



# **AFSA ENFORCEMENT POLICY**

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## PART 1: INTRODUCTION

### 1.1. Name

This Policy is named *AFSA Enforcement Policy* ("Policy").

### 1.2. Powers to adopt

This Policy has been approved by the Board of Directors of the AFSA under Clause 5 of the Charter of the Board of Directors of the AFSA dated 18 May 2017, adopted by the Resolution of the Governor, and in accordance with Section 8 (1) of the FSFR.

### 1.3. Application of the Policy

1.3.1. This Policy applies in the AIFC.

1.3.2. Without limiting paragraph 1.3.1, this Policy applies to any Person who conducts business in or from the AIFC.

### 1.4. Purpose of this Policy

The purpose of this Policy is to set out the principles and approach the AFSA will follow in exercising its enforcement powers to uphold the integrity of the AIFC's regulatory framework. It ensures that enforcement actions are carried out in a fair, consistent, and proportionate manner, reinforcing compliance and promoting high standards of conduct. The Policy also provides clarity on how investigations are conducted and enforcement decisions are made.

### 1.5. Definitions

Terms used in this Policy have the same meanings as they have, from time to time, in the AIFC Financial Services Framework Regulations ("FSFR"), or the provisions of other relevant AIFC Regulations and Rules, unless expressly stated otherwise or where the context clearly indicates that no defined meaning is intended.

### 1.6. The legal basis of the AFSA's enforcement powers

The AFSA is established by virtue of Article 12 of the Constitutional Statute of the Republic of Kazakhstan No. 438-V ZRK dated 7 December 2015 "On the Astana International Financial Centre" ("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 the AIFC participants and taking appropriate measures in relation to them. The authority and procedures of the AFSA in relation to investigation and enforcement are principally set out in AIFC Regulations and Rules, including Part 9 of the FSFR.

### 1.7. The role of the AIFC Court

The AFSA may apply to the AIFC Court in the exercise of its powers.

### 1.8. Review and updates

The Policy is reviewed and updated as necessary to ensure alignment with amendments to the legislation administered by the AFSA and evolving international regulatory standards.



## PART 2: APPROACH TO ENFORCEMENT

### 2.1. General Approach to Enforcement

- 2.1.1. In determining its enforcement approach, the AFSA considers the risks that a contravention of any legislation administered by the AFSA may pose to the achievement of its Regulatory Objectives. As such, the AFSA assesses those risks and allocates its resources accordingly to ensure effective and proportionate enforcement action.
- 2.1.2. The principles, duties, and responsibilities imposed on Centre Participants by the legislation administered by the AFSA define the standards of conduct expected of them. The AFSA also takes into account whether these standards have been met, and considers the nature, extent, and impact of any failure to comply with such principles, duties, or responsibilities.
- 2.1.3. 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 Centre Participants are not interfered with unnecessarily.

### 2.2. Enforcement Principles

- 2.2.1. The AFSA's enforcement actions are guided by the following principles:

- a. **Proportionality:** The AFSA adopts a flexible approach to enforcement, 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, unless such disclosure is necessary. 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. **Co-operation and mutual assistance:** The AFSA works closely with other Financial Services Regulators or other authorities 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 enforcement action.

**2.3. Actions against individuals**

- 2.3.1. In certain circumstances, it may not be appropriate for the AFSA to take enforcement action against a firm for the misconduct of an individual. However, in other cases, enforcement action may be taken against both the firm and the individual, depending on the nature and extent of their respective responsibilities and involvement. For example, where a firm's compliance systems have failed and an Approved Individual is complicit in these failures, the AFSA takes action against both the firm and the individual. In such cases, the AFSA believes that taking enforcement action emphasizes the individual accountability within firms and reinforces Regulatory Objectives by deterring similar misconduct by other individuals.
- 2.3.2. The AFSA will only take enforcement action against individuals, where there is evidence of personal culpability or where the individual is knowingly concerned in a Contravention, as described in Section 120 of FSFR. Personal culpability occurs when an individual is responsible for a Contravention through their own actions or omissions, particularly where the conduct was intentional, reckless, or negligent, or where the individual had knowledge of the misconduct, failed to take reasonable steps to prevent it, or demonstrated a disregard for their obligations.
- 2.3.3. The AFSA does not take enforcement action against individuals solely on the basis of vicarious liability (that is, holding them responsible for the acts of others), provided appropriate delegation and oversight has taken place.
- 2.3.4. In determining whether the conduct of an individual fell short of the standard reasonably expected of them, the AFSA will take into account the factors set out in section 8 of Schedule 1 to this Policy.
- 2.3.5. Where enforcement action is taken against an individual, the onus is on the AFSA to show that the individual has contravened the relevant legislation or was otherwise knowingly concerned in a Contravention.

**2.4. Cooperation with the AFSA**

- 2.4.1 The AFSA considers the cooperation offered by a Person 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.
- 2.4.2. The AFSA gives credit for cooperation only when it goes above and beyond the obligations of the Person under the legislation administered by the AFSA, including but not limited to, Person's reporting obligations or obligations to comply with AFSA directions or decisions.
- 2.4.3. There are many ways in which a Person can proactively cooperate with the AFSA. For example, in assessing an appropriate regulatory response, the AFSA would take into account cooperation demonstrated by a Person in any of the following ways:
  - 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 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 Person 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 sanctions 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.
- 2.4.4. 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.

### **2.5. Extended Powers**

- 2.5.1. The AFSA retains extended powers to exercise its enforcement functions in relation to an Authorised Person, Ancillary Service Provider, Approved Individual, Designated Individual or any Director, officer, Employee or representative of an Authorised Person, Ancillary Service Provider, or Registered Auditor even after the withdrawal of their licences or statuses as set out by Section 158 of the FSFR.
- 2.5.2. These powers may be exercised for up to three years from the date the AFSA became aware of the relevant act or omission. Where proceedings have commenced within that timeframe, the powers remain in force until those proceedings, including any reviews or appeals, are concluded.





## PART 3: ASSESSMENT OF ALLEGATIONS

### 3.1. Sources of allegations

- 3.1.1. There are several ways that the AFSA may become aware of a matter that warrants enforcement action.
- 3.1.2. The AFSA may become aware of potential misconduct or contraventions through its regulatory activities, such as the supervision of licensed firms. Possible contraventions and matters of concern may also be reported to the AFSA by an Authorised Person or Ancillary Service Provider pursuant to their disclosure obligations under AIFC Regulations and Rules.
- 3.1.3. The AFSA may also receive allegations of misconduct from investors, clients, and current or former employees of the Person concerned, other regulatory authorities or law enforcement agencies, as well as from any other stakeholders raising concerns about the conduct of the Person.

### 3.2. Assessment

- 3.2.1. The assessment of allegations involves a review of all the information available to the AFSA, the law, the assessment criteria outlined in paragraph 3.3.2 and the Regulatory Objectives of the AFSA to determine how the AFSA's discretion should be exercised and whether any action is required.
- 3.2.2. The AFSA may also take into account any other factors it considers relevant and, where appropriate, may seek additional information from other regulatory authorities or law enforcement agencies to support its assessment.
- 3.2.3. At the assessment stage, the AFSA generally relies on the voluntary cooperation of a Person. The Person concerned, as well as any other Persons who may have information relevant to the matter, may be requested to provide or produce any information or documents relevant to the assessment of the alleged contraventions. Where appropriate, the AFSA may also arrange an interview to obtain further information.
- 3.2.4. If the Person is outside the AIFC and is not an Authorised Person, Ancillary Service Provider, or an Approved Individual, Designated Individual, or Director of an Authorised Person or Ancillary Service Provider, the AFSA must 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 to exercise the power; or
  - b. Apply to the AIFC Court for an order compelling the Person to provide the information, produce or procure production of the documents, or answer questions, or permitting the AFSA to enter the premises of that Person.
- 3.2.5. The steps taken during an assessment will vary depending on the nature, complexity and circumstances of the allegations.

### 3.3. Assessment Criteria

- 3.3.1. In assessing an allegation, the AFSA is guided by its Regulatory Objectives and considers the specific circumstances of each case.
- 3.3.2. 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 to determine whether, in all the circumstances, it would be appropriate for the AFSA to investigate the alleged misconduct to further its aims and objectives. The criteria include:

- a. Whether the AFSA has jurisdiction in the matter;
- b. The seriousness of the alleged contravention in relations to its nature;
- c. The impact of the alleged contravention, including harm caused to stakeholders, reputation of the AIFC and its regulatory framework, and any risks posed to the stability and integrity of the market;
- d. Whether the alleged contravention was intentional, reckless or negligent;
- e. The likelihood of the alleged misconduct being proven, having regard to the availability, reliability, and quality of the evidence of the alleged misconduct;
- f. Whether the Person has offered or is likely to offer any assistance to the AFSA or stakeholders affected by the alleged misconduct;
- g. The remedies and regulatory actions available to the AFSA;
- h. Whether another authority is able to take action in relation to the alleged misconduct, and the likelihood of such action being taken;
- i. Whether the Person is an individual;
- j. Any other criteria that the AFSA deems relevant depending on the circumstances of each case.

### **3.4. Outcome of assessment**

- 3.4.1. It is not necessarily appropriate to commence an investigation in response to every allegation reported to the AFSA, and the AFSA has discretion to decide whether an investigation is commenced in relation to the allegations.
- 3.4.2. Depending on the outcome of the assessment, the AFSA may consider one or more of the following actions:
  - a. Immediately taking enforcement action or imposing disciplinary sanctions outlined in Section 118 of the FSFR. This may occur when the contravention does not appear to be in dispute, or the Person has indicated a willingness to resolve the matter by way of settlement;
  - b. Initiating an investigation pursuant to Section 114 (1) of the FSFR;
  - c. Issuing a Private Warning;
  - d. Referring the alleged misconduct to another Financial Services Regulator or other agencies (e.g., a Financial Intelligence Unit) in the Republic of Kazakhstan or abroad;
  - e. Taking supervisory action in respect of the specific misconduct, or more generally, addressing the overall conduct of the Person involved;



- f. Engaging in settlement discussions and approving a settlement agreement;
  - g. Taking no further action. The AFSA may decide this is the appropriate outcome where:
    - i. There is no evidence that a contravention has occurred;
    - ii. Although there is evidence that a contravention has occurred, any detriment caused by the Contravention has been fully remedied or 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.
  - h. The AFSA may consider any other action that is available and appropriate to the circumstances of the matter.
- 3.4.3. Where appropriate, the AFSA may inform the Person(s) who reported the alleged misconduct, subject to the nature of the outcome, ongoing regulatory considerations, and the extent to which disclosure may prejudice current or prospective regulatory and enforcement action.

### **3.5. Financial Crime and referral to law enforcement**

- 3.5.1. Where there is a reasonable suspicion of money laundering, terrorist financing, fraud or other forms of Financial Crime, the AFSA may refer the matter to domestic or foreign law enforcement agencies. Such referrals may be made independently of any enforcement action taken by the AFSA and are aimed at ensuring that suspected criminal activity is investigated by the appropriate competent agencies. Although AFSA may refer the conduct to the relevant agency, it may continue its parallel investigation, depending on the nature of the misconduct.

## **PART 4: CONDUCT OF INVESTIGATIONS AND REGULATORY POWERS**

### **4.1. Investigations by the AFSA**

- 4.1.1. The AFSA may conduct any investigation it considers appropriate and expedient where it has reason to suspect that a contravention of the legislation administered by the AFSA is being, or may have been, committed, or where a request for assistance is made by a Financial Services Regulator.

### **4.2. Investigation opening criteria**

- 4.2.1. When deciding whether to initiate an investigation, the AFSA will consider the factors set out in the assessment criteria detailed in paragraph 3.3.2 of this Policy.
- 4.2.2. The criteria are not exhaustive, and AFSA evaluates the specific circumstances of each case before initiating an investigation. This implies that not all factors will be pertinent to every situation, and additional factors may be relevant in specific instances. Any single factor could justify the initiation of an investigation, and in some cases, such as when breaches are self-reported, the severity of the misconduct may necessitate enforcement action as the only appropriate course of action.

**4.3. Additional considerations – individuals**

- 4.3.1. 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 factors set out in section 8 of Schedule 1 to this Policy. 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.
- 4.3.2. The AFSA also considers whether it is appropriate or necessary to suspend 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). If the Approved Individual is, or has been, in breach of an obligation that applies to their status, or is no longer fit and proper to perform the role of an Approved Individual, the AFSA may, pursuant to Section 45-1 of the FSFR, restrict the Person from carrying on a Controlled Function or suspend or withdraw their Approved Individual.

**4.4. Appointment of investigators**

- 4.4.1. Once the AFSA decides that it is appropriate to commence an investigation, it will appoint one or more Investigators.
- 4.4.2. The notice of Appointment of Investigators is served on the Person concerned as a formal notification of commencement of an investigation. 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 the Person.
- 4.4.3. In some investigations, the AFSA may appoint additional Investigators. If this occurs, and the AFSA has previously informed the Person of the original appointment of Investigators, the AFSA will normally give written notice of any such additional appointment. This will be done where the additional Investigator is required to exercise powers under Section 116 of the FSFR.
- 4.4.4. The AFSA may engage external consultants or experts to assist throughout the investigation process. However, they are not vested with the powers set out in Part 9 of the FSFR, and may only be present when such powers are exercised by Investigators appointed by the AFSA.

**4.5. Commencement of an investigation**

- 4.5.1. Once the investigation has commenced, Investigators may contact the Person concerned and arrange a voluntary interview. The purpose of this interview is to inform the Person of the reasons for initiating the investigation and to provide an early indication of the nature and the basis of the AFSA's concerns, the scope of the investigation, an explanation of the relevant procedures and the types of documents and information the AFSA is likely to request.
- 4.5.2. Holding such an interview may not be appropriate in all cases, particularly where the circumstances warrant urgent and prompt action by the AFSA. The decision will be made by the AFSA on a case-by-case basis.
- 4.5.3. As a general rule, the employees of the AFSA 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 and the maintenance of an ongoing supervisory relationship with the firm.
- 4.5.4. Where the AFSA decides to discontinue an investigation without taking any action, it is not obliged to inform the subject of the investigation that it is being discontinued. However, where the subject of the investigation has previously been notified of the commencement of the investigation, the AFSA will



confirm its decision to discontinue or cease pursuing the matter, when it considers it appropriate to do so, having regard to the circumstances of the case.

#### **4.6. Publicity about investigations**

- 4.6.1. 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;
  - d. To protect the interests of consumers and investors; or
  - e. To assist the investigation itself, for example, encouraging witnesses or victims who have suffered loss to come forward.

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

- 4.7.1. Pursuant to Section 116 of the FSFR, the AFSA has the power to request any information and document which is or may be relevant to an investigation.
- 4.7.2. 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. However, there is no obligation on the AFSA to give notice, written or otherwise, and it may exercise its powers without notice where appropriate in the context of an investigation.
- 4.7.3. Authorised Persons, Ancillary Service Providers, Approved Individuals, and Designated Individuals have specific obligations to deal with the AFSA in an open and co-operative manner, and to promptly disclose any information that the AFSA would reasonably expect to be notified of. Where the AFSA uses its powers under Section 116 of the FSFR, the Person concerned might be required, by written notice, to give it assistance in relation to the investigation.
- 4.7.4. If the AFSA believes that a Person is not complying with the written notice, it may apply to the AIFC Court for 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 minimise loss or damage as set out in Section 124 of the FSFR.
- 4.7.5. The AFSA's information-gathering powers under Section 116 of the FSFR cover Persons within the AIFC. Where the Person is located outside the AIFC (whether in the Republic of Kazakhstan or abroad), the AFSA may either rely on co-operation arrangements with the regulatory authority of the relevant jurisdiction or apply to the AIFC Court in order to impose these requirements on the Person.



**4.8. Power to enter the business premises**

- 4.8.1. The AFSA also has a general power under Section 116 (1) (a) of the FSFR to enter the business premises of such Person during normal business hours for the purpose of inspecting and copying information or documents stored in any form in such premises.
- 4.8.2. Where the AFSA exercises this power, it may:
- (a) require any appropriate Person to make available any relevant information stored at those premises for inspection or copying;
  - (b) require any appropriate Person to convert any relevant information into a form capable of being copied; and
  - (c) use the facilities of the occupier of the premises, free of charge, to make copies.
- 4.8.3. The visit may be made without prior notice, and includes the following circumstances:
- a. It is reasonably believed that documents or information critical to the investigation are located at the premises;
  - b. Providing prior notice could compromise the integrity of the investigation;
  - c. There is a significant risk that an advance request for information would not be complied with; and
  - d. Providing prior notice may result in obstruction of the investigation, including the concealment, tampering, or destruction of relevant materials.
- 4.8.4. If the AFSA is denied access to premises, or if access to documents or information is refused, it may, where appropriate, apply to the AIFC Court for a search order, or any other order the AIFC Court sees fit.

**4.9. Power to conduct interviews**

- 4.9.1. 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 a compulsory interview before an officer, employee or agent of the AFSA at a specified time and place to answer questions in private. The AFSA must clearly indicate whether the interview is being conducted on a voluntary basis or under compulsion, as there may be circumstances where a voluntary interview is appropriate.
- 4.9.2. Pursuant to Section 116 (3) of the FSFR, where the AFSA exercises its powers to conduct a compulsory interview, it may give a direction:
- a. Concerning who may be present;
  - b. Preventing any Person present during any part of the compulsory interview from disclosing to any other Person any information provided to the interviewee or questions asked by the interviewer during the compulsory interview;
  - c. Concerning the conduct of any Person present, including as to the manner in which they will participate in the interview;



- d. Requiring the interviewee to swear an oath or give an affirmation that the answers of the interviewee will be true; and
  - e. Requiring the interviewee to answer any questions relevant to the investigation.
- 4.9.3. Pursuant to Section 114(2) of the FSFR, a Person is entitled to legal representation during the course of an investigation. Hence, a Person may be accompanied by a legal representative during the interview, provided that the representative presents appropriate documentation confirming their authority to represent the Person.
- 4.9.4. Interviews will generally be recorded, subject to the consent of the interviewee, who may request a copy of the recording and, if available, a transcript of the interview.
- 4.9.5. Not all interviews held by the AFSA will be compulsory. Wherever appropriate, the AFSA may carry out voluntary interviews. Compulsory interviews are used when the AFSA considers it necessary to obtain information that cannot be secured through a voluntary interview or when a voluntary interview is not feasible.

#### **4.10. Power to require assistance**

- 4.10.1. Pursuant to Section 116(1)(b)(iv), the AFSA may require the Person concerned to give it assistance in relation to the investigation. This may involve requiring the Person to do an act or thing, such as providing information necessary for the investigative process. For instance, an appointed Investigator may ask the Person to help locate certain documents. The AFSA may exercise this power on its own or alongside other investigative powers.

#### **4.11. Admissibility, confidentiality and protection**

- 4.11.1. Any information given or document procured as a result of the exercise by the AFSA of powers under Section 116 of the FSFR is admissible in evidence in any proceedings, provided that any such information or document also complies with any requirements relating to the admissibility of evidence in such proceedings. Similarly, any document or other information voluntarily provided to the AFSA is admissible in any proceedings the AFSA decides to take.
- 4.11.2. 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(2) and Section 132(2) of the FSFR.
- 4.11.3. The AFSA requires the Person under investigation to maintain the confidentiality of all matters related to the investigation. Under Section 132-1 of the FSFR, a Person who receives from the AFSA notice, decision, direction, order, request or warning, which is marked as confidential, must not disclose the existence and content of such notice, decision, direction, order, request or warning to any third party except for obtaining necessary professional advice in relation to the Person's rights and obligations.

#### **4.12. Self-incrimination**

- 4.12.1. 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, a Person is expected to provide information or documents to the AFSA and answer questions even if it is possible that it might incriminate them.





#### **4.13. Costs of an investigation**

- 4.13.1. Section 115 of the FSFR provides that the AFSA must generally pay the costs and expenses of an investigation. However, where the Person under investigation is found to have contravened the legislation administered by the AFSA, the AFSA 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.

#### **4.14. Findings of the Investigation**

- 4.14.1. Appointed Investigators document the findings of the investigation in an Investigation Report, which serves as the basis for decision-making.
- 4.14.2. Where the AFSA makes a decision following an investigation, it will issue a written notice to the Person concerned detailing the decision, the reasons behind it, and any supporting findings.
- 4.14.3. If an investigation is discontinued and no further action is taken, the AFSA returns all documents and other materials obtained during the investigation to the Person from whom they were seized, as soon as reasonably practicable.

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

- 4.15.1. The AFSA acknowledges that firms may have valid reasons to conduct their own internal investigations when concerns arise, such as for disciplinary purposes, effective management, or enhancing operational and risk controls. The AFSA encourages this proactive stance and respects a firm's right to manage such matters independently. However, firms should understand that the results of their investigations could be relevant to the AFSA, especially if the AFSA is considering an initiation of an enforcement investigation. Voluntarily sharing these findings can help streamline the process and conserve resources for both the firm and the AFSA.
- 4.15.2. 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 acquire documents under Section 116 of the FSFR. Likewise, an internal investigation is not a replacement for regulatory enforcement where the AFSA considers such action necessary. However, the outcomes of a firm's internal review may assist the AFSA in determining the most appropriate course of action or in focusing its attention on particular areas of concern.
- 4.15.3. Accordingly, where the AFSA has indicated to a firm that an issue or concern may result in enforcement action, 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.
- 4.15.4. 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 facts, or whether it will include opinions about potential contraventions of the legislation administered by the AFSA;
  - 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.
- 4.15.5. 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.
- 4.15.6. The AFSA regards such reports as confidential information and treats them accordingly.

## **PART 5: DECISION-MAKING AND SANCTIONS FOR CONTRAVENTIONS**

### **5.1. Decision-making authority**

- 5.1.1 Decisions in relation to enforcement matters are taken by the appropriate decision-making authority within the AFSA, in accordance with its internal procedures and governance arrangements. Depending on the nature and circumstances of the matter, this may be a designated collective decision-making body.

### **5.2. Decision to impose sanctions for contraventions**

- 5.2.1. Depending on the circumstances of the case, the AFSA may decide to impose the following sanctions for contraventions in accordance with Section 118 of the FSFR:
- a. Fine the Person such amount as the AFSA considers appropriate in respect of the contravention;
  - b. Censure the Person in respect of the contravention;
  - c. Make a direction requiring the Person to effect restitution or compensate any other Person in respect of the contravention within such period and on such terms as the AFSA may direct;



- d. Give a direction requiring the Person to account for, in such form and on such terms as the AFSA may direct, such amounts as the AFSA determines to be profits or unjust enrichment arising from the contravention;
  - e. Give a direction requiring the Person to cease and desist from such activity constituting or connected to the contravention as the AFSA may stipulate;
  - f. Give a direction requiring the Person to do an act or thing to remedy the contravention or matters arising from the contravention;
  - g. Give a direction restricting or prohibiting the Person from holding office in or being a Director or Employee of any Authorised Person or Ancillary Service Provider.
- 5.2.2. The sanctions listed in paragraph 5.2.1 above are not exhaustive and do not prevent the AFSA from making other decisions or exercising any other powers conferred on it under any legislation administered by it.
- 5.3. Factors considered in imposing sanctions.**
- 5.3.1. When imposing sanctions outlined in paragraph 5.2.1 of this Policy, the AFSA takes into account the following factors, which are described in more detail in Schedule 1 to this Policy:
- a. The seriousness of the contravention in relation to its nature;
  - b. The impact of the contravention;
  - c. The extent to which the contravention was intentional, reckless or negligent;
  - d. The amount of any benefit gained or loss avoided by the Person as a result of the contravention;
  - e. The subsequent conduct of the Person, considering their overall cooperation and remedial actions taken after the contravention;
  - f. The disciplinary record and compliance history of the Person;
  - g. Whether the Person is an individual;
  - h. Any other factors the AFSA deems relevant or appropriate in the circumstances.
- 5.3.2. The factors above are not exhaustive, and the AFSA evaluates the specific circumstances of each case before imposing sanctions or taking any other enforcement action. This implies that not all factors will be pertinent to every situation, and additional factors may be relevant in specific instances.
- 5.3.3. It should not be assumed that a Person subject to investigation will automatically be subject to disciplinary sanctions. Equally, the absence of appointed investigators does not necessarily mean that the AFSA will not impose disciplinary sanctions on the Person concerned. In most cases, the AFSA takes action based on the findings of an investigation, and in most instances, investigators are formally appointed.

**5.4. Decision-making procedures**

- 5.4.1. When the AFSA proposes to make a decision to impose sanctions for contraventions, it issues a written notice in accordance with Schedule 1 to the FSFR.
- 5.4.2. Procedures outlined in Schedule 1 to the FSFR do not apply to a decision by the AFSA in relation to a Person, if the Person has requested, or consented in writing to, the making of the decision, decision-making procedures outlined in Schedule 1 to the FSFR are not applicable.
- 5.4.3. Section 11 of the FSFR states that a Person aggrieved by the decision of the AFSA may appeal to the AIFC Court against the decision. The procedure to be adopted by parties to an appeal and by the AIFC Court on such an appeal is set out in Schedule 2 of the FSFR. An appeal may be instituted within a period of 28 days after the date of the decision, including by way of a Decision Notice, given to the Person by the AFSA.
- 5.4.4. Where the Person concerned confirms in writing their acceptance of the action set out in the Decision Notice and decides not to refer the decision to the AIFC Court, the AFSA need not wait 28 days before taking the action specified in the Decision Notice.
- 5.4.5. 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.

**5.5. Third party rights**

- 5.5.1. If a Decision Notice includes reasons that relate to a matter which identifies a Person other than the Person to whom the notice is given (a "Third Party"), and if the AFSA considers those reasons to be prejudicial to that Third Party, the AFSA must provide the Third Party with a notice or a copy of the Decision Notice, or extracts of its relevant parts. However, where the AFSA considers it impractical, it is not required to provide a copy of the notice to the Third Party. The relevant procedures are set out in Section 7 of Schedule 1 to the FSFR.

**5.6. Other enforcement powers**

- 5.6.1. Where appropriate, the AFSA may also consider the following actions in making decisions:
  - a. 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 in accordance with Section 122 of the FSFR;
  - b. Petition the AIFC Court for the winding up of an Authorised Person or Ancillary Service Provider (Section 123 (1) of the FSFR).

**5.7. Applications to the AIFC Court**

- 5.7.1. Depending on the circumstances of the case and nature of the contraventions, the AFSA may exercise its rights to apply to the AIFC Court for the following:
  - a. An injunction pursuant to Sections 124 to 126 of the FSFR;
  - b. An order for restitution pursuant to Sections 127 and 128 of the FSFR;



- c. An order for the recovery of damages or for compensation for the recovery of property pursuant to Section 129 of the FSFR;
- d. Any other order the AIFC Court sees fit.

## **5.8. Restitution and Action for damages**

- 5.8.1. If it becomes apparent during the enforcement process that the conduct in question has resulted in the Person concerned profiting, and that one or more Persons have incurred losses, damages or other adverse effects, AFSA may make a direction requiring the Person to effect restitution or compensate any other Person in respect of the contravention within such period and on such terms as the AFSA may direct pursuant to Section 118 (1)(c) of the FSFR.
- 5.8.2. The AFSA and the Person concerned may pursue a settlement regarding Restitution or Action for damages for affected parties. Such a settlement can facilitate a more timely resolution than court proceedings, enabling efficient determination of how amounts should be paid or distributed to those adversely impacted.
- 5.8.3. However, where the AFSA is not able to exercise its powers under Part 9 of the FSFR, it may apply to the AIFC Court, in accordance with Section 127 and 128 of the FSFR, for an order requiring the Person to pay an amount deemed just and equitable based on the profits gained or the losses suffered as a result of his or her contraventions or market abuse. Any funds recovered through this process must be distributed among the affected Person or Persons as directed by the AIFC Court.
- 5.8.4. Section 129 of the FSFR allows the AFSA to apply to the AIFC Court for an order for the recovery of damages or for compensation or for the recovery of property when a Person intentionally, recklessly, or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed by the FSFR, or commits fraud or other dishonest conduct in connection with a matter. The AIFC Court, in such cases, on application of AFSA may order broader remedies, including compensation for damages and the restoration of property, which go beyond mere restitution of profits or losses directly linked to the contravention.

## **5.9. Private Warnings**

- 5.9.1. In some cases, the AFSA may decide that, despite having concerns about a Person's conduct or sufficient evidence of a contravention of the legislation administered by the AFSA, it is not appropriate to impose disciplinary sanctions on the Person given the circumstances of the matter. This enables the AFSA to use its resources in the most efficient manner.
- 5.9.2. The decision to issue 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 AFSA decides that a Private Warning is more appropriate than imposing disciplinary sanctions outlined in Section 118 of the FSFR, considering the circumstances of the matter;
  - b. The matter gives the AFSA cause for concern but there is insufficient evidence to initiate an investigation, impose disciplinary sanctions or take any other enforcement action; or
  - c. There is sufficient evidence of a contravention, but the AFSA concludes that, under the circumstances, it is not appropriate to impose disciplinary sanctions, 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.



- 5.9.3. In deciding whether to give a Private Warning, the AFSA takes into account all relevant circumstances of the case, including its likely effect on the recipient, whether the recipient poses any risk to the AFSA's objectives or the factors laid out in Schedule 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.

**5.10. Access to material**

- 5.10.1. Where the AFSA proposes or decides to exercise its disciplinary powers under Section 116 of the FSFR, that decision will be based on the materials available to it. Given the potentially voluminous nature of the materials, not all the materials gathered during an investigation will be relevant to the decision-making process. Accordingly, the AFSA will identify and disclose to the Person the material it relied upon in reaching its decision and will provide the list of that material.
- 5.10.2. The AFSA recognises the importance of transparency and considers that, where appropriate, allowing access to relevant material at the Preliminary Notice stage may assist in identifying any evidential issues that might arise and support a fair resolution of the matter.
- 5.10.3. However, 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 may withhold such material. In such cases, the AFSA will generally provide a written explanation to the Person setting out the reasons for restricting access. The AFSA, as a matter of policy, treats access to material at the Preliminary Notice stage the same as at the Decision Notice stage.

**PART 6: FINANCIAL PENALTIES AND CENSURES****6.1. AFSA's approach to imposing a financial penalty or censure**

- 6.1.1. Pursuant to Section 118 of the FSFR, the AFSA may impose a financial penalty or issue a censure to the Person as it deems appropriate.

**6.2. Factors determining whether to issue a censure**

- 6.2.1. In some cases, the AFSA may decide that, although some disciplinary sanctions on the Person for contravention of the legislation administered by the AFSA are justified, the sanction 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. The nature and scale of the Person's activities, where the Person carries out large-scale or high-impact activities, the reputational consequences of a censure may provide an effective deterrent, particularly in circumstances where a financial penalty would have limited impact due to the Person's financial resources, as the penalty may be easily absorbed without affecting their overall financial position or behavior;
  - c. Where a Person has gained a profit or avoided a loss as a result of the contravention, a financial penalty is likely to be the appropriate sanction to deprive the Person of the amount of any benefit gained or loss avoided;
  - d. Where a contravention is particularly serious in relation to its nature and its impact, a financial penalty is more likely to be appropriate, as the severity of the sanction should to the



seriousness and consequences of the misconduct, ensuring a proportionate regulatory response;

- e. 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. This approach also sends a clear message to the public and other participants in the AIFC financial system that cooperation and remedial efforts are recognised and taken into account by the AFSA;
- f. Where the Person has a history of prior misconduct or a pattern of non-compliance, including previous findings by the AFSA, a financial penalty may be more appropriate;
- g. The AFSA's approach in similar cases as the AFSA seeks to be consistent in the making of these decisions;
- h. The effect on the Person concerned. The AFSA would only decide to issue a censure instead of imposing a financial penalty in exceptional circumstances. 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 the Person's shareholders, or consequential damage to confidence in, or the stability or reputation of, the AIFC if a financial penalty were imposed.

### **6.3. Principles for imposing financial penalties**

6.3.1. The AFSA applies the following principles when imposing a financial penalty:

- a. Disgorgement: Depriving a Person of any benefit they may have gained as a result of the contravention;
- b. Sanction: Penalising a Person for committing a contravention;
- c. Deterrence: Deterring a Person who has committed the contravention, and others, from committing further or similar contraventions.

### **6.4. Disgorgement**

6.4.1. When determining the total amount a Person must pay, the AFSA will take into account any benefit obtained or loss avoided as a result of the contravention, and may include disgorgement where appropriate. The AFSA will seek to deprive the Person concerned of the amount of any benefit gained or loss avoided by that Person as a result of committing a contravention. Accordingly, if the Person has made a profit or avoided a loss, the AFSA will impose a disciplinary sanction 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.



## **6.5. Sanction**

- 6.5.1. In determining the amount of a financial penalty as a sanction for contravention, the AFSA must have regard to the following factors:
- a. The seriousness of the contravention in relation to its nature;
  - b. The impact of the contravention;
  - c. The extent to which the contravention was intentional, reckless or negligent.
- 6.5.2. The AFSA may adjust the amount of the financial penalty, excluding the amount to be disgorged, to take into account factors that may aggravate or mitigate the contravention. These factors include:
- a. Subsequent conduct of the Person following the contravention;
  - b. Disciplinary record and compliance history of the Person;
  - c. Any other factor the AFSA deems relevant.
- 6.5.3. The factors outlined in paragraphs 6.5.1. and 6.5.2 are described in detail in Schedule 1 to this Policy.
- 6.5.4. The AFSA will assess all pertinent aspects of each case when determining the amount of a financial penalty. Certain factors may not be applicable in every instance, and additional considerations not listed above may also be taken into account as relevant to the specific circumstances.

## **6.6. Deterrence**

- 6.6.1. 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 a Person from committing more contraventions and thereby deterring others from committing similar contraventions. In this regard, the 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. 6.3.4.

## **6.7. Whether the Person is an individual**

- 6.7.1. The AFSA has regard as to whether the Person on whom the financial penalty will be imposed is an individual. In determining the appropriate amount of a financial penalty, the following factors must be considered:
- a. Individuals do not always have similar resources to firms;
  - b. The enforcement may have a more significant effect on an individual than a firm; and
  - c. It may be possible to achieve deterrence by imposing a smaller penalty on an individual than on a firm.
- 6.7.2. Where the Person is an individual, the AFSA also considers the factors set out in section 8 of Schedule 1 to this Policy.





**6.8. Financial resources, means, and relevant circumstances of the Person**

- 6.8.1. Where relevant, the AFSA may take into consideration the size, financial resources, and other relevant circumstances of the Person. The AFSA may consider whether there is verifiable evidence that a Person would suffer serious financial hardship if the proposed financial penalty was imposed on them. While the size and financial resources of the Person are taken into account, the AFSA does not consider there to be a direct correlation between those factors and the amount of the penalty.
- 6.8.2. Where the 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.
- 6.8.3. 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.
- 6.8.4. 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.
- 6.8.5. 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. Intentional 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.
- 6.8.6. Where appropriate, 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 an Approved Individual, where the AFSA may consider it appropriate to impose both a financial penalty and prohibit the Person from performing a particular function. Similarly, where the case involves an Authorised Person, the AFSA may decide to impose a financial penalty and prohibit the firm from entering into particular transactions.



**6.9. Action taken in similar cases**

- 6.9.1. In certain circumstances, the AFSA may take into consideration actions taken in similar cases in determining the level of a financial penalty. Whilst the AFSA seeks to act consistently in determining the amount of a financial penalty, it acknowledges that each case may have distinct circumstances that justify a higher or lower financial penalty. All relevant factors will be carefully considered in the decision-making process.

**6.10. Actions taken by other regulatory authorities or law enforcement agencies**

- 6.10.1. The AFSA will consider any actions taken by other regulatory authorities or law enforcement agencies regarding the same or related conduct. This includes assessing whether financial penalties or other sanctions have already been imposed to promote consistency, avoid duplication, and ensure that the overall enforcement response is fair and proportionate. Coordination with other agencies helps maintain regulatory integrity and supports effective enforcement outcomes.

**6.11. Settlement discount**

- 6.11.1. The amount of the financial penalty, which may otherwise have been payable, may be reduced to reflect the settlement discount afforded to the Person concerned as a result of reaching a settlement agreement with the AFSA. However, this settlement discount does not apply to the disgorgement of any benefits obtained or losses avoided. Further details regarding settlement discounts are set out in paragraph 7.7.1 of this Policy.

**6.12. Time and manner for payment**

- 6.12.1. Where the AFSA decides to impose a financial penalty under Section 118 of the FSFR, it gives the Person concerned a Preliminary or Decision Notice informing them of the decision. The 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 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 that the debt is outstanding and due to the AFSA. In such cases, an application will be made by the AFSA to the AIFC Court for an order that the debt is outstanding and due to the AFSA.

**PART 7: SETTLEMENT****7.1. Approach to settlement**

- 7.1.1. Where a Person is, or is likely to be, the subject of enforcement action, they may enter into settlement discussions with the AFSA at any stage of the enforcement process. A settlement is a mutually agreed resolution between the AFSA and the Person subject to enforcement action that determines the outcome of the matter based on agreed terms, and reflects a regulatory decision taken with the agreement of that Person.
- 7.1.2. 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.
- 7.1.3. 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.



- 7.1.4. 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. It also enables the Person 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.
- 7.1.5. 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 Schedule 1 to this Policy.
- 7.1.6. 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.
- 7.1.7. 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.

### **7.2. Timing and process**

- 7.2.1. 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.
- 7.2.2. Once settlement discussions commence, the AFSA may set clear and reasonable timeframes to ensure the process progresses efficiently and does not cause undue delays to enforcement outcomes. If it becomes evident that the Person is participating in settlement discussions without a genuine intention to reach a resolution and is instead using the process to delay enforcement processes, the AFSA may discontinue the discussions and pursue other appropriate enforcement actions.

### **7.3. Basis for settlement discussions**

- 7.3.1. 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.

### **7.4. Decisions regarding proposed settlements**

- 7.4.1. Settlement discussions take place between the Person concerned and employee(s) of the AFSA. If the discussions result in an agreement on the proposed terms of the settlement, the matter will be concluded through the execution of a legally binding Settlement Agreement, which incorporates the



terms of the settlement and serves as the basis for issuing a Decision Notice reflecting those agreed terms. The Settlement Agreement is executed between the Person and the AFSA.

- 7.4.2. If the AFSA does not approve the terms, the AFSA will proceed with the enforcement action as initially contemplated.

### **7.5. Publicity**

- 7.5.1. The Settlement Agreement is treated as a confidential document. However, the AFSA generally publishes the outcome of a settlement and the key terms of the settlement to ensure transparency and accountability. The AFSA recognises that settlement may involve commercially sensitive or otherwise confidential information. Accordingly, the AFSA will not publish such information and will act in accordance with the confidentiality provisions set out in the FSFR and other relevant legislation.

### **7.6. Terms of settlement**

- 7.6.1. The AFSA only accepts settlements where the Person subject to the enforcement action acknowledges having contravened relevant requirements and admits the relevant facts regarding those contraventions as part of the settlement. The terms of a settlement vary depending on the circumstances of the matter and the stage at which the settlement is agreed during the enforcement process. However, in general, a Person is asked to:
- a. Waive, and undertake not to exercise, any rights to make representations to the AIFC Court or to access to material considered by the AFSA;
  - b. Not object to the issuance of a decision notice prior to the expiry of any period specified by the AFSA for making written representations;
  - c. Not dispute the facts or matters set out in the decision notice;
  - d. Agree that the AFSA will make a public statement regarding the settlement;
  - e. 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. 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.

### **7.7. Financial penalties and settlement**

- 7.7.1. 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 lower than if the penalty were imposed at a later stage in the enforcement process. Accordingly, the AFSA may reduce the financial penalty by up to 30% for early settlement accompanied by maximum co-operation, with the exact reduction determined on a sliding scale based on the timing of the settlement and the specific circumstances of the matter.
- 7.7.2. 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.

- 7.7.3. The AFSA may also, depending on the circumstances, agree to the payment of a financial penalty in installments. No reduction will be given on amounts representing profits obtained from the contraventions or losses avoided as a result of the contraventions. The public statement will contain the appropriate financial penalty, and the discounted financial penalty that is payable after settlement.

## **PART 8: PUBLICITY**

### **8.1. Publicity about ongoing matters**

- 8.1.1. 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 may depart 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 unauthorised 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.

- 8.1.2. Exceptional circumstances may also arise where the matter under investigation has become a matter of public concern, speculation or rumor. The AFSA may make a public statement to allay that concern or contain speculation or rumor. 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.

### **8.2. Publication of enforcement actions**

- 8.2.1. Except in very rare circumstances, the AFSA publishes the outcomes of enforcement actions. Publication of the outcomes of enforcement actions allows other firms to see the seriousness with which the AFSA views contraventions of the legislation it administers and allows the 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 actions taken by the AFSA helps it to meet its regulatory objectives.

- 8.2.2. The AFSA may in some rare circumstances consider it appropriate not to publicise enforcement actions 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.

- 8.2.3. 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 enforcement 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.

### **8.3. Publicity about Decision Notices**

- 8.3.1. The AFSA does not publish Decision Notices. Similarly, a Person who has been issued 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.
- 8.3.2. Generally, the AFSA will make a public statement about enforcement 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.

### **8.4. Publicity about proceedings**

- 8.4.1. 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.
- 8.4.2. 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.

### **8.5. Public Registers**

- 8.5.1. The AFSA generally publicises on its website or the Public Register the fact of certain enforcement actions taken in respect of a Person concerned. This is particularly relevant to actions taken by the AFSA leading to variations, suspension, withdrawals, prohibitions and restrictions in relation to Authorised Persons and Approved Individuals. 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.
- 8.5.2. The AFSA may decide not to publish details of an enforcement action if doing so would not be in the public interest, would undermine confidence in the financial system and the AIFC, or would be prejudicial to the interests of clients and customers. The AFSA will also abide by any directions of the AIFC Court about publicity for enforcement actions referred to the Court.



**SCHEDULE 1: Factors considered in determining enforcement action**

**1. Interpretation**

- 1.1. The following factors are considered when assessing contraventions prior to any enforcement action being taken and in making related decisions. This list is indicative and not exhaustive. Other factors not specifically listed may also be taken into account depending on the circumstances of each case.

**2. The seriousness of the contravention in relation to its nature**

- 2.1. The AFSA has regard to the following:
- a. The nature of the AIFC Regulations and Rules contravened;
  - b. The duration and frequency of the contravention and the length of time elapsed since it occurred;
  - c. Whether the contravention revealed serious weaknesses in the firm's systems and controls;
  - d. The effectiveness and responsibility of the firm's senior management in overseeing its affairs, including whether they were aware of, or should have been aware of, the contravention;
  - e. The nature and scale of any Financial Crime that was facilitated, or the potential for such Financial Crime to be facilitated, as a direct or indirect result of the contravention;
  - f. Whether the Person failed to conduct business with integrity and uphold high standards of fair dealing;
  - g. The extent to which the Person acted in an open, co-operative, and timely manner in its dealings with the AFSA.

**3. The impact of the contravention**

- 3.1. The AFSA considers the following factors in relation to the impact of the contravention:
- a. The overall harm caused, or potential harm posed, to investors, clients of the Person, or other participants in the AIFC financial system;
  - b. The extent to which the contravention may have undermined the integrity or stability of the AIFC's financial system, or posed a risk to public confidence in the market;
  - c. The extent to which the contravention caused reputational harm to the AIFC or its regulatory framework.

**4. Intentional, reckless or negligent**

- 4.1. The AFSA also has regard to the extent to which the contraventions were intentional, reckless or negligent. In determining whether the contravention was intentional, the AFSA considers the following:
- a. Whether the contravention was intentional, in that the Person concerned (including the senior management of an authorised 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 authorised 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.

4.2. 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.

4.3. Factors tending to show a contravention was negligent include:

- a. The Person did not know the rule or obligation, but reasonably should have;
- b. Senior management failing to fulfill responsibilities or duties, showing a lack of care or attention.

**5. Subsequent conduct**

5.1. 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 Person showed during the investigation of the apparent contravention;
- 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 given carelessly, recklessly or in an attempt to mislead.





**6. Disciplinary record and compliance history**

6.1. 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 of the FSFR;
- 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.

**7. Benefit gained or loss avoided**

- 7.1. In assessing the contravention, the AFSA carefully considers whether the Person has obtained any benefit or avoided any loss as a direct or indirect result of the conduct in question. This factor is significant because it reflects the extent to which the contravention may have provided an unfair advantage or unjust enrichment. The principle underlying this consideration is that no Person should profit or gain financially from contraventions of the legislation administered by the AFSA.

**8. Whether the Person is an individual**

8.1. If the Person is an individual, the following factors will also be relevant:

- a. The individual's position, role and responsibilities, and in particular, how senior the Person is or was in the firm and how important the individual's duties were in the firm;
- b. Whether an individual exercised due skill, care, and diligence when considering the information available to them;
- c. Whether an individual reached a reasonable conclusion and acted reasonably on it;
- d. The nature, scale and complexity of the firm's business;
- e. The knowledge the individual had, or should have had, of regulatory concerns arising from the business under their control;
- f. The extent of an individual's involvement;
- g. The individual's intent, including whether any misconduct was intentional, reckless, or negligent;
- h. Whether enforcement action against the firm rather than the individual would be a more appropriate regulatory response;





- i. Whether enforcement action against a Person would be a proportionate response to the nature and seriousness of the contravention.