of senior managers and approved individuals in the firm and supports our regulatory objectives by deterring future similar conduct by other individuals.
- 2.9 The AFSA will only take disciplinary or enforcement action against individuals such as a Director or senior manager or other person, where there is evidence of personal culpability or knowing concern, as described in Section 120 of FSFR, on the part of the individual concerned. Personal culpability arises where the behavior was deliberate or reckless, or where the standard of behavior was below that which could be expected to be reasonable in all the circumstances at the time the conduct occurred.
- 2.10 The AFSA does not take discipline action on individuals based on vicarious liability (that is, holding them responsible for the acts of others), provided appropriate delegation and supervision has taken place.

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<sup>6</sup> Section 4 of the AIFC General Rules ("GEN").

<sup>7</sup> Section 2.2 of the AIFC Anti-Money Laundering, Counter terrorist Financing and Sanction Rules ("AML/CFTR")

<sup>8</sup> Whilst 'Senior Management' is not specifically defined, an Authorised person must ensure that 'Senior Management' have clear responsibility for the day-to-day management of the Authorised Person's business in accordance with the business objectives and strategies approved or set by the Governing Body. The Senior Management Function is defined in Section 2.3.2 of the AIFC General Rules as an individual who is responsible either alone or jointly with other individuals for the management, supervision or control of one or more parts of an Authorised person's regulated activities, who is an employee of an Authorised person but not a Director or Partner of the Authorised Person.

- 2.11 The AFSA will not take action against a Director or senior manager simply because a regulatory failure has occurred in an area of the business for which he is responsible. Rather, the AFSA will consider whether the individual's conduct was below the standard which would be reasonable given all the circumstances at the time the conduct occurred. Accordingly, a senior manager, or any other person, will not be considered by the AFSA to have contravened the relevant legislation if the individual or person has exercised due skill, care and diligence when assessing information, has reached a reasonable conclusion and has acted reasonably on it and is able to demonstrate this.
- 2.12 In determining whether the conduct of a person who has managerial responsibilities at a firm fell short of the standard reasonably to be expected of him or her, the AFSA will take into account:
- a. Whether he or she exercised reasonable care, skill and diligence when considering the information available to him;
  - b. Whether he or she reached a reasonable conclusion and acted reasonably on it;
  - c. The nature, scale and complexity of the firm's business;
  - d. His or her role and responsibility as an approved individual performing a controlled function; and
  - e. The knowledge he or she had, or should have had, of regulatory concerns, if any, arising from the business under his control.
- 2.13 Where disciplinary or enforcement action is taken against a senior manager, or any other person, the onus is on the AFSA to show that the individual has contravened the relevant legislation or was otherwise knowingly concerned in a contravention.

### **Cooperation**

- 2.14 Authorised firms and approved individuals are defined in the AIFC General Rules ("GEN")<sup>9</sup>. Both Authorised firms and Approved Individuals are obliged to maintain a cooperative relationship with the AFSA. As such, the AFSA gives credit for a person co-operating only when the cooperation offered by a firm or individual goes above and beyond the firm or individual's obligation to the AFSA. For example, the following would not be considered cooperation beyond what a firm or individual is obliged to do:
- a. Complying with a notice from the AFSA under Sections 96 or 116 of the FSFR by providing information required in the notice;
  - b. Providing the AFSA with a report required by the AFSA under Section 97 of the FSFR; and
  - c. Reporting a contravention to the AFSA, to comply with reporting obligations under GEN 6.2.3.
- 2.15 The AFSA considers the cooperation offered by a firm or individual in assessing the overall relationship with the AFSA, and whether in that context it is appropriate for the AFSA to exercise its enforcement powers. The AFSA also considers cooperation offered by a firm or individual in deciding what enforcement action is appropriate in a particular matter.
- 2.16 There are many ways in which a party can proactively cooperate with the AFSA. By way of an example, in assessing an appropriate regulatory response, the AFSA would take into account cooperation demonstrated by a person in any of the following ways<sup>10</sup>:
- a. Spontaneously and promptly reporting to the AFSA the occurrence of any apparent contravention, including details of material facts and the firm's immediate action in addressing the contravention;
  - b. Taking responsibility for the matter and being open and communicative with the AFSA in discussing the matter. A person should provide the AFSA with not only information that is

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<sup>9</sup> Sections 1.1.1 and 2.1.1 of the AIFC General Rules

<sup>10</sup> This list is non-exhaustive.

requested or required but also with other relevant information which the AFSA might otherwise not have known about;

- c. A significant indicator of cooperation is the firm being proactive in identifying the effect of the firm's actions on its customers and clients and the firm agreeing with the AFSA on the remedies, including appropriate restitution for customers and clients;
- d. Accepting disciplinary liability for the matter at an early stage in the investigation or disciplinary process;
- e. Being proactive in bringing the matter to an early conclusion (for example by admitting the facts of the matter);
- f. Taking all practical steps to limit any damage to the interests of other participants of the AIFC;
- g. Undertaking external audits and independent external reviews of the firm's systems, policies and processes and sharing the findings with the AFSA;
- h. Implementing steps identified by the investigation into the causes of the apparent contraventions and keeping the AFSA informed of the firm's action plan and progress in the implementation of those steps;
- i. Taking appropriate steps in relation to individuals involved in or responsible for the apparent contraventions, including disciplinary action or dismissal in line with the firm's internal employment processes;
- j. Waiving legal professional privilege attaching to any document provided to the AFSA; and
- k. Devoting resources and manpower, including that of senior managers, to assist the AFSA in its assessment or investigation of the matter.

2.17 The AFSA believes that considering cooperation by a firm or individual in decisions about the use of its enforcement powers helps the AFSA to meet its regulatory objectives. Cooperation offered by firms or individuals is likely to reduce the impact of a contravention on consumers, other AIFC participants and the AIFC market as a whole, as well as the AFSA. Time and resources are required to assist the AFSA to use its resources more efficiently in mitigating risks to the regulatory system. Cooperation also promotes a culture of compliance within the AIFC and encourages firms to accept responsibility for the detrimental consequences of their action by, for example, paying restitution or providing remedies to clients.

## CHAPTER 3 – ASSESSMENT OF ALLEGATIONS

### Sources of allegations

- 3.1 There are several ways that the AFSA may become aware of a matter that warrants enforcement action.
- 3.2 The AFSA may become aware of potential misconduct or contraventions through its normal regulatory operations, such as the conduct of on-site supervision visits as part of its routine supervision of licensed firms. Possible contraventions may also be brought to the AFSA's attention by a firm's contravention of a reporting obligation under GEN, or through the 'whistleblowing' hotline.
- 3.3 The AFSA may also become aware of possible misconduct through complaints received from various external sources (such as clients or employees of licensed firms), referrals from the AIX, other government agencies or from other firms based in the AIFC.

### Assessment

- 3.4 The AFSA's Enforcement Division is responsible for assessing allegations of misconduct and the Director of Enforcement decides whether a matter should be assessed.
- 3.5 The assessment of allegations involves a review of all the information available to the AFSA, the law, the assessment criteria described below and the objectives of the AFSA to determine how the AFSA's discretion should be exercised and what action, if any is required.
- 3.6 The steps taken during an assessment will vary depending on the nature, complexity and circumstances of the allegations.

### Information gathering in the assessment process

- 3.7 The AFSA may request further information by way of correspondence or an interview with the complainant to help it assess the allegation. The AFSA may also approach the person who is the subject of those concerns to seek further information if appropriate.
- 3.8 At the assessment stage the AFSA is flexible about how it seeks information. The AFSA generally obtains information voluntarily. A firm or individual may be contacted by the AFSA's staff responsible for the supervision of the firm, or staff from the Enforcement Division, to obtain further information.
- 3.9 The AFSA may consider it appropriate to use its compulsory information gathering powers to obtain further information about an allegation. At the assessment stage the AFSA may use the general information powers available to it under Sections 96 and 116 of the FSFR to:
  - a. Require a person within the AIFC to produce specified information;
  - b. Seek an order from the AIFC Court requiring a person outside the AIFC to provide specified information;
  - c. Enter premises in the AIFC and copy information or documents on the premises; and
  - d. Require the production of a report under Section 97 of the FSFR.
- 3.10 The AFSA may exercise these powers under Section 116 (1) of the FSFR in respect of any person in or outside of the AIFC provided that, if the person is outside the AIFC and is not an Authorised Person or Approved Individual, the AFSA will either:

- a. Use any arrangement it has with a Regulatory Authority in the jurisdiction where the Person is resident or domiciled, or the premises are located, to assist it in the exercise of its powers; or
- b. Apply to the AIFC Court for an order compelling the Person to provide the information, produce or procure production of the documents, answer questions, or permit the AFSA to enter the premises of that person.

### **Assessment Criteria**

- 3.11 In assessing an allegation the AFSA is guided by the regulatory objectives set out in Section 7 of the FSFR.
- 3.12 To ensure consistency and transparency in decision making, the AFSA assesses allegations against certain criteria. These assessment criteria are designed to deliver outcomes consistent with the priorities and objectives of the AFSA and whether, in all the circumstances, it would be appropriate for the AFSA to investigate the alleged misconduct to further its aims and objectives. The application of the criteria depends entirely on the circumstances of a particular matter and not all the criteria will be relevant to every allegation. The criteria include:
  - a. Whether the AFSA has jurisdiction in the matter;
  - b. Whether the alleged misconduct relates to a matter of strategic importance or significance to the AFSA or the AIFC;
  - c. The nature of the alleged misconduct, including whether it was deliberate, reckless or minor;
  - d. The seriousness of the misconduct, including whether it indicates problems of a widespread or systemic nature;
  - e. The effect of the misconduct, including whether it resulted in a benefit to the person concerned and/or actual or potential loss or detriment to others;
  - f. The frequency and duration of the alleged misconduct, including whether it is ongoing and the time that has elapsed since it occurred;
  - g. The likelihood of the alleged misconduct being proved, having regard to the availability, reliability and quality of the evidence of the alleged misconduct;
  - h. The disciplinary record and conduct history of the person concerned, including whether they have previously been warned concerning the misconduct;
  - i. The person's or persons' subsequent conduct after the alleged misconduct has occurred, including whether they brought it to the AFSA's attention or sought to conceal the misconduct, and any steps taken to address the causes and effects of the misconduct;
  - j. Whether the person or persons has or have offered or is likely to offer any assistance to the AFSA or persons affected by the alleged misconduct;
  - k. The remedies and regulatory action available to the AFSA;
  - l. Any remedies practically available to persons affected by the alleged misconduct;
  - m. Whether another Authority is able to take action against the alleged misconduct and the likelihood of such action being taken;
  - n. Whether any authority (in Kazakhstan or elsewhere) has sought the cooperation of the AFSA in relation to the alleged misconduct; and
  - o. Whether the alleged misconduct undermines or damages the efficiency, transparency, integrity, financial stability, reputation of or confidence in the AIFC.

## **Outcome of assessment**

- 3.13 It is not necessarily appropriate to commence an investigation in response to every allegation made to the AFSA, and the AFSA has discretion to decide whether an investigation is commenced in relation to the allegations.
- 3.14 Depending on the outcome of the assessment, AFSA's Director of Enforcement will recommend, in writing, a suitable course of action to be tabled in front of the Enforcement Committee ("ENFCO"). The role, composition and terms of reference of the ENFCO are further explained in Chapter 5 of this Policy. Possible recommendations to ENFCO in respect of an allegation will include:
- a. Immediately taking disciplinary or enforcement action. This may occur when the facts and contraventions do not appear to be in dispute, or the person has indicated a willingness to resolve the matter by way of settlement;
  - b. Commencing an investigation (which may or may not involve the appointment of investigators);
  - c. Referring the alleged misconduct to another authority, in Kazakhstan or elsewhere;
  - d. Taking some form of Supervisory action, such as enhanced supervision, in respect of the specific alleged misconduct or more generally of the firm involved;
  - e. Taking no further action. The AFSA may decide this is the appropriate outcome where:
    - i. There is no evidence that contraventions have occurred;
    - ii. Although there is evidence that contraventions have occurred, any detriment caused by the contravention has been fully remedied and the person(s) responsible are no longer under the jurisdiction of the AIFC;
    - iii. The complaint or allegation is too vague or general to be satisfactorily investigated;  
or
    - iv. The AFSA considers that the issues raised, or concerns identified relate to matters which would not be appropriate for the AFSA to become involved in.
  - f. the AFSA may consider any other action that is available and appropriate to the circumstances of the matter. This may include acceptance of an enforceable undertaking or dealing with the person responsible for the misconduct by way of a private warning.
- 3.15 The AFSA will record the outcome of the assessment of alleged misconduct in accordance with its internal procedures. This process will include notification of the outcome of the assessment to person or persons providing the information or making the complaint.

## **Financial crime, anti-money laundering and referral to law enforcement**

- 3.16 By virtue of Section 1.2 of the AIFC Anti-Money laundering, Counter-Terrorist Financing and Sanctions Rules No. FR0008 of 2017, ("AML/CFT Rules"), the rules apply to Authorised Firms, Authorised Market Institutions, Designated Non-Financial Businesses and Professions ("DNFBP's") and Registered Auditors within the AIFC. They are therefore obliged to comply with the AML/CFT Rules.
- 3.17 If, at any stage during an investigation, evidence of a criminal offence is discovered or becomes apparent, the lead investigator will inform the Director of Enforcement Division immediately. The investigation must be stopped, and the matter immediately referred to the competent authority, usually the police or public prosecutor, under the Criminal Procedure Code of the Republic of Kazakhstan. In the majority of cases further investigation by AFSA may be put on hold, but in selected cases the competent authority may allow a parallel investigation by AFSA into the regulatory contraventions.

## **CHAPTER 4 – CONDUCT OF INVESTIGATIONS AND REGULATORY POWERS**

### **Investigations by AFSA**

- 4.1 As foreshadowed in paragraph 3.14, the commencement of an enforcement investigation is only one of the options available to the AFSA when it becomes aware of a matter that gives it cause for concern. The commencement of an investigation will, in most cases, occur with the consent of the ENFCO and after a preliminary assessment report has been completed by Director of Enforcement. The Director of Enforcement does, however, reserve the right to commence an urgent investigation where appropriate and notify the ENFCO as soon as practicable.
- 4.2 Once the ENFCO has decided that it is appropriate to commence an investigation, the Director of Enforcement will appoint an investigator or investigators in the first instance. The appointment letter will be signed by the Director of Enforcement and logged into evidence. The assigned investigator will then complete a new matter form and open a case folder on the Enforcement shared drive. The notice of Appointment of Investigators will be served on the firm concerned as formal notification of commencement of an investigation, accompanied by a covering letter also signed by the CEO who can, if appropriate, delegate this task to the Director of Enforcement.
- 4.3 The AFSA will provide a copy of the Notice of Appointment of Investigators and an outline of the purposes of the investigation to any firm or individual subject of the investigation prior to any formal interview of them.
- 4.4 Formal appointment of investigators is necessary where powers under Section 116 of the FSFR are utilised during the investigation. These powers are described more fully in paragraphs 4.12 – 4.22 below.

### **Commencement of an investigation**

- 4.5 Once a firm or person has been notified of the commencement of an enforcement investigation, the Enforcement Division may contact that person and arrange an informal interview. The purpose of this is to inform appropriate senior management why an investigation has been commenced and give them an early indication of the nature of, and the reason for, the AFSA's concerns, the scope of the investigation, an explanation of the relevant processes and the type of documents and information the AFSA is likely to require.
- 4.6 It is not appropriate to hold such an interview in all cases, particularly where the circumstances warrant urgent and prompt action on the part of the AFSA. This decision will be made by the Director of Enforcement on a case-by-case basis.
- 4.7 As a general rule, AFSA staff who supervise entities under investigation are not directly involved in an enforcement investigation. This ensures that there is a clear division between the conduct of the investigation on one hand and the maintenance of an ongoing supervisory relationship with the entity on the other.

### **Appointment of investigators**

- 4.8 The AFSA informs a firm or individual that an investigator has been appointed in writing to formally notify them that an enforcement investigation has commenced. However, where the AFSA believes that the giving of such notice may frustrate the investigation in a material way, the AFSA is not obliged to inform them.

- 4.9 In some investigations, the AFSA may appoint additional investigators. If this does occur, and the AFSA has previously informed the person of the appointment of investigators, the AFSA normally will give written notice of any such additional appointment. This will be when the additional investigator will be required to exercise powers under Article 116 of the FSFR.
- 4.10 Where the AFSA decides to discontinue an investigation without taking any action, the AFSA is not obliged to inform the subject of the investigation that it is being discontinued. Despite the fact there is no obligation to do so, if the AFSA has previously notified the subject of the commencement of the investigation but it has decided to discontinue or cease to pursue the investigation, the AFSA will confirm this with the subject as soon as it considers it appropriate to do so and having regard to the circumstances of the case.

### **Publicity about investigations**

- 4.11 The AFSA is aware of the potential effect of an investigation becoming public knowledge. Accordingly, the AFSA does not generally make public the fact that it is, or is not, investigating a particular matter or the findings or conclusions of an investigation. There may, however, be exceptional circumstances where the AFSA considers that it would be appropriate to announce whether it is investigating a particular matter. For example, an announcement may be appropriate:
- a. To help maintain the integrity and confidence in the AIFC or the AFSA;
  - b. To prevent or constrain public speculation or rumors about a possible investigation;
  - c. To prevent widespread malpractice or misconduct; or
  - d. To assist the investigation itself, for example, encouraging witnesses or victims who have suffered loss to come forward.

### **The AFSA's information gathering powers**

- 4.12 Authorised Persons and Approved Individuals have specific obligations to deal with the AFSA in an open and co-operative manner and to promptly disclose to the AFSA information of which the AFSA would reasonably expect notice. Accordingly, firms and individuals are expected to provide information and documents willingly, proactively and in a timely manner.
- 4.13 There may be occasions when it is necessary for the AFSA to require a person to provide information or documents. The AFSA does not need to appoint investigators to do so, as the general power is contained in Section 116 (1) (b) of the FSFR, "Where the AFSA considers that a person is, or may be able to give information or produce a document which is or may be relevant to the investigation, it may.....require such person, by written notice, to give, or procure the giving of, specified information in such form as it may reasonably require, produce, or procure the production of, specified documents and to attend before an officer, employee or agent of the AFSA at a specified time and place to answer questions in private".
- 4.14 These powers cover persons in the AIFC, but the AFSA has the power to apply to the AIFC Court in order to impose these requirements on a person outside the AIFC, (whether in Kazakhstan or elsewhere). Where the AFSA obtains such an order it may request assistance from the appropriate overseas regulator<sup>11</sup> in exercising this power.
- 4.15 The AFSA also has a general power under Section 116 (1) (a) of the FSFR to enter the business premises of such person during business hours for the purpose of inspecting and copying information or documents stored in any form in such premises.

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<sup>11</sup> These are listed in Sections 2.2 of the AIFC Co-Operation and Exchange of Information Rules



- 4.16 There is no obligation on the AFSA to give notice, written or otherwise, when it exercises its information gathering or inspection powers under Section 116 of the FSFR, however whenever practical to do so the AFSA gives written notice specifying the information or documents the person is required to provide.
- 4.17 Where the AFSA uses its general information gathering powers under Section 116 of the FSFR, the person to which the requirement relates must “give any assistance in relation to the investigation the person is able to give”<sup>12</sup>.

#### **Power to require a report**

- 4.18 In addition to its information gathering powers in Section 116 of the FSFR, the AFSA also has the power under Section 97 (1) of the FSFR to require, by notice in writing, an Authorised Person to provide the AFSA with a report on any matter the AFSA considers necessary or desirable to meet the objectives of the AFSA.
- 4.19 The Person nominated to make a report required by Section 97 (1) of the FSFR must be a person nominated or approved by the AFSA. The AFSA will generally only exercise this power in respect of authorised firms, not individuals.
- 4.20 There are many circumstances in which it may be appropriate for the AFSA to exercise its power under Section 97 (1) of the FSFR. However, the following, non-exhaustive, list provides examples of matters where the AFSA may consider it appropriate to require the production of a report:
- a. Where the AFSA has identified concerns in respect of a firm’s record keeping and requires an independent assessment of the firm’s systems and controls for record keeping;
  - b. Where issues have been identified with a firm’s client monies calculations and the AFSA requires independent verification that the client money reconciliations are accurate and compliant with the relevant regulatory requirements;
  - c. Where the AFSA wants independent assurance that responsibilities for overseeing and managing the affairs of a business have been allocated appropriately and that the firm has suitable arrangements to oversee the effectiveness of any delegation of responsibilities.
  - d. Where the AFSA considers it appropriate to have an impartial and independent assessment of the robustness and effectiveness of a firm’s measures for managing conflicts of interest;  
or
  - e. Where the AFSA has concerns about the adequacy and accuracy of notifications, reports or returns provided by a firm.

#### **Other investigative powers**

- 4.21 Where the AFSA exercises the power under Section 116 of the FSFR, it gives written notice to a person of what is required from them. That written notice also sets out a reasonable period in which the person is required to give the information or produce the documents required.
- 4.22 If the AFSA believes that a person or firm is not complying with the written notice, it may apply to the AIFC Court for an order requiring the person or firm to preserve any assets, books and records and not move or otherwise deal with them.

#### **Interviews**

- 4.23 The AFSA, or an investigator appointed on its behalf, has a specific power under Section 116 of the FSFR to require a person to attend before an officer, employee or agent of the AFSA at a specified time and place to answer questions in private. This is a compulsory or compelled interview. As already stated, there may be circumstances where the AFSA wishes to interview a person on a

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<sup>12</sup> Section 116 (1) (b) (iv) of the FSFR.

voluntary basis. The AFSA must make clear at the outset of the interview whether it is compelled or voluntary.

#### **Additional considerations – individuals**

- 4.24 The AFSA recognizes that an enforcement investigation can have a significant effect on individuals. In deciding to commence an investigation the AFSA must always have regard to the position, role and responsibilities of an individual when deciding whether to investigate their conduct. However, this needs to be balanced against the effect of the alleged misconduct on potential victims of the conduct, other AIFC participants or the market as a whole.
- 4.25 The AFSA also considers whether it is appropriate or necessary to vary or withdraw a person's status as an approved individual for the duration of the investigation and related proceedings (insofar as the investigation or proceedings relate to that individual). In this case the AFSA can apply to the AIFC Court under Section 124 of the FSFR for an order restraining that person from engaging in the alleged conduct including but not limited to engaging in conduct that may constitute a contravention.

#### **Admissibility, confidentiality and protection**

- 4.26 Any statement that is made, information that is given or document that is produced in compliance with Part 9 of the FSFR from the AFSA or an investigator is admissible as evidence in any proceedings as long as it also complies with the requirements regarding admissibility of evidence in the relevant proceedings. Similarly, any document or other information that is given voluntarily to the AFSA is admissible in any proceedings the AFSA decides to take.
- 4.27 The AFSA owes a general duty of confidentiality in respect of information that comes into its possession, whether as a result of a requirement to provide it or otherwise. Where information is considered confidential, the AFSA treats it as such and does not disclose it except as permitted by Section 117 of the FSFR.

#### **Self-incrimination**

- 4.28 Where a person is subject to a requirement under Part 9 of the FSFR, it is not a reasonable excuse for them to refuse or fail to comply with the requirement on the grounds that the provision, production disclosure or inspection of any such information, document or answer might tend to incriminate them or make them liable to a financial penalty. Accordingly, persons are expected to provide information or documents to the AFSA and answer questions even if it is possible that it might incriminate them.

#### **Costs of an investigation**

- 4.29 Section 115 of the FSFR provides that the AFSA must generally pay the costs and expenses of an investigation. However, where a person under investigation is found to have contravened any legislation administered by the AIFC, the ASFA, or, where appropriate the AIFC Court, may order that the person must pay the AFSA in respect of the whole or any part of costs and expenses of the investigation.

#### **Findings – Investigation reports**

- 4.30 Investigators appointed to investigate must provide the AFSA with a written report, unless for some reason the investigation is discontinued. This report is referred to the AFSA Enforcement Committee.
- 4.31 An investigation report sets out the facts relevant to the matter under investigation and the findings of the investigation, including, where appropriate any potential contraventions of AIFC legislation. This report will then be tabled to the ENFCO to decide further action.

- 4.32 If an investigation is discontinued and no further action is taken, the AFSA returns all documents and other materials which it obtained for the investigation to the firm or individual from which it was seized as soon as reasonably practicable.

### **Firm-commissioned reviews and investigations**

- 4.33 The AFSA recognizes that there may be good reasons for firms wishing to carry out their own investigations where issues of concern for the AFSA have been identified. This might be, for example, disciplinary purposes, general good management or operational and risk control. The AFSA supports this proactive approach and does not wish to interfere with a firm's legitimate procedures and controls. However, in commissioning such a review, a firm must be aware that the findings may be useful to the AFSA, particularly where an enforcement investigation into the same matter is contemplated. Sharing the outcome of the investigation can save time and resources for both parties.
- 4.34 Work done or commissioned by a firm does not restrict the AFSA's ability to use the powers available to it under the FSFR, for example to require a report under Section 97 of the FSFR or acquire documents under Section 116 of the FSFR. Nor is an internal investigation by a firm a substitute for enforcement action where considered appropriate. An internal report conducted by a firm may assist the AFSA to decide on the appropriate action or narrow the areas of regulatory concern.
- 4.35 Accordingly, where the AFSA has indicated to a firm that an issue or concern may result in a referral to the Enforcement Division, the AFSA expects the firm to engage with it before commissioning an internal investigation. This is with a view to discussing the scope and purpose of the investigation and how the work will be carried out. The extent of the AFSA's involvement in discussing the scope of a firm commissioned internal investigation depends entirely on the circumstances of the particular matter.
- 4.36 There are several themes and issues common to the potential scope or purpose of a report. These include:
- a. To what extent the AFSA would be able to rely on the report in any subsequent proceedings;
  - b. To what extent the AFSA would have access to the underlying evidence or information that was relied on in producing the report;
  - c. Where legal professional privilege or other professional confidentiality is claimed over the report or any of its underlying material, to what extent such material would be disclosed to the AFSA and the purpose for which it may be used;
  - d. The approach and techniques used to establish the relevant facts;
  - e. How evidence will be recorded and maintained;
  - f. Whether there are any conflicts of interest and proposals for managing them;
  - g. The extent to which the report will identify the roles and responsibilities of individuals involved in the matter;
  - h. Whether the investigation will be limited to stating findings of fact, or whether it will include opinions about potential contraventions of AIFC legislation;
  - i. How the firm will keep the AFSA informed of progress and communicate the conclusions of the investigation; and
  - j. The timing of the investigation.
- 4.37 In certain situations, the AFSA may prefer the firm does not commission its own investigation. Such is the case when such an investigation may prejudice an AFSA Enforcement investigation. Firms are therefore encouraged to engage with the AFSA at an early stage to discuss these issues. Firms are also encouraged to keep detailed notes of any interviews conducted, the importance of this cannot be stressed too highly.
- 4.38 The AFSA regards such reports as confidential information and treats them accordingly.

## CHAPTER FIVE – DECISION MAKING AND DISCIPLINARY ACTION

### AFSA decision making body

- 5.1 The AFSA Enforcement Committee (“ENFCO”) is the AFSA’s principal decision-making body. Schedule 1 of the FSFR sets out the decision-making process. The ENFCO will consist of four Directors of AFSA who are independent of the enforcement investigation and referral. This will be formed by the Executive Body<sup>13</sup> in each case, who will also appoint the Chair.
- 5.2 A quorum will consist of three of the four members of the ENFCO, and no meeting can be convened or proceeded with without a quorum. Where a Division Head has referred a matter to Enforcement for investigation or where a matter is supervised by the Director of a Division responsible for the entity, he or she should not sit on the ENFCO in respect of decisions relating to that matter as this may pose a conflict of interest.
- 5.3 The Chair may co-opt or invite any other appropriate officer from the AFSA to render assistance. This may be for the purpose of technical or subject matter expertise and is primarily to assist the ENFCO in deciding. A person in this position will have no voting rights and is simply present to render assistance or information. The ENFCO will meet as and when required and will usually give a minimum of five working days advance notice to members.
- 5.4 The Chair will nominate an appropriate person to provide a secretariat function for the meeting, who will assist the Chair in drafting minutes, recommendations and decisions.
- 5.5 In accordance with Schedule 1 of the FSFR, ENFCO will consider and determine the exercise by the AFSA of its enforcement powers under Part 9 of the FSFR or pursuant to any other legislation, including:
- a. Whether an investigation will be instigated following an Assessment Report;
  - b. Whether a preliminary notice will be issued in accordance with Schedule 1, Section 4 (1) (a) of the FSFR;
  - c. The representations made by the persons concerned and the AFSA reaction to those representations in accordance with Schedule 1 Section (5) of the FSFR;
  - d. Whether to issue a Decision Notice in accordance with Schedule 1, Section (6) (a) or (b) of the FSFR;
  - e. The amount of the financial penalty, if any, considered appropriate by the AFSA; and
  - f. Whether to accept, reject or amend the proposal in relation to a proposed settlement agreement.
- 5.6 The AFSA’s policy in respect of imposing financial penalties is set out in Chapter 6 of this policy.
- 5.7 A Preliminary Notice or a Decision Notice will contain details of the ENFCO decision. The ENFCO in every case makes decisions based on the relevant tests set out in AIFC law and rules and regarding the context and nature of the matter. This includes the relevant facts and law, guidance and policy statements made by the AFSA appropriate to the matter. In each case the ENFCO will:

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<sup>13</sup>Charter of Board Part II Section 6(8) +Charter of AFSA Part III section 9 – Board determines functions of Ex body, including forming Committee of Ex body, if necessary appointing their members.

- a. Consider whether the material on which the proposed action is based is sufficient to support it;
- b. Ensure the Board are fully briefed on the nature of the decision, the reasons behind it and the proposed outcome;
- c. Satisfy itself that the action recommended is appropriate in all the circumstances; and
- d. Decides whether to follow the recommendation or take the action proposed, and the terms of the action.

### **Enforcement Committee Terms of Reference**

- 5.8 ENFCO is an internal committee which forms an integral part of AFSA's decision making process. It is not independent of the AFSA and its management processes. That said, all decisions of the ENFCO are reported to the Board who are free to comment if their views are at variance with those of the Enforcement Committee.
- 5.9 The AFSA's policy on the role, responsibility and powers of ENFCO are set out in various places in the Enforcement Policy ("EP"), mainly in this Chapter 5 – Decision Making and Disciplinary Action.
- 5.10 ENFCO's deliberations and decision will be issued in writing in the form of minutes of the meeting. The minutes will be circulated to all members and individually acknowledged as a true recollection of the reasoning behind the decision. These minutes will form part of the record of the matter and may be subject to disclosure in the case of proceedings before the AIFC Court.

### **Role of Enforcement and material provided to ENFCO**

- 5.11 From wherever the material is sourced, Enforcement is responsible for preparing the material to be considered by ENFCO and assisting members review of that material. Normally that material will be provided to its members five working days before the scheduled ENFCO meeting.
- 5.12 Enforcement will also provide any relevant and necessary legal advice to ENFCO on the particular facts and circumstances of a case and on Enforcement issues generally.
- 5.13 Based on consideration of all the written and verbal information provided, ENFCO may take, or recommend, one or more of the following actions, depending upon the circumstances of the case, including to:
  - a. Take no action;
  - b. Give a Private Warning<sup>14</sup>;
  - c. Impose a financial penalty<sup>15</sup>
  - d. Give a public censure, instead of imposing a financial penalty;
  - e. Vary or impose restrictions on the authorization of a firm or the approval of an individual;
  - f. Appoint one or more individuals to act as managers of the business of a firm;
  - g. Prohibit a person from performing a controlled function;
  - h. Accept, propose alternative terms for, or reject an enforceable undertaking offered by a firm;
  - i. Accept, propose alternative terms for, or reject a proposed settlement agreement; or
  - j. Request further information.

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<sup>14</sup> Paragraphs 5.39 – 5.41 this Chapter

<sup>15</sup> See Enforcement Policy Chapter 6.

### **Day-to-day administration of enforcement investigations**

- 5.14 Normally, ENFCO will reach its conclusions based upon the material provided to it. ENFCO's role does not extend to managing or providing directions on the conduct of an enforcement matter. Decisions about matters of an operational or administrative nature, or those relating to day-to-day conduct of enforcement investigations, are made by the Director of Enforcement. For example, the following would not be part of ENFCO's consideration:
- a. The appointment of Investigators;
  - b. The scope of an investigation;
  - c. Identifying further areas for investigation;
  - d. The use of compulsory powers, such as compelling the production of documents or requiring a person to participate in an interview;
  - e. Requests for extensions of time to comply with the requirements of AFSA, for example a request to provide further time to make representations; and
  - f. The preparation for, and conduct of litigation in the AIFC Court, or any other court proceedings in respect of the enforcement matter.
- 5.15 The Director of Enforcement is also responsible for certain actions which require notices to be prepared and served on the person to whom the action relates. Following is a list of those principal decisions which can be made by the Director of Enforcement:
- a. Requiring the production of a report under Section 97 of the FSFR;
  - b. Appointment of an Investigator;
  - c. Suspension or variation of an approved individual's status for the duration of the investigation; and
- 5.16 The decision to discontinue an investigation without taking any action will be taken by ENFCO, as the investigation was initiated by them.

### **Deciding whether to take disciplinary action**

- 5.17 Disciplinary action is only one of the options available to the AFSA. It may be appropriate for the AFSA to address an instance of non-compliance or regulatory concern without taking disciplinary action. For example, the AFSA may decide that it is appropriate to resolve a matter by way of some form of supervisory action, or by way of a private warning. Further details of the AFSA policy in respect of private warnings are set out later in this Chapter.
- 5.18 It should not be assumed that a person subject to investigation will automatically be subject to disciplinary action. Equally, it should not be assumed, simply because investigators have not been appointed, the AFSA will not take disciplinary action against a person. In most cases AFSA takes action against a person on the basis of the findings of an investigation and in most instances investigators are formally appointed.

### **Criteria for deciding whether to take disciplinary action**

- 5.19 The disciplinary powers available to the AFSA are set out in the FSFR. Where the AFSA considers that a person has contravened AIFC legislation, it may:
- a. Under Section 118 (1) (a) of the FSFR, fine the person such amount as it considers appropriate in respect of the contravention; and
  - b. Under Section 118 (1) (b) of the FSFR, censure a person in respect of the contravention.

5.20 In deciding whether to take disciplinary action in respect of contravention of AIFC legislation the AFSA considers the full circumstances known to it for each case. Annex 1 to this Chapter provides a list of factors that may be relevant to making this decision in a particular case. The list is indicative only and not all factors are relevant in a particular case.

5.21 Other powers available to the AFSA include:

- a. Under Section 122 of the FSFR, to require an Authorised Person to appoint one or more individuals to act as managers of the business on such terms as the AFSA may specify;
- b. Under Section 124 of the FSFR, apply to the AIFC Court for an order restraining the person from engaging in conduct including but not limited to conduct constituting a contravention;
- c. Under Section 125 of the FSFR, apply to the AIFC Court to restrain a person from transferring, disposing of or otherwise dealing with assets;
- d. Under Section 125 of the FSFR, to apply for an injunction; and
- e. Under Section 125 of the FSFR, prohibit a person from leaving the republic of Kazakhstan.

### **Procedure for deciding whether to take disciplinary action**

5.22 Where the AFSA appoints an investigator, the investigator must submit a report of his investigation to the ENFCO. An investigation report is the first step in deciding whether to take action against a person and plays a key role in establishing the facts and matters on which any such action is based. Following submission of the investigation report, the AFSA's procedure for deciding whether to take disciplinary action involves the following steps:

- a. The Enforcement Department recommends to the ENFCO whether action should be taken against a person and the nature of such action;
- b. The ENFCO considers the matter and decides what the appropriate action should be;
- c. The ENFCO:
  - i. Considers the facts set out in the Investigation report and any other comments from the person concerned or third parties;
  - ii. Considers whether the material on which the recommendation is based is adequate to support it;
  - iii. Satisfies itself that the action recommended is appropriate in all the circumstances; and
  - iv. Decides whether to follow the recommendation, or take the action proposed, and the terms of the action.
- d. The ENFCO may accept the recommendation and decide accordingly; decide on some other form of action; or decide that no action should be taken or that clarification is required (which may lead to further investigation). Where no action is decided the AFSA will notify the person concerned as soon as practicable of the decision, as well as informing the original source of the information or complaint;
- e. Where the ENFCO decides it is appropriate for the AFSA to exercise its disciplinary powers, it will serve the person concerned with a 'Preliminary Notice' under Section 4 (1) (a) of Schedule 1 of the FSFR. In so doing the AFSA allows access to the material on which the Preliminary Notice is based, unless to do so would not be in the public interest or fair;
- f. The person concerned is then given an opportunity to make representations to the AFSA on the action the AFSA is proposing to take. In most cases the time allowed is at least 28 days;
- g. In certain cases, relevant third parties are also given the opportunity to make written representations to the AFSA;
- h. If the AFSA receives no response or written representations within the period allowed in the Preliminary Notice, the AFSA considers the matters in that notice are not disputed, a decision notice is given accordingly;

- i. If representations are submitted by the person concerned or a third party, they will be considered by the ENFCO, who will then decide whether a decision Notice should be issued. The ENFCO may decide:
  - i. To give the person a Decision Notice and what the terms of that notice should be;
  - ii. To revoke the Preliminary Notice and give the person a further Preliminary Notice and what the terms of that notice should be;
  - iii. That no action be taken; or
  - iv. To postpone making a final decision pending the outcome of some other action, for example further investigation by the Enforcement Division.
- j. In deciding this, the ENFCO reviews the material before it, including any representations by the person concerned or third parties and any comments by AFSA staff on those representations;
- k. If the ENFCO decides not to take action proposed in the Preliminary Notice, it normally gives the person concerned a notice of discontinuance, although it is not obliged to do so;
- l. If the ENFCO decides to issue a Decision Notice, it must allow the person concerned access to the material on which it relied to make that decision, unless this would not be in the public interest or fair in relation to other concerned parties;
- m. The person concerned then has the right to appeal to the AIFC Court to appeal against the AFSA's decision within a set time period (at least 28 days).

### **The Preliminary Notice**

- 5.23 Schedule 1, Section 4 of the FSFR provides that if the AFSA proposes to decide to which the schedule applies, it must first give the relevant person:
- a. A written notice ("A Preliminary Notice") containing the information below;
  - b. An opportunity to make representations to the AFSA in person and in writing concerning the decision the AFSA proposes to take.
- 5.24 The Preliminary Notice must:
- a. Specify the proposed decision;
  - b. Specify the reasons for the proposed decision, including any proposed findings of fact;
  - c. Include a copy of the relevant materials which were considered when making the proposed decision;
  - d. Inform the person they may make representations to the AFSA concerning the proposed decision; and
  - e. Specify how and when any such representations may be made.
- 5.25 A Preliminary Notice must be given to the person concerned if the AFSA proposes to exercise any of the following Powers:
- a. The imposition of a financial penalty under Section 118 (1) (a) of the FSFR;
  - b. The imposition of a censure under Section 118 (1) (b) of the FSFR;
  - c. The appointment of managers under Section 122 of the FSFR; or
  - d. The imposition of any prohibition or restriction under Section 118 (f) or (g) of the FSFR.
- 5.26 Under Schedule 1, Section 4 (7) of the FSFR the AFSA may choose not to give a Preliminary Notice to a person where concludes that any delay is likely to arise as a result of complying with the procedures would be prejudicial to the interests or clients of the person concerned , the AIFC or the AIFC financial system:



- a. The requirements in paragraph 5.23 – 5.24 do not apply; and
  - b. The AFSA must provide the person an opportunity to make representations in accordance with paragraph 5.23 after it has made its decision.
- 5.27 The only formal requirements for a Preliminary Notice are those set out in paragraph 5.23 and 5.24 above. However, it is the AFSA's normal practice to set out the following in such a notice:
- a. The facts and matters relied on and the reasons for the AFSA's decision to take the action proposed in the notice;
  - b. The decision-maker;
  - c. The way and the time period within which the person must make any written representations (In most cases this will be at least 28 days);
  - d. Whether the person will be allowed access to the material on which the Regulatory Authority relied on in deciding to give the notice of proposed action; and
  - e. Any third parties involved, and the extent to which they have any rights in relation to the Preliminary Notice.

### **The Decision Notice**

- 5.28 Schedule 1, Section 5 of the FSFR provides that if the AFSA decides to take the action proposed in the Preliminary Notice, and that action involves making a decision to which Schedule 1 applies, it must, as soon as practicable, give the Relevant Person a written notice ("A Decision Notice") specifying:
- a. The decision;
  - b. The reasons for the decision, including findings of fact;
  - c. The date on which the decision is to take effect;
  - d. If applicable, the date by which any relevant action must be taken by the person concerned; and
  - e. The person's right to seek an appeal to the AIFC Court.
- 5.29 A Decision Notice is required to be given to a person where the AFSA decides to exercise any of the following powers:
- a. The imposition of a financial penalty under Section 118 (1) (a) of the FSFR;
  - b. The imposition of a censure under Section 118 (1) (b) of the FSFR;
  - c. The appointment of managers under Section 122 of the FSFR; or
  - d. The imposition of any prohibition or restriction under Section 118 (f) or (g) of the FSFR.
- 5.30 Having regard to the requirements of Schedule 1, Section 5 of the FSFR, the Decision Notice must be in writing and:
- a. Set out the facts and matters relied on and give the reasons for the AFSA's decision to take the action to which the notice relates;
  - b. Include a summary of the key representations made and the AFSA's consideration of these representations;
  - c. Identify the decision-maker;
  - d. State whether access to the material relied in deciding to give the notice is able to be accessed by the person concerned;
  - e. Identify third parties and the extent to which they have any rights in relation to the Decision Notice;

- f. State any right to refer the matter to the AIFC Court (within a reasonable period stated in the notice);
- g. In terms of a decision to make the censure public the terms of the proposed censure;
- h. In the case of a decision to impose a financial penalty the amount of the financial penalty and the period within which it is to be paid;
- i. In the case of a decision to appoint a manager under Section 122, the terms of such appointment; and
- j. In the case of a decision to impose a prohibition or requirement under Section 118 (f) or (g), the terms of the prohibition or requirement, the date on which it comes into effect and, where the AFSA decides it should apply for a limited period, the period.

5.31 Section 11 of the FSFR states that a person aggrieved by the decision of the AFSA may appeal to the AIFC Court about the decision. Schedule 2, Section 1 of the FSFR provides that a person must lodge such an appeal within 28 days following the date of the Decision Notice issued by the AFSA. The appeal must state the grounds and the material facts on which the applicant relies. Grounds include:

- a. The decision was ultra vires or there was some other error of law<sup>16</sup>;
- b. The decision was unreasonable;
- c. The decision was not made in good faith;
- d. There is a lack of proportionality; or
- e. There was a material procedural error.

5.32 Where the person concerned agrees to the action set out in the Decision Notice being taken and decides not to refer the decision to the AFSA, the AFSA need not wait 28 days before taking the action set out in the Decision Notice.

5.33 Once the period for referring the matter to the AIFC Court has passed it is open for the AFSA to take the action set out in the Decision Notice. However, if a person decides to appeal to the AIFC Court, they may apply to the court to stay the action pending the outcome of the appeal. The AFSA can agree to a stay of the action pending appeal but is not obliged to do so.

### **Access to material**

5.34 Where the AFSA proposes or decides to exercise its disciplinary powers under Section 116 of the FSFR and Schedule 1 of the FSFR, it will have made the decision to do so based on the material available to it. In enforcement investigations that material may be voluminous. Not all the material gathered in the enforcement investigation will be relevant to the AFSA's decision and some will be more relevant than others. Accordingly, the AFSA will identify the material on which it based its decision and will provide the person with a list of that material.

5.35 The AFSA also considers that allowing access to material at the Preliminary Notice stage helps identify any evidential issues that might arise and therefore assist the AFSA's consideration of the matter.

5.36 Where the AFSA considers that allowing a person access to the material is not in the public interest or not fair (whether to other parties to whom the material relates or otherwise), it must give a written explanation to the person containing the reasons for the refusal to allow access. The AFSA, as a

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<sup>16</sup> Section 11 (2) FSFR.

matter of policy, treats access to material at the Preliminary Notice stage the same as at the Decision Notice stage.

### **Third party rights**

- 5.37 In some cases, in order to explain a person's misconduct or actions, or ensure the appropriate facts are described in the correct context, it is necessary to refer to the actions and involvement of others. These others are known as a "third party".

### **Procedure if no representations are made**

- 5.38 If the AFSA receives no representations in relation to a Preliminary Notice either in the manner prescribed, within the period allowed or at all, the decision-maker may regard the allegations as undisputed and give a Decision Notice accordingly<sup>17</sup>. The person's right to refer the matter to the AIFC Court is not affected.

### **Private Warnings**

- 5.39 In some cases the AFSA may decide that despite having concerns about a person's conduct or sufficient evidence of a contravention of AIFC law, in the circumstances of the matter it is not appropriate to take disciplinary action against the person. This enables the AFSA to use its resources in the most efficient manner. In such cases the AFSA may give the person a private warning.
- 5.40 The decision to give a private warning can be made at any stage of the enforcement process and for different reasons. For example, the AFSA may consider a private warning where:
- a. The ENFCO decides that a private warning should be given instead of discipline or enforcement action;
  - b. The matter gives the AFSA cause for concern but there is insufficient evidence to take disciplinary or enforcement action; or
  - c. There is sufficient evidence of a contravention but the AFSA concludes that under the circumstances it is not appropriate to take disciplinary action, for example where the person concerned has taken full and immediate remedial action or where the matter causing concern is minor in nature or degree.
- 5.41 In deciding whether to give a private warning the AFSA takes into account all the circumstances of the case, including the likely effect of a private warning on the recipient, whether the recipient poses any risk to the AFSA's objectives or the factors laid out in **Annexure 1** to this policy. Where the AFSA gives a private warning to an approved individual it will generally inform their employer and provide them with a copy.

### **Decision making in respect to settlement**

- 5.42 The AFSA's policy regarding settlement of enforcement investigations and disciplinary action is set out in Chapter 7 of this policy. Either the AFSA or the person concerned may initiate settlement discussions at any time during the enforcement process. That is, prior to a Notice of Appointment of Investigator, before or after a Preliminary Notice or after a Decision Notice is served. The AFSA is less likely to agree to settle a matter after a Decision Notice is served, or during an appeal process, unless the person to whom the notice was issued is prepared to accept the action taken or new and compelling evidence comes to light.

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<sup>17</sup> Schedule 1 Section 4 (4) FSFR.

## CHAPTER 6 – FINANCIAL PENALTIES, CENSURES AND ANCILLARY POWERS

### Purpose of financial penalties and censures

- 6.1 The AFSA considers that the main purpose of imposing a financial penalty or a censure is to promote high standards of conduct by:
- a. Penalising persons who have committed contraventions;
  - b. Depriving persons of any benefit they may have gained as a result of their contraventions;
  - c. Deterring persons who have committed contraventions from committing further contraventions;
  - d. Deterring others from committing contraventions; and
  - e. Demonstrating generally the benefits of compliance with regulatory requirements.
- 6.2 Financial penalties and censures are therefore tools that the AFSA may use to help it achieve its regulatory objectives.

### Factors determining whether to issue a censure

- 6.3 In some cases the AFSA may decide that, although some form of discipline action against a person for contravention of AIFC law is justified, the discipline action should take the form of a censure rather than a financial penalty. In deciding whether to impose a censure instead of a financial penalty the AFSA considers all relevant circumstances of the case. Some additional facts that may be relevant include:
- a. Whether or not issuing a censure would be an effective deterrent;
  - b. Whether the person made a profit or a loss as a result of the contravention, (although this is likely to be a consideration in favour of a financial penalty);
  - c. The seriousness of the contravention – if the contravention is more serious in nature or degree, this is likely to be a consideration in favour of imposing a financial penalty;
  - d. The conduct of the person concerned, for example, bringing the contravention to the AFSA's attention, providing full and immediate cooperation, admitting the contravention and ensuring persons who have suffered financially as a result of the contravention are fully compensated is more likely to warrant a censure;
  - e. The disciplinary record and compliance history of the person concerned;
  - f. The AFSA's approach in similar cases, AFSA seeks to be consistent in the making of these decisions; and
  - g. The effect on the person concerned. Only in exceptional circumstances would the AFSA decide to issue a censure if the contravention was more appropriately dealt with by a financial penalty. Such exceptional circumstances would include:
    - i. Where the person concerned has provided verifiable evidence that they would suffer serious financial hardship if the AFSA imposed a financial penalty;
    - ii. Where the person concerned has provided verifiable evidence that they would be unable to meet regulatory requirements, particularly financial resource requirements, if the AFSA imposed an appropriate financial penalty; and
    - iii. Where there is a likelihood of a severe adverse effect on a person's shareholders, or consequential damage to confidence in, or the stability or reputation of the AIFC if a financial penalty was imposed.

## **Factors in determining the appropriate level of financial penalty**

- 6.4 In determining the amount of a financial penalty the AFSA must have regard to the following factors:
- a. The seriousness of the contravention in relation to the nature of the requirement contravened;
  - b. The extent to which the contravention was deliberate or reckless;
  - c. Whether the person on whom the penalty is to be imposed is an individual; and
  - d. The effect on third parties, clients and customers and the best interests of the financial system.

### **Seriousness**

- 6.5 The AFSA must also take the seriousness of the contravention into account, these issues are covered in Annex 1 to Chapter 5 of this policy.

### **Deliberate or reckless**

- 6.6 The AFSA also has regard to the extent to which the contraventions were deliberate or reckless. A deliberate or reckless contravention is more likely to attract a larger financial penalty. In this regard the AFSA considers the following:

- a. Whether the contravention was intentional, in that the person concerned (including the senior management of an authorized firm), intended or foresaw that their actions would or might result in a contravention;
  - b. Whether the person concerned (including the senior management of an authorized firm), knew their actions were not in accordance with internal procedures;
  - c. Whether any steps were taken to conceal the contraventions;
  - d. Whether the contravention was committed in such a way as to avoid or reduce the risk that the contravention would be discovered;
  - e. Whether the contravention occurred more than once and if so, how often; and
  - f. Whether reasonable professional advice was obtained before or during the contravention and was not followed or responded to appropriately. Obtaining professional advice does not remove a person's responsibility for compliance.
- 6.7 Factors tending to show a contravention was reckless include:
- a. The person knowing that there was a risk that their actions or inactions could result in a contravention but failing to mitigate that risk adequately; and
  - b. The person knowing there was a risk that their action or inaction would result in a contravention but failing to check if they were acting in accordance with relevant internal procedures.

### **Whether the person is an individual**

- 6.8 The AFSA has regard as to whether the person on whom the financial penalty will be imposed is an individual. In determining an appropriate financial penalty, the following factors must be considered:
- a. Individuals do not always have similar resources to a firm;
  - b. The enforcement may have a more significant effect on an individual than a firm; and
  - c. That it may be possible to achieve deterrence by imposing a smaller penalty on an individual than a firm.

- 6.9 The AFSA also consider the person's position and/or responsibilities are such to make a contravention committed by that person more serious and thus attract a higher financial penalty.

### **Deterrence**

- 6.10 In determining the appropriate amount of a financial penalty, the AFSA has regard to its objectives as laid out in Section 7 of the FSFR. These include restraining persons from committing more contraventions and thereby deterring others from committing similar contraventions. In this regard AFSA considers the extent to which it is necessary to impose a financial penalty of an appropriate amount to ensure the deterrent effect is not diminished or reduced.

### **Means, financial resources and other circumstances of the person**

- 6.11 In determining the appropriate amount of a financial penalty the AFSA will take into consideration the size, financial resources and other circumstances of the person. The AFSA may consider whether there is verifiable evidence that a person would suffer serious financial hardship if a proposed financial penalty was imposed on them. The AFSA regards the size and the financial resources of the person to be taken into consideration when determining the level of financial penalty, but not to the extent that there is a direct correlation between those factors and the amount of the penalty.
- 6.12 For an authorized firm, the seriousness of the contravention may be linked to the size of the firm and therefore affect a much larger number of clients or customers than in a smaller firm. Also, contraventions in firms with a large turnover of business may be more serious than those in a smaller firm.

### **Financial gain or loss avoided**

- 6.13 The AFSA will seek to deprive a person who commits a contravention of the amount of any benefit gained or loss avoided by that person as a result of the contravention. Accordingly, if the person has made a profit or avoided a loss, the AFSA will impose a financial penalty consistent with the principle that a person who commits a contravention should not benefit from the contravention. The financial penalty will not be less than the amount of profit made or loss avoided.

### **Subsequent conduct**

- 6.14 The AFSA considers the conduct of the person after the contravention in determining the financial penalty, including:
- a. The conduct of the person in bringing (or failing to bring) the contravention quickly, effectively and completely to the attention of the AFSA or other regulators if appropriate;
  - b. The degree of cooperation shown by the person during the investigation;
  - c. Any remedial steps taken by the person, whether on the person's own initiative or that of AFSA or another Regulator, including:
    - i. Ascertaining whether clients or customers suffered loss and compensating them if they have;
    - ii. Correcting any misleading statement or impression;
    - iii. If appropriate, taking disciplinary action against, or providing training for, staff involved in the contravention;
    - iv. Recruiting new staff to enhance or increase resources; and
    - v. Introducing or improving policies, procedures, systems and controls to reduce the likelihood of contraventions in the future.
  - d. Whether persons have complied with any decisions of the AFSA in relation to the contravention.

- 6.15 That the person has fully cooperated with the AFSA investigation is a consideration tending to reduce a subsequent financial penalty.

### **Disciplinary History and Compliance Record**

- 6.16 The disciplinary record and compliance history of the person, including:
- a. Whether the AFSA has previously taken any disciplinary or enforcement action against the person;
  - b. Whether the AFSA has previously given an enforceable undertaking;
  - c. Whether the AFSA has previously prohibited or restricted under Articles 99 or 100;
  - d. Whether an injunction has previously been served on the person;
  - e. Whether the AFSA has previously asked the person to take remedial action, and the extent to which such action has been taken;
  - f. The person's general compliance history, including whether the AFSA have previously given the person a private warning.
- 6.17 The disciplinary record of a person could be used by the AFSA to increase a financial penalty if a person has committed similar acts in the past or received warnings for similar misconduct. In assessing a person's discipline record, the older a contravention record the less serious it can be regarded.

### **Action in similar cases**

- 6.18 The AFSA takes into consideration action taken in similar cases involving others in determining the financial penalty. Whilst the AFSA seeks to act consistently in determining the amount of a financial penalty it does not operate a "tariff" system. In a particular case there may be circumstances which justify a greater or lesser financial penalty different to that imposed in another case which is otherwise substantially similar.

### **Settlement discount**

- 6.19 The AFSA's policy in respect of settlement is set out in Chapter 8 of this policy.

### **Serious financial hardship**

- 6.20 The purpose of a financial penalty is not to render a person insolvent or to threaten their solvency. If this is a material consideration, the AFSA considers, having regard to all the factors, whether a smaller financial penalty will be appropriate. However, where a person asserts that payment of a proposed financial penalty would cause them to suffer serious financial hardship, the AFSA will consider whether to reduce the financial penalty only if:
- a. The person provides verifiable evidence that payment of the proposed financial penalty would cause them to suffer serious financial hardship; and
  - b. The person provides a full, frank and timely disclosure of the verifiable evidence and cooperates with the AFSA enquiries into their financial position.
- 6.21 It is the responsibility of the person concerned to satisfy the AFSA that the proposed financial penalty would cause them to suffer serious financial hardship. It is not the AFSA's responsibility to establish that the person does not have the means to pay the proposed financial penalty.

- 6.22 Verifiable evidence that a person will suffer serious financial hardship is only one of the factors relevant to determining the imposition of a financial penalty and the AFSA has discretion as to whether it will take such evidence into account.
- 6.23 Following are the key factors the AFSA will take into consideration when determining whether someone will suffer serious financial hardship:
- a. Whether the person has immediately realisable capital to enable them to pay the financial penalty, or if not, whether they should be required to pay it in a reasonable period or in installments;
  - b. What is the person's capital position, including their savings, investments, personal possessions, land, property and pension (depending on their age)? Relevant considerations under this heading include:
    - i. The fact a person may have to sell their home to pay a financial penalty may not, of itself, amount to serious financial hardship and does not automatically lead to a conclusion that the financial penalty should be reduced;
    - ii. Is the fact they have to sell their property disproportionate to the seriousness of the misconduct?
    - iii. Is the person elderly, disabled or ill?
    - iv. Has the person taken steps to dispose of, transfer or dissipate assets since the investigation began?
    - v. Are the assets held jointly? If so, what is the person's share?
    - vi. What liabilities does the person have?
  - c. Taking the total assets and liabilities into consideration, does the person have sufficient capital to pay the financial penalty?
  - d. If the person is unable to pay the proposed financial penalty from immediately available capital, then it is appropriate to look at their income. In this regard the AFSA would consider the income a person receives from employment in connection with the contravention as well as any income from a third party.
  - e. What level of income is required to enable the person to maintain a reasonable standard of living without suffering serious financial hardship? Is their lifestyle lavish or excessive?
  - f. What effect would the financial penalty have on the person's ability to meet reasonable living expenses and financial commitments? In this regard, the following may be relevant:
    - i. Number of dependents;
    - ii. Lifestyle;
    - iii. Long term financial commitments such as court ordered payments;
    - iv. Reasonable rent or mortgage payments; and
    - v. Medical expenses or care fees.
  - g. If the person has no income, was this a result of their misconduct? Were they dismissed by their employer?
  - h. How likely is it the person will lose their income due to the actions of the AFSA?
- 6.24 The above considerations will enable the AFSA to take a view on whether the person is likely to suffer serious financial hardship if the proposed financial penalty is imposed. It is recognized it may be appropriate to reduce the financial penalty in particular cases. Alternatively, the AFSA can agree the penalty is paid at some future date where a person needs time to realise assets or in installments if a person needs to wait for salary payments.

### **Serious misconduct**

- 6.25 There will be cases where despite showing the person would suffer serious financial hardship, the misconduct is so serious that it is not appropriate to lower the financial penalty. The AFSA will



consider all the circumstances of the case in determining whether a contravention falls into this category. Examples of such conduct may include:

- a. Providing false or misleading information to the AFSA;
- b. Deliberate and repeated contraventions of AIFC Law;
- c. Misconduct which fundamentally undermines the objectives of the AFSA;
- d. Particularly serious misconduct which has resulted in, or given rise to the risk of, loss by third parties;
- e. Where the person has acted fraudulently or dishonestly for personal gain; and
- f. Where previous action by the AFSA has been unsuccessful in bringing about the desired change by the person concerned or in the wider AIFC community.

6.26 In appropriate cases, the AFSA may combine its power to impose a censure and a financial penalty with other powers available to it by virtue of Part 9 of the FSFR. This might happen in a case involving and approved individual where the AFSA considers it appropriate to impose both a financial penalty and prohibit the person from performing a particular function. Similarly, where the case involves an authorized firm, the AFSA may decide to impose a financial penalty and prohibit the firm from entering into particular transactions. If the totality of these actions are not disproportionate in relation to the contravention itself this form of action is acceptable.

#### **Time and manner for payment**

6.27 Where the AFSA decides to impose a financial penalty under Section 118 of the FSFR, it gives the person concerned a Decision Notice informing them of the decision. The Decision Notice specifies the amount of the financial penalty and the time and manner of payment. A financial penalty, or part of a financial penalty, that is not paid within the period specified in the Decision notice may be recovered by the AFSA as a debt. In such cases an application will be made by the AFSA to the AIFC Court for an order the debt is outstanding and due to the AFSA.

#### **Enforceable agreements**

6.28 The AFSA may enter into an 'Enforceable Agreement' with any person, this may include an agreement to:

- a. Pay any sum to any person (including the AFSA); or
- b. Take remedial action; or
- c. do any other thing.

6.29 The terms of such an agreement can be varied by the AFSA, however enforceable agreements are essentially a promise, in writing, given by a person to the AFSA to which a particular status is given under Section 101 of the FSFR. Enforceable agreements are public documents. If a person fails to comply with an enforceable agreement the AFSA may apply to the AIFC Court for:

- a. An order directing a person to comply with the terms of the agreement; or
- b. An order directing the person pay to any person or the AFSA an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonable attributed to the contravention, or
- c. Any order the AIFC Court considers appropriate directing the person to compensate any other person who has suffered loss or damage because of the contravention; or
- d. Any other order that the AIFC Court considers appropriate.

6.29 A person may offer an enforceable agreement to do, or not to do something at any time. The AFSA are under no obligation to accept such an offer, but it has discretion to accept such an offer when it considers it appropriate to do so. In deciding whether to accept and enforceable agreement the AFSA has regard to the particular circumstances of the matter. Enforceable agreements are discussed in more detail in the Enforcement Guide.

### **Prohibitions, restraints and restrictions**

6.30 Section 98 of the FSFR covers Authorised Firms, and allows the AFSA to restrict, withdraw or suspend a licence. The AFSA may:

- a. Impose or vary such conditions, restrictions and requirements on a licence as the AFSA considers appropriate;
- b. Withdraw an Authorised Person's Licence or vary its Licence to remove one or more Regulated Activities or Market Activities; or
- c. Suspend an Authorised person's Licence in relation to one or more Regulated Activities or Market Activities.

6.31 Section 99 of the FSFR gives the AFSA the power to impose a prohibition. The AFSA may prohibit an Authorised person from:

- a. Entering into certain specified transactions or types of transactions;
- b. Soliciting business from certain specified persons or types of persons;
- c. Carry on business in a specified manner or other than in a specified manner;
- d. Using a particular name or description in respect of the Authorised person;
- e. Dealing with any relevant property in a specified manner or other than in a specified manner; or
- f. Assisting counselling or procuring another person to deal with any relevant property in a specified manner or other than in a specified manner.

6.32 Section 124 of the FSFR gives the AFSA power to issue an injunction where a person is engaging or proposing to engage in conduct that would constitute a contravention. The AFSA may make:

- a. An order restraining the person from engaging in the conduct including but not limited to, engaging in conduct that may constitute a contravention;
- b. An order requiring that Person to do any act or thing, including but not limited to, acts or things to remedy the contravention or to minimize loss and damage; or
- c. Any other order the AIFC Court sees fit.

6.33 These powers are further discussed and enlarged upon in the Enforcement Guide.

## CHAPTER 7 – SETTLEMENT

### Approach to settlement

- 7.1 The decision to settle an enforcement action is a regulatory decision taken with the agreement of the person who is the subject of such enforcement action. Under a settlement the person against whom enforcement action is being taken agrees to the imposition of a financial penalty or other enforcement outcome and waives any right to contest the financial penalty or other enforcement outcome. By definition, a settlement requires the agreement of both the AFSA and the person concerned. The AFSA cannot unilaterally impose a settlement. AFSA intends that a settlement will bring the matters subject to the settlement to a conclusion.
- 7.2 Early settlement of an enforcement action has many advantages for both parties. For example, settling enforcement actions avoids the need for further regulatory proceedings and possible litigation and is thus time and resource effective for both the AFSA and the person concerned. Settlement allows the AFSA to use its resources more effectively by avoiding the need to allocate resources to matters which are capable of being resolved early by way of settlement.
- 7.3 A settlement can allow redress or restitution for clients earlier than might have otherwise been possible. A settlement also allows the AFSA to make a public statement concerning the settlement earlier than would otherwise be possible. Settlement also gives the person concerned an opportunity to engage with the AFSA in the drafting of the settlement and any other such notices as may be served on them, such as a preliminary notice or a decision notice. It also enables persons to bring matters to conclusion more swiftly. The AFSA therefore believes that where it is appropriate and possible, enforcement actions should be settled as early as possible and that it is in the public interest to do so.
- 7.4 Before engaging in settlement discussions, the AFSA satisfies itself that taking some enforcement is in the public interest and appropriate in the circumstances of the matter. In this regard the AFSA also considers the factors outlined in Annex 1 of Chapter 5.
- 7.5 The terms of the settlement of an enforcement action vary on the circumstances of the matter. In each case the AFSA carefully considers its regulatory objectives, the public interest, the importance of sending a clear, consistent message through enforcement and the circumstances of the matter. The AFSA would agree to settle only if the agreed terms of the settlement achieve an acceptable regulatory outcome.
- 7.6 Although the AFSA accepts that it is in the public interest to conduct settlement discussions earlier in the enforcement process rather than later, it will only engage in settlement discussions when it has sufficient understanding of the nature and gravity of such misconduct to enable it to make a reasonable assessment of the appropriate outcome.

### Timing and process

- 7.7 Settlement discussions can be held at any stage of the enforcement process. For example, settlement discussions can take place before investigators are appointed, before or after a Preliminary Notice has been issued or before and after a decision notice has been issued or during proceedings resulting from a referral to the AIFC Court. The AFSA generally considers that settlement proposals are more productive if a Preliminary Notice has been issued to the person concerned. This enables the person to fully comprehend the issues of concern and what it considers to be the appropriate action and also provides a starting point for settlement discussions.

### **Basis for settlement discussions**

- 7.8 The AFSA holds settlement discussions on a “without prejudice” basis, which means that neither the AFSA nor the person concerned would seek to rely against the other on any admissions or statements made during the course of the discussions or in documents recording the discussions if the matter is subsequently considered by the AIFC Court. The AFSA sets out these terms in writing before settlement discussions begin. This ensures that both parties can discuss matters fully and frankly to facilitate and increase the likelihood of reaching a settlement.

### **Decisions regarding proposed settlements**

- 7.9 Settlement discussions take place between AFSA staff (normally Enforcement Division staff) and the person concerned. If the discussions result in a proposed settlement, the AFSA staff will document the proposed settlement and submit the document to the ENFCO, which is the appropriate decision-maker. Only a formal acceptance by the decision-maker binds the AFSA to an agreement. The decision maker may request further information to assist in their consideration and may also request further meetings with the person concerned. Once the decision maker receives a recommendation from AFSA staff it may decide to:
- a. Settle the matter on the terms proposed;
  - b. Recommend other terms that the decision maker is prepared to consider and ask the AFSA staff to engage in further settlement discussions with the person concerned; or
  - c. Decline to settle the matter.

### **Publicity**

- 7.10 The AFSA generally publishes the outcome of a settlement, including the names of the subjects and the key terms of the settlement. Such a statement not only ensures transparency and accountability, but also promotes the AFSA as a flexible and fair regulator and encourages others to be more receptive to the early settlement of enforcement or disciplinary actions. The AFSA is also aware that persons may provide highly confidential and commercially sensitive information as part of the settlement discussions. In this case the AFSA may decide not to publish such information and is governed by the confidentiality clauses in the FSFR and CO-OP Rules.

### **Terms of settlement**

- 7.11 The AFSA only accepts settlements where the person subject to the enforcement action accepts that he or she contravened relevant requirements and admits relevant facts regarding those contraventions in settlement. Terms of a settlement vary depending on the circumstances of the matter and the stage of the enforcement action at which the settlement is agreed. However generally a person is asked:
- a. To waive, and promise not to exercise, any rights to make representations to the AIFC Court or to gain access to material considered by the AFSA;
  - b. Not to object to being given a decision notice before any period specified by the AFSA for making written representations has expired;
  - c. Not to dispute the facts or matters set out in the decision notice;
  - d. To agree that the AFSA will make a public statement regarding the settlement;
  - e. To agree not to make any public statement that in any way conflicts with the intent, purpose or factual basis of the settlement and the action taken by the AFSA; and
  - f. To agree that if the terms of the settlement are breached, the AFSA may apply to the AIFC Court for an order directing that the person comply with the terms of the settlement or any other order that the AFSA considers appropriate.

### **Financial penalties and settlement**

- 7.12 The AFSA consider that where a person has been open and cooperative and has demonstrated a commitment to settle an enforcement matter as early as possible, the person should be given appropriate recognition. The AFSA considers that where a financial penalty is imposed on a person as a result of an early settlement, the amount payable should be less than if the penalty had been imposed on a later stage of the enforcement process. Accordingly, the AFSA may reduce the financial penalty accordingly from a starting point of 30% for early settlement with maximum co-operation on a sliding scale to 0% given the length of time and complete circumstances of the matter.
- 7.13 In some cases it may be appropriate to agree on a settlement and then submit the agreement for approval by the AIFC Court, especially in cases where proceedings have commenced. Having the court rule on the settlement provides greater transparency and confidence in the rigor of the settlement.
- 7.14 The AFSA may also agree, depending on the circumstances, that a financial penalty is paid in installments. No reduction will be given on monies the result of profit from the contraventions or losses avoided by the contraventions. The public statement will contain the appropriate financial penalty, and the discounted financial penalty that is payable after settlement.

## CHAPTER 8 – PUBLICITY

### Introduction

- 8.1 This Chapter sets out the AFSA policy on publicity surrounding:
- a. Ongoing enforcement matters where the AFSA is assessing or investigating concerns and has not taken any enforcement or disciplinary action;
  - b. Enforcement and disciplinary actions taken by the AFSA;
  - c. Decision Notices given to persons under Schedule 1; and
  - d. Proceedings in the AIFC Court.
- 8.2 This Chapter also sets out the AFSA’s policy about the updating of public registers of authorized firms and approved individuals to record the outcomes of enforcement action taken by the AFSA. Publicity about enforcement improves the understanding of regulatory standards among firms and potential users of the AIFC, deters other persons from engaging in similar misconduct, and demonstrates how the AFSA is using its enforcement and disciplinary powers to meet its regulatory objectives.

### Publicity about ongoing matters

- 8.3 The AFSA’s general policy is not to publicise the fact that it is or is not investigating, or considering enforcement action, about a matter. However, in exceptional circumstances, AFSA departs from this general policy by making a public announcement about an ongoing enforcement action. The AFSA considers that exceptional circumstances have arisen when such a public statement becomes necessary in the interests of meeting its regulatory objectives. A public announcement about an ongoing enforcement matter may be required where:
- a. Needed to assist in maintaining the integrity and confidence in the AIFC or the AFSA;
  - b. Needed to protect clients, for example by alerting clients to the risk of unauthorized conduct by a person overseas who is under investigation by the AFSA;
  - c. Needed to prevent and restrain conduct which may cause damage to the reputation of the AIFC, for example by alerting other firms in the AIFC to the conduct of a firm under investigation to stop or deter other firms from engaging in similar conduct; or
  - d. Assist in the investigation itself, for example by encouraging witnesses to come forward.
- 8.4 Exceptional circumstances may also arise where the matter under investigation has become a matter of public concern, speculation or rumour. The AFSA may make a public statement to allay that concern or contain speculation or rumour. Disclosure of an investigation is sometimes unavoidable, for example when investigators speak to witnesses. In such cases the investigation is only disclosed to the extent necessary.

### Publication of enforcement and disciplinary actions

- 8.5 Except in very rare circumstances, the AFSA publishes the outcomes of enforcement and disciplinary actions. Publication of the outcomes of enforcement or disciplinary actions allows other firms to see the seriousness with which the AFSA views contraventions of AIFC Law and allows AFSA to demonstrate consistency and transparency in its enforcement actions. Such publicity has an important role in deterring persons who have committed contraventions from committing further contraventions, and others from committing similar contraventions. As such, publicity about enforcement and disciplinary actions taken by the AFSA helps it to meet its regulatory objectives.

- 8.6 The AFSA may in some rare circumstances consider it appropriate not to publicise enforcement or disciplinary action taken, or not to do this immediately. This happens if publication would not be in the public interest, would damage confidence in the financial system or would be prejudicial to the interests of clients.
- 8.7 The AFSA will retain media releases about enforcement outcomes on its website regardless of how long ago they were published. Where a further public statement is required about a matter, for example where further disciplinary action is taken against the same person or there is an appeal against the AFSA decision, AFSA will generally update or publish a further media release about the matter.

#### **Publicity about Decision Notices**

- 8.8 The AFSA does not publish Decision Notices. Similarly, a person who has been given a Decision Notice may not publish it or any details concerning it. The AFSA regards such disclosure as a contravention of AIFC Law and will, where appropriate, take action accordingly.
- 8.9 Generally the AFSA will make a public statement about the enforcement or disciplinary action to which a Decision Notice relates when:
- a. Any applicable appeal rights in respect of the matter have been waived or have expired;
  - b. The matter has not been referred to the AIFC Court, or
  - c. Any appeals or proceedings about the enforcement action have concluded.

#### **Publicity about proceedings**

- 8.10 Section 32 of the AIFC Court Regulations 2017 provides that matters will be heard in public unless otherwise directed by the Court. Subject to the Court rules or any contrary direction by the Court, AFSA will therefore make a public statement about the commencement of proceedings once the parties have been served. The AFSA will normally make a public statement about the outcome of proceedings, unless the AIFC Court directs otherwise.
- 8.11 In cases where the AFSA has successfully applied for an injunction or a restitution order, the AFSA will generally publicise the matter. The AFSA considers it appropriate to publicise the fact and effect of an injunction to inform the clients of that person and protect them from further matters dealt with by the injunction, or a restitution order to protect and inform clients and restore market confidence.<sup>8</sup>

#### **Public Registers**

- 8.12 The AFSA generally publicises on its web-site or the public registers the fact of any enforcement or disciplinary actions taken in respect of an authorised firm or a controlled individual. This is particularly relevant to actions taken by the AFSA leading to variations, suspension, withdrawals, prohibitions and restrictions. The AFSA also considers what additional information about the circumstances of the enforcement action should be maintained in the public registers, considering any prejudice to the person concerned and the interests of consumer protection.
- 8.14 The AFSA may decide not to record the enforcement action details if the publication would not be in the public interest, would damage confidence in the financial system or would be prejudicial to the interests of clients and customers. The AFSA will also abide by the directions of the AIFC Court about publicity for enforcement actions referred to the Court.

## **Annex 1 – factors in deciding to take disciplinary action**

1. In deciding whether to take disciplinary action in respect of conduct appearing to contravene AIFC law, the AFSA considers the full factors known about each case. The following is a list of factors that may be relevant in making that decision in a particular case. The list is indicative only and not all factors will be relevant.

### **The nature, seriousness and effect of the conduct**

2. The AFSA has regard to the following:
  - a. Whether the AFSA has jurisdiction in the matter;
  - b. Whether the contravention was deliberate or reckless;
  - c. The duration and frequency of the contravention and the length of time elapsed since it occurred;
  - d. The amount of any benefit gained, or loss avoided, as a result of apparent contravention;
  - e. If the person is an Authorised Firm whether the apparent contravention happened because of serious or systemic weaknesses in the persons systems, procedures or controls or the resources (including staffing) allocated to them were inadequate.
  - f. Any effect or potential effect of the apparent contravention on the following:
    - i. The efficiency, transparency and the integrity of the AIFC;
    - ii. The efficiency, transparency and integrity of the AIX;
    - iii. Confidence in the AIFC by users and potential users of the AIFC;
    - iv. Confidence in the AIX by users and potential users;
    - v. The financial stability of the AIFC, including systemic risk relating to the AIFC;
    - vi. The financial stability of the AIX, including systemic risk;
    - vii. The reputation of the AIX; and
    - viii. The reputation of the AIFC.
  - g. Any loss or risk to client, customers and other affected people;
  - h. Whether the suspected contravention has influenced vulnerable people, whether internationally or otherwise;
  - i. The nature and extent of any financial crime caused or facilitated by, or otherwise attributable to, the apparent contravention;
  - j. The scope for any financial crime to be caused or facilitated by the apparent contravention; and
  - k. Whether several smaller issues which individually may not justify disciplinary action but when taken together do so.

### **Subsequent conduct**

3. The person's subsequent conduct, including for example:
  - a. How quickly, effectively and completely the person brought the apparent contravention to the attention of the AFSA or another body;
  - b. The degree of cooperation the individual showed during the investigation of the apparent contravention; and
  - c. Any remedial steps the person has taken in respect of the suspected contravention, and whether these were taken on a person's own initiative or that of the AFSA or other body.
  - d. The likelihood that the same type of contravention will recur if no action is taken;
  - e. Whether the person has complied with any requirements or decisions of the AFSA or any other body in relation to the apparent contravention;
  - f. The nature and extent of any false, misleading or inaccurate information given by the person to the AFSA or other body in relation to the contravention and whether any such information appears to have been give carelessly, recklessly or in an attempt to mislead.



### **Disciplinary record and compliance history**

4. The disciplinary record and compliance history of the person, including:
  - a. Whether the AFSA has previously taken any disciplinary or enforcement action against the person;
  - b. Whether the AFSA has previously given an enforceable undertaking;
  - c. Whether the AFSA has previously prohibited or restricted the person under Sections 99 and 100;
  - d. Whether an injunction has previously been served on the person;
  - e. Whether the Regulatory Authority has previously asked the person to take remedial action, and the extent to which such action has been taken;
  - f. The person's general compliance history, including whether the AFSA have previously given the person a private warning.
  
5. If the person is or was an Approved Individual, the following factors will also be relevant:
  - a. The person's position, role and responsibilities, and in particular, how senior the person is or was in the firm and how important the person's duties were in the firm;
  - b. The extent of a person's involvement;
  - c. Whether the person's conduct is such that disciplinary action should be taken against that person. This may occur if the AFSA considers a person's conduct was deliberate or below the standard expected or required;
  - d. Whether disciplinary action against the firm rather than the person would be a more appropriate regulatory response; and
  - e. Whether disciplinary action against a person would be a proportionate response to the nature and seriousness of the contravention.