

**Draft Guideline on Pecuniary Penalty to be issued by
the independent Insurance Authority (“IIA”)**

Purpose

This paper seeks Members’ suggestions on areas to be covered by the guideline on pecuniary penalty that may be issued by IIA.

Background

2. Under the Insurance Companies (Amendment) Ordinance 2015 (“Amendment Ordinance”), IIA is empowered to impose a range of disciplinary sanctions on a regulated person¹, including a pecuniary penalty not exceeding the greater of HK\$10,000,000 or three times the amount of the profit gained or loss avoided by the person as a result of guilty of misconduct or not being a fit and proper person.

3. The Amendment Ordinance requires IIA to publish in the Gazette (and in any other manner it considers appropriate) a guideline to indicate the way in which it proposes to exercise the power to impose pecuniary penalty and to consult the Monetary Authority before publishing the guideline. The Amendment Ordinance also requires IIA to have regard to the guideline in exercising that power.

The Draft Guideline

4. The attached draft guideline on pecuniary penalty is meant to serve as a working draft that reflects the views of the industry to facilitate IIA to prepare the guideline. It is likely that IIA will consult the industry formally before finalising the guideline. References have been made to the following guidelines -

¹ A regulated person means (i) a licensed insurance intermediary, (ii) a responsible officer of a licensed insurance agency/broker company, or (iii) a person concerned in the management of the regulated activities carried on by a licensed insurance agency/broker company.

- (a) guidelines issued by the three Self-Regulatory Organisations (“SROs”);
- (b) fining guidelines issued under anti-money laundering regime²; and
- (c) Decision Procedure and Penalties Manual issued by the Financial Conduct Authority of the United Kingdom.

5. Given the complexity of today's market, the diverse activities of insurance intermediaries and the wide spectrum of insurance intermediaries (some of which are individuals while other are banks and international brokerage firms, etc.), it is considered inappropriate to set any tier structure for different kinds of misconduct as that would confine the flexibility of IIA to tailor and fine-tune the sanction to address each specific case.

6. The draft guideline sets out the major considerations that IIA should take into account when determining whether to impose a pecuniary penalty and the amount of the penalty. They include –

- (a) the nature, seriousness and impact of the conduct (factors such as whether the conduct is intentional, reckless, fraudulent or negligent and the amount of profit gained or loss avoided as a result of the conduct would be considered);
- (b) the behaviour of the regulated person after the conduct (factors such as whether the regulated person has timely reported the conduct or attempted to conceal the conduct and what remedial steps have been taken would be considered);
- (c) previous disciplinary record and compliance history of the regulated person;
- (d) financial resources of the regulated person; and
- (e) guidance issued by IIA and actions taken by IIA in previous similar cases.

² The respective guidelines are issued by the Insurance Authority, the Monetary Authority and the Commissioner of Customs and Excise pursuant to section 23 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615).

7. To address the concerns about the maximum amount of pecuniary penalty for individuals, the following factors categorised under “financial resources of the regulated person” are covered in the draft guideline –

- (a) whether a penalty imposed in a particular case would have the likely effect of putting the regulated person concerned in financial jeopardy; and
- (b) whether the regulated person is an individual, sole proprietor, partnership or limited company.

Advice sought

8. Members are invited to comment on the draft guideline on pecuniary penalty. We will consolidate Members’ comments for IIA’s future reference.

Financial Services and the Treasury Bureau
15 February 2016

Guideline on Exercising Power to Impose Pecuniary Penalty

**Published under Section 83(1) of the Insurance Ordinance
(Chapter 41)**

Guideline on Exercising Power to Impose Pecuniary Penalty

Introduction

This Guideline is issued by the Insurance Authority (“IA”) pursuant to section 83(1) of the Insurance Ordinance (Chapter 41) (the “Ordinance”). Under section 81 of the Ordinance, the IA may impose a pecuniary penalty either on its own or together with other disciplinary sanctions on a regulated person as defined in Part XI of the Ordinance including:

- a licensed insurance intermediary;
- a responsible officer of a licensed insurance agency/broker company; or
- a person concerned in the management of the regulated activities carried on by a licensed insurance agency/broker company,

for misconduct or being not a fit and proper person.

In exercising the power to impose a pecuniary penalty referred to in section 81(4)(e) of the Ordinance, the IA shall have regard to this Guideline which indicates the way in which it proposes to exercise that power.

Considerations in exercising IA’s power to impose pecuniary penalty

- Under section 81 of the Ordinance, the IA may impose a pecuniary penalty either on its own or together with other disciplinary sanctions. The principal purposes of imposing a pecuniary penalty are:
 - (i) to promote high standards of market conduct by deterring regulated persons who have committed misconduct from committing further misconduct, and helping deter other regulated persons from committing similar misconduct; and
 - (ii) to ensure a regulated person guilty of misconduct should not benefit from the misconduct.
- The IA regards a pecuniary penalty as a more severe sanction than a reprimand. The IA will not impose a pecuniary penalty if the circumstances of a particular case only warrant a reprimand and the deterrence may be effectively achieved by issuing a reprimand.
- As a matter of policy, the IA will usually publicize all its decisions to impose a pecuniary penalty.
- A pecuniary penalty should be effective, proportionate and fair. The more

serious the conduct, the greater the likelihood that the IA will impose a pecuniary penalty and that the amount of the penalty will be higher. When considering whether to impose a pecuniary penalty and the amount of the penalty, the IA will consider the full circumstances of the particular case, including the relevant factors listed below. These factors are not exhaustive and not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

(a) *The nature, seriousness and impact of the conduct, including:*

- (i) whether the conduct was intentional, reckless, fraudulent or negligent;
- (ii) the duration and frequency of the conduct;
- (iii) the amount of any profit gained or loss avoided by the regulated person and related parties (including, in relation to a firm, its directors and employees) as a result of the conduct;
- (iv) whether the conduct is potentially damaging or detrimental to the integrity and stability of the insurance industry, and/or the reputation of Hong Kong as an international financial centre;
- (v) the loss or risk of loss caused to policy holders or potential policy holders;
- (vi) whether a breach of fiduciary duty was involved;
- (vii) whether there are a number of smaller issues, which individually may not justify a disciplinary action, but which do so when taken collectively;
- (viii) whether the conduct was part of a more serious misconduct;
- (ix) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the conduct;
- (x) in relation to a firm,
 - whether the conduct reveals serious or systemic weaknesses of the management systems or internal controls in respect of all or part of the regulated activities carried on by the firm;
 - whether the conduct is widespread in the firm;
 - whether the firm’s senior management were aware of the conduct; and
- (xi) in relation to an individual,
 - whether the individual abused a position of trust;
 - whether the individual caused or encouraged other individuals to engage in the same type of conduct; and
 - the individual’s experience in the industry and position within the insurance agency/broker company.

- (b) *The behavior of the regulated person after the conduct, including:*
- (i) whether the regulated person has timely and comprehensively reported the conduct to the IA or another relevant regulatory authority;
 - (ii) whether the regulated person attempted to conceal the conduct;
 - (iii) the degree of cooperation with the IA during the investigation;
 - (iv) any remedial steps taken in respect of the conduct, including any action taken by the regulated person against those involved, and any steps taken to redress the loss caused to policy holders (or others) or to prevent recurrence of the conduct; and
 - (v) the likelihood that the regulated person will engage in the same type of conduct in the future.
- (c) *The previous disciplinary record and compliance history of the regulated person, including:*
- (i) the disciplinary history of the regulated person; and
 - (ii) whether the regulated person has previously undertaken not to engage in particular conduct.
- (d) *Financial resources of the regulated person:*
- (i) whether a penalty imposed in a particular case would have the likely effect of putting the regulated person concerned in financial jeopardy; and
 - (ii) whether the regulated person is an individual, sole proprietor, partnership or limited company.
- (e) *Guidance issued by the IA:*
- (i) whether the IA has issued any guidance in relation to the conduct in question; and
 - (ii) generally the IA will not take action against a person for conduct that it considers to be in line with the guidance prevailing at the time of the conduct in question.
- (f) *Actions taken by the IA in previous similar cases.*
- (g) *Other factors:*
- (i) actions taken by other domestic or overseas regulatory authorities in respect of the conduct in question; and
 - (ii) result or likely result of any civil action taken or likely to be taken

against the regulated person in respect of the conduct in question.