



**ISLE OF MAN
FINANCIAL SERVICES AUTHORITY**

Lught-Reill Shirveishyn Argidoil Ellan Vannin

Anti-Money Laundering and Countering the Financing of Terrorism (Civil Penalties) Regulations 2019

Guidance Note

**This guidance note is relevant to any person listed in
paragraph 2(6)(a) to (r) of Schedule 4 to the Proceeds of
Crime Act 2008**

Issued: October 2019

Whilst this publication has been prepared by the Financial Services Authority, it is not a legal document and should not be relied upon in respect of points of law. Reference for that purpose should be made to the appropriate statutory provisions.

Contact:

AML Unit, Financial Services Authority

PO Box 58,

Finch Hill House,

Bucks Road,

Douglas

Isle of Man

IM99 1DT

Tel: 01624 646000

Email: aml@iomfsa.im

Version 1.1

First issued October 2019, last updated October 2019

Contents

1. Foreword.....	3
2. Introduction	3
2.1 Anti-Money Laundering and Countering the Financing of Terrorism Civil Penalties	3
3. The Regulations.....	4
3.1 Statutory Powers.....	4
3.2 Application	4
3.3 Overview	6
3.4 Discount.....	10
3.5 Written Notice.....	10
3.6 Appeals.....	10
3.7 Payment	11
3.8 Income.....	11
3.8.1 Income for Legal Professionals	12
3.9 Publication.....	12
Appendix A - Glossary	14

1. Foreword

This document has been published to provide guidance for relevant persons regarding the application of the Anti-Money Laundering and Countering the Financing of Terrorism (Civil Penalties) Regulations 2019 (“the Regulations”). For the purposes of the Regulations and this guidance document, “relevant person” means any person listed in paragraph 2(6)(a) to (r) of the Schedule 4 to the Proceeds of Crime Act 2008 (“POCA”). Further clarity regarding the definition of “relevant person” will be provided later in this document.

2. Introduction

2.1 Anti-Money Laundering and Countering the Financing of Terrorism Civil Penalties

As part of the Authority’s project to update the Island’s AML/CFT framework in 2019, a civil penalties regime was introduced for contraventions of the AML/CFT Code. The Regulations, which are made under section 157 of POCA and section 68 of the Terrorism and Other Crime (Financial Restrictions) Act 2014 (“TOCFR”), provide the Authority with alternative sanctioning powers for dealing with contraventions of the AML/CFT Code, whilst also retaining the existing criminal sanctions¹; the Authority maintains the ability to refer the most egregious contraventions to the Attorney General’s Chambers for criminal prosecution².

The core principle behind the civil penalties regime is to enable the imposition of punitive financial sanctions upon relevant persons for contraventions of the AML/CFT Code. Civil penalties are intended to act as both a sanction, in appropriate circumstances, and serve as a deterrent to the wider financial services sector. It is not intended to impose civil penalties for isolated contraventions; instead, the civil penalties regime will be utilised where systemic contraventions are identified or reported³.

Civil penalties issued under the Regulations may be used in conjunction with other regulatory powers, where necessary and appropriate, in order for the Authority to meet its regulatory objectives. The imposition of a civil penalty for AML/CFT Code

¹ The criminal offences are set out at paragraph 42 of the AML/CFT Code.

² A civil penalty may only be issued for contraventions of the AML/CFT Code provided that criminal proceedings have not commenced in respect of the contravention, as is set out in section 157 of POCA and section 68 of TOCFR.

³ For the purposes of the Regulations and this Guidance, systemic means that either there are multiple and/or continued contraventions on certain customer relationships or there are multiple and/or continued contraventions present across the entire customer base. It is not intended to issue civil penalties for isolated AML/CFT Code contraventions.

contraventions does not necessarily preclude the use of complementary regulatory actions; the appropriateness of imposing complementary regulatory action will be assessed by the Authority on a case-by-case basis.

The Authority recognises the potential financial and reputational impact of civil penalties on relevant persons, as well as the importance of having suitably robust internal procedures for the administration of the framework in order to impose a decision in a fair, effective and proportionate manner. The decision to impose a civil penalty for AML/CFT Code contraventions will therefore be made using the Authority's Enforcement Decision Making Process. The Authority will determine the level and amount of a penalty by assessing the contraventions against the criteria set out in the Regulations and any aggravating and mitigating factors which may be present.

3. The Regulations

3.1 Statutory Powers

The Regulations are made under section 157 of POCA and section 68 of TOCFR ("the enabling powers"). Both pieces of legislation were amended in June 2019⁴ to allow for regulations to be made for the imposition of civil penalties for contraventions of the AML/CFT Code.

The enabling powers require the Authority to provide written notice of the decision to impose a penalty, allow the Authority to publish information relating to the decision to impose a penalty and set out the appeals process for relevant persons; further information will be provided later in this document.

3.2 Application

The Regulations apply to relevant persons, which are any persons listed in paragraph 2(6)(a) to (r) of Schedule 4 to POCA. Schedule 4 to POCA defines those activities that are business in the regulated sector and which specific AML/CFT Code applies to those particular activities⁵. The activities which require compliance with the AML/CFT Code and therefore fall within the remit of the Regulations are –

⁴ Section 157 of POCA was amended by the Proceeds of Crime Act (Compliance with International Standards) Order 2019 (SD 2019/0206) and section 68 of TOCFR was amended by the Terrorism and Other Crime (Financial Restrictions) Act (Section 69A) Order 2019 (SD 2019/0205).

⁵ For clarity, there are three separate AML/CFT Codes: the AML/CFT Code, the Anti-Money Laundering and Countering the Financing of Terrorism (Specified Non-Profit Organisations) Code 2019 and the Gambling (Anti-Money Laundering and Countering the Financing of Terrorism) Code 2019. The three separate Codes apply different activities set out in Schedule 4 to POCA. These Regulations only apply to the activities caught by the AML/CFT Code, as set out at paragraph 2(6)(a) to (r) of Schedule 4 to POCA.

- (a) *engaging in any regulated activity within the meaning of the Financial Services Act 2008, whether or not an exemption specified in the Financial Services (Exemptions) Regulations 2011, as those Regulations have effect from time to time and any instrument or enactment from time to time amending or replacing those Regulations, applies to that activity;*
- (b) *a collective investment scheme within the meaning of section 1 of the Collective Investment Schemes Act 2008;*
- (c) *insurance business within the meaning of the Insurance Act 2008;*
- (d) *acting as an insurance manager for, or in relation to, an insurer within the meaning of the Insurance Act 2008;*
- (e) *acting as an insurance intermediary within the meaning of the Insurance Act 2008;*
- (f) *acting as an administrator of a retirement benefits scheme within the meaning of the Retirement Benefits Schemes Act 2000;*
- (g) *acting as trustee of a retirement benefits scheme within the meaning of the Retirement Benefits Schemes Act 2000;*
- (h) *any of the following activity when undertaken by a legal professional –*
 - (i) *managing any assets belonging to a client;*
 - (ii) *the provision of legal services which involve the participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise) by acting for, or on behalf of, a client in respect of –*
 - (A) *the sale or purchase of land;*
 - (B) *managing bank, savings or security accounts;*
 - (C) *organising contributions for the promotion, formation, operation or management of bodies corporate;*
 - (D) *the sale or purchase of a business; or*
 - (E) *the creation, operation or management of a legal person or legal arrangement;*
- (i) *an external accountant;*
- (j) *a tax adviser;*
- (k) *a payroll agent;*
- (l) *lending in respect of products other than consumer products for and on behalf of customers;*
- (m) *providing financial leasing arrangements in respect of products other than consumer products for and on behalf of customers;*
- (n) *providing financial guarantees and commitments in respect of products other than consumer products for and on behalf of customers;*
- (o) *an estate agent;*
- (p) *dealing in goods or services of any description (including dealing as an auctioneer) whenever a transaction or series of linked transactions involves accepting a total cash payment (in any currency) that is equivalent to at least €15,000;*
- (q) *providing safe custody facilities for cash or liquid securities, deposit boxes or other secure storage facilities suitable for high value physical items or assets, jewellery, precious metals, stones, bullion or documents of title;*

(r) convertible virtual currency activity.

The definitions of the activities listed above, along with any exemptions, are set out in full in Schedule 4 to POCA, which is also replicated in Appendix B of the AML/CFT Handbook.

For clarity, the Regulations apply to persons that are relevant persons at the time of the contraventions. In addition, the Regulations apply to contraventions of the 2019 AML/CFT Code and will not be applied to retrospective contraventions identified under the 2015 AML/CFT Code. However, the Authority retains the ability to use other powers in relation to contraventions of previous AML/CFT Codes, if deemed appropriate.

3.3 Overview

The Regulations refer to two levels of penalties; Level 1 and Level 2. As set out in the Table of the Schedule to the Regulations, Level 1 penalties can be up to 5% of the relevant person's income and Level 2 penalties can be up to 8%. The difference in the amounts of penalties that may be levied reflects the different factors that the Authority must consider when deciding to impose a civil penalty for contraventions of the AML/CFT Code.

When determining whether to impose a civil penalty, the Authority shall have regard to the factors set out at Regulation 5(2)(a) to (k). These factors, which will be assessed when the contraventions are identified by, or disclosed to, the Authority will be considered when determining whether to impose a penalty at all and at which level (the factors will be considered for both Level 1 and Level 2).

There are a number of further factors listed at Regulation 5(3)(a) to (d) and where these factors are *not* present, the Authority may impose a Level 1 penalty. The factors listed at Regulation 5(3)(a) to (d) will be discussed later in this document.

The factors listed at Regulation 5(2)(a) to (k) are –

Regulation	Guidance
5(2)(a) <i>whether the contravention is systemic</i>	It is not intended to issue civil penalties for isolated AML/CFT Code contraventions, instead the Authority will assess whether the contraventions are systemic throughout the business of the relevant person or throughout the client base.
5(2)(b) <i>whether the relevant person brought the contravention to the Authority's attention</i>	When determining whether to impose a civil penalty (at either Level 1 or Level 2) the Authority will consider whether the contravention was brought to the Authority's

	attention by the relevant person or if it was identified by the Authority.
5(2)(c) <i>whether the relevant person was aware, or should have been aware, of the contravention</i>	This is linked to Regulation 5(2)(b) above; where contraventions are identified by the Authority, the Authority will consider whether the relevant person was aware of the contraventions (and failed to bring it to the Authority's attention) or if the relevant person <i>should</i> have been aware of the contraventions (which may raise concerns as to the conduct, competency and integrity of the relevant person).
5(2)(d) <i>whether the contravention was committed deliberately or recklessly</i>	When assessing the seriousness of the contravention and therefore whether a civil penalty should be imposed, the Authority will consider whether the relevant person committed the contravention deliberately or recklessly.
5(2)(e) <i>whether there were aggravating or mitigating factors in relation to the contravention</i>	<p>When determining the appropriateness of issuing a civil penalty, as well as the level of penalty which may be imposed, the Authority will look at what aggravating and mitigating factors are present.</p> <p>Mitigating factors include, but are not limited to:</p> <ul style="list-style-type: none"> (i) early detection and disclosure to the Authority; (ii) prompt and/or effective remedial action; (iii) co-operation with the Authority; (iv) little or no damage to customers and/or the reputation of the Island; (v) the contraventions were inadvertent or the result of genuine error. <p>Aggravating factors include, but are not limited to:</p> <ul style="list-style-type: none"> (i) previous regulatory contraventions; (ii) slow and/or inadequate remediation action; (iii) significant damage to customers and/or the reputation of the Island.

5(2)(f) <i>whether appropriate steps were taken to remedy the contravention to the Authority's satisfaction</i>	This forms part of the Authority's consideration of any mitigating factors that may be present. The Authority will work with the relevant person to assess whether the contraventions have been remediated (or if work has begun to remediate the contraventions) and whether this has been completed to the Authority's satisfaction.
5(2)(g) <i>whether the contravention created a significant risk that financial crime may have occurred</i>	This is an important consideration when determining the seriousness of AML/CFT Code contraventions as failure to follow the AML/CFT Code can significantly increase the risk of a relevant person facilitating ML or FT (intentionally or unintentionally). The Authority will therefore consider whether the contraventions identified have increased the risk that financial crime may have occurred.
5(2)(h) <i>the relevant person's record of compliance with the Code or any legislation revoked by the Code ("the previous Code") or any legislation revoked by the previous Code</i>	This factor refers to the AML/CFT Code and previous AML/CFT Codes which may have been revoked. The Authority will consider a relevant person's record of compliance with the AML/CFT Code (and relevant previous Codes) to help determine if the relevant person has contravened provisions of the various iterations of the AML/CFT Code.
5(2)(i) <i>penalties imposed by the Authority in other cases</i>	The Authority will consider any factors present in decisions to impose civil penalties in other cases, to ensure a fair and consistent approach to the imposition of civil penalties.
5(2)(j) <i>compliance with any relevant supervisory guidance provided by a competent authority that applies to the relevant person</i>	The Authority will consider the extent to which a relevant person has complied with any relevant guidance, including the AML/CFT Handbook.
5(2)(k) <i>the potential financial consequences of imposing a penalty on the relevant person and on any third parties including customers and creditors of the relevant person</i>	When determining the appropriateness of issuing a civil penalty, along with the amount to be levied, the Authority will consider the financial consequences for both the relevant person and any relevant third parties. This ensures that the Authority remains fair and proportionate when utilising its sanctioning powers.

Where the Authority has considered the above factors of Regulation 5(2), and one or more of the factors set out at Regulation 5(3)(a) to (d) are present, the Authority may issue a Level 2 civil penalty. The factors that will be considered when determining if a Level 2 penalty is appropriate are aggravating factors and will be considered more serious by the

Authority. This is reflected in the amount of penalty which may be imposed at Level 2, which is up to 8% of the relevant person's income. The relevant Level 2 factors are –

Regulation	Guidance
5(3)(a) <i>the relevant person failed to bring the contravention to the Authority's attention</i>	When determining whether to impose a civil penalty (at either Level 1 or Level 2) the Authority will consider whether the contravention was brought to the Authority's attention by the relevant person. It will therefore be considered an aggravating factor if the relevant person did not bring the contravention to the Authority's attention when it was identified.
5(3)(b) <i>the relevant person, or any of the relevant person's senior management, have attempted to conceal the contravention from the Authority</i>	Any attempts to conceal a contravention from the Authority will be considered to be a serious aggravating factor and one which will impact the Authority's consideration of imposing a Level 2 penalty. Any attempts to conceal a contravention may indicate that the relevant person, or any of its senior management, were aware of the contravention yet have attempted to conceal it, rather than bring it to the Authority's attention.
5(3)(c) <i>the contravention was incurred deliberately by the relevant person, or any of the relevant person's senior management, in order to obtain a benefit or mitigate a loss</i>	Any attempts to benefit or mitigate loss by deliberately contravening the AML/CFT Code by the relevant person, or any of the relevant person's senior management, will be viewed as a serious aggravating factor by the Authority.
5(3)(d) <i>the contravention is attributable to material deficiencies in –</i> <ul style="list-style-type: none"> <i>(i) The relevant person's procedures, systems and controls as required by the Code; or</i> <i>(ii) The conduct of the relevant person, or any of the relevant person's senior management.</i> 	Given the importance of the procedures, systems and controls provisions in the AML/CFT Code, in relation to preventing ML/FT, any contraventions relating to these requirements will be viewed as serious by the Authority and may lead to the imposition of a Level 2 penalty. In addition, the Authority will consider whether the contravention is attributable to material deficiencies in the conduct of the relevant person, or any of its senior management when determining whether a Level 2 penalty is appropriate. Such material deficiencies may also impact on the Authority's decision to take further

	enforcement action relating to the conduct, fitness and propriety of relevant persons or any of the relevant person's senior management.
--	--

3.4 Discount

The Regulations allow the Authority to reduce the amount of a civil penalty by up to 30% where the relevant person has co-operated with the Authority in respect of any proceedings or investigation into the contravention and has taken appropriate steps to remediate the contravention to the Authority's satisfaction.

The discount provision is intended to encourage co-operation with the Authority and combined with the Authority's ongoing monitoring, help the relevant person to achieve a prompt and effective resolution of the contraventions, which is in the interest of all parties involved.

3.5 Written Notice

As required by the enabling powers and the Regulations, once the decision has been taken to issue a civil penalty, the Authority will provide the relevant person with written notice concerning the imposition of a penalty and a statement of the reasons for the decision. The written notice will include details of -

- the amount of the civil penalty imposed, the level of civil penalty being applied and the payment timeframe;
- the Authority's reasons for imposing the civil penalty;
- the relevant person's right to appeal under section 175(2ZD) of POCA and section 68(2ZD) of TOCFR.

3.6 Appeals

In accordance with section 157(2ZD) of POCA and section 68(2ZD) of TOCFR, an appeal may be made to the Financial Services Tribunal ("the Tribunal") on the grounds that a decision to impose a penalty under the Regulations was unreasonable, having regard to all the circumstances of the case. The Tribunal has the power to confirm, vary or revoke the decision of the Authority to impose a penalty.

The ability of relevant persons to appeal to the Tribunal is key to the fair operation of the civil penalties regime for AML/CFT contraventions. In addition, the appeals process is an important mechanism alongside the Regulations, published guidance and the Authority's internal procedures for achieving due process, fairness and consistency in the operation

of the regime. In establishing the civil penalties regime for contraventions of the AML/CFT Code, the Authority is of the belief that the regime is correct in law and is compliant with human rights legislation.

A relevant person can appeal to the Tribunal within 21 days of the date on which the original decision was notified to the relevant person. Further information on the Tribunal can be found at the Isle of Man Courts website here - <https://www.courts.im/court-procedures/tribunals-service/tribunals/>

3.7 Payment

Regulation 5(8) sets out the requirements relating to payment of a civil penalty. As stated, unless the Authority specifies otherwise in writing, a penalty must be paid on or before the due date.

The determination of the due date is dependent on whether an appeal is lodged. If the relevant person *does not* appeal, the due date of the penalty is the last day of the period of 90 business days immediately following the date specified in the written notice.

If a relevant person *does* appeal, the due date of the penalty is the last day of the period of 90 business days immediately following -

- the date the appeal is abandoned; or
- the date the Tribunal confirms or varies the Authority's decision.

An invoice will be issued for the amount of the penalty being imposed when the written notice is issued. Delayed or non-payment of a civil penalty would be regarded as a serious matter and may prompt the Authority to consider the use of additional powers, such as a review of the fitness and propriety of the relevant person and / or any individuals, where applicable.

3.8 Income

The decision to impose a civil penalty, along with the amount which may be levied, is discretionary. The amount of a penalty issued for a Level 1 penalty can be up to 5% of the relevant person's income and the amount of a Level 2 penalty can be up to 8%.

For the purposes of the Regulation, income is defined as –

“all income derived from the relevant person's business in the regulated sector during the accounting year in which the contravention occurred”

Where the Regulations state the “relevant person’s income” this refers to income generated solely from activity which is “business in the regulated sector”, as defined in Schedule 4 to POCA.

3.8.1 Income for Legal Professionals

“Relevant person’s income” refers only to income generated from business in the regulated sector. Only certain activity undertaken by legal professionals is defined in Schedule 4 to POCA as business in the regulated sector. The activity is as follows –

- (i) managing any assets belonging to a client;*
- (ii) the provision of legal services which involve the participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise) by acting for, or on behalf of, a client in respect of –*
 - (A) the sale or purchase of land;*
 - (B) managing bank, savings or security accounts;*
 - (C) organising contributions for the promotion, formation, operation or management of bodies corporate;*
 - (D) the sale or purchase of a business; or*
 - (E) the creation, operation or management of a legal person or legal arrangement.*

To assist in establishing the “relevant person’s income” for legal professions, businesses within the sector should separate their accounts to reflect the income derived from activity in the regulated sector (as defined above) and income derived from activity that falls outside the definition of business in the regulated sector. Where this is a change in procedure for the preparation of accounts, legal professionals should seek to implement these changes following the end of the businesses’ current accounting year.

3.9 Publication

Publication of information in relation to a civil penalty is a key element of the civil penalties regime as the imposition of penalties may act as a general deterrent to the regulated sector in order to reduce the likelihood of similar failings occurring in future.

The Authority will publish details of any civil penalties issued under the Regulations, in accordance with section 157(2ZC) of POCA and section 68(2ZC) of TOCFR, except in exceptional circumstances. The details will be published on the Authority’s website via a press release on the Authority’s homepage, the details will also be included in an entry on the log of civil penalties maintained on the Authority’s website. The published details of the civil penalty will include –

- the name of the relevant person against which the civil penalty is being imposed;
- the amount of the civil penalty; and
- a description of the nature of contraventions for which the civil penalty is being imposed.

For the avoidance of doubt, the Authority will not publish details of a civil penalty until –

- if no appeal under section 157(2ZD) of POCA and section 68(2ZD) of TOCFR is made within the prescribed period, the expiry of that period; or
- if there is an appeal under section 157 POCA and section 68 of TOCFR –
 - where the appellant abandons the appeal, the date of the abandonment;
 - where the decision of the Authority is confirmed, the date of confirmation;
or
 - where the decision of the Authority is varied, such date as the Tribunal directs.

The press release and entry to the log will be kept for a maximum of 5 years before being removed.

Appendix A - Glossary

Term	Definition
“2015 AML/CFT Code”	the Anti-Money Laundering and Countering the Financing of Terrorism Code 2015, (revoked by the AML/CFT Code)
“accounting year”	the relevant person’s accounting year
“AML/CFT”	anti-money laundering and countering the financing of terrorism
“AML/CFT Code”	the Anti-Money Laundering and Countering the Financing of Terrorism Code 2019
“AML/CFT Handbook”	the Anti-Money Laundering and Countering the Financing of Terrorism Handbook
“the Authority”	the Isle of Man Financial Services Authority
“business day”	any day other than – (a) a Saturday; (b) a Sunday; (c) a bank holiday under the Bank Holidays Act 1989; (d) a day declared to be a non-business day under a Treasury order under section 1 of the Banking and Financial Dealings (Isle of Man) Act 1973
“competent authority”	all Isle of Man administrative and law enforcement authorities concerned with AML/CFT, including the Authority, the Isle of Man Gambling Supervision Commission, the Department of Home Affairs, the Isle of Man Constabulary, the Financial Intelligence Unit, the Attorney General and the Customs and Excise and Income Tax Divisions of Treasury
“contravention”	a contravention of any provision of the AML/CFT Code
“the enabling powers”	section 157 of POCA and section 68 of TOCFR
“income”	all income derived from the relevant person’s business in the regulated sector during the accounting year in which the contravention occurred
“ML/FT”	money laundering and financing of terrorism
“POCA”	the Proceeds of Crime Act 2008
“the Regulations”	the Anti-Money Laundering and Countering the Financing of Terrorism (Civil Penalties) Regulations 2019
“relevant person”	any person listed in paragraph 2(6)(a) to (r) of Schedule 4 to POCA
“senior management”	the directors or persons who are nominated to ensure that the relevant person is effectively controlled on a day-to-day basis and who have responsibility for overseeing the relevant person’s proper conduct

"the Tribunal"	an independent judicial body, whose full title is the Financial Services Tribunal, established to hear and determine appeals brought against decisions made by the Authority
"TOCFR"	the Terrorism and Other Crimes (Financial Restrictions) Act 2014