

Agenda Item 7(d)
April 25/23 EOC Meeting

FSRA Consultation on “Proposed Guidance : Administrative Monetary Penalties”

ID 2023-004

Type

Policy

Sector

Cross Sector

Status

Open

Date

March 27, 2023

Comment Due Date

May 31, 2023

The Financial Services Regulatory Authority of Ontario (FSRA) is now consulting on proposed Guidance designed to improve consumer protection by appropriately sanctioning persons and entities not in compliance with sector statutes, regulations and FSRA rules and requirements.

The Guidance sets out when Administrative Monetary Penalties are imposed and how the amounts are determined. This approach supports transparency, fairness and consistency.

We encourage all interested stakeholders to provide feedback by May 31st, 2023. Your feedback will help inform our final approach.

[Learn more:](#)

- [Proposed Guidance: Administrative Monetary Penalties](#)

Purpose

This Guidance aims to assist stakeholders in understanding how the Chief Executive Officer of FSRA (the “CEO”)^[1] and his/her delegates exercise discretion when imposing Administrative Monetary Penalties (“AMP” or “AMPs”) and determining AMP amounts. This will support transparency, fairness, consistency, as well as better decision-making by persons/entities on whom AMPs are imposed.

FSRA has the power to impose AMPs on licensees and other persons and entities under many of its Sector Statutes (defined below) if it is satisfied that a person or entity has contravened or is non-compliant with certain statutory requirements.

The Sector Statutes authorize FSRA to impose two types of AMPs:

1. General Administrative Penalties (“General AMP” or “General AMPs”): These tend to be available for a broad range of contraventions under the Sector Statutes and the amounts are subject to significant regulatory discretion, within the statutory maximums. General AMPs have robust procedural protections including notice and a right to hearing before the Financial Services Tribunal (the “FST”).
2. Summary Administrative Penalties (“Summary AMP” or “Summary AMPs”): These are available under some of the Sector Statutes for more technical contraventions, including non-filing and inappropriate record-keeping, and the amounts are usually prescribed. Summary AMPs have an expedited process which includes notice, a right to make written submissions, and a right of appeal to the FST.

This Guidance sets out FSRA’s position on the interpretation of, and approach to the application of the statutory and regulatory provisions dealing with the following aspects of AMPs:

1. The purposes for which AMPs can be imposed under the Sector Statutes, which are,
 - a. To promote compliance with statutory requirements; and
 - b. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with statutory requirements (collectively, the “**Statutory Purposes**”).
2. The criteria for determining the amount of General AMPs imposed under the Sector Statutes (“Statutory Criteria”); and
3. The considerations for determining whether a General AMP is “punitive” and requires adjustment, or whether the amount of penalty imposed is consistent with the purposes for imposing AMPs^[2].

FSRA takes a principles-based approach to imposing AMPs. AMPs are imposed in a manner that is compliant with applicable statutory requirements and consistent with FSRA's statutory objectives and desired regulatory outcomes.

Scope

This Guidance deals with AMPs imposed under the following statutes (the "Sector Statutes")^[3]:

- *Insurance Act*, R.S.O. 1990
- *Mortgage Brokerages, Lenders and Administrators Act*, 2006
- *Pension Benefits Act*, R.S.O. 1990
- *Credit Unions and Caisses Populaires Act*, 2020
- *Automobile Insurance Rate Stabilization Act*, 2003
- *Compulsory Automobile Insurance Act*, R.S.O. 1990

This Guidance applies to all persons and entities who engage in activities regulated by the Sector Statutes.

Rationale and background

The Sector Statutes and their respective AMP regulations empower FSRA to impose General AMPs and Summary AMPs for specified contraventions of and/or failures to comply with the Sector Statutes, related regulations, and any other rules and requirements established under such statutes.

The regulations under the Sector Statutes also prescribe the Statutory Criteria to be considered when determining the amount of General AMPs, within the statutory maximums. The amount of Summary AMPs are prescribed in many cases. FSRA is granted considerable discretion with respect to the imposition of AMPs and the monetary amount of General AMPs to be imposed within the statutory maximums.

The provisions which are the subject of this Guidance are listed in Appendix A below.

FSRA exercises its discretion to impose AMPs to achieve enforcement outcomes consistent with the statutory objects established under the *Financial Services Regulatory Authority of Ontario Act, 2016* (the "FSRA Act"), including:

1. To regulate and generally supervise the regulated sectors
2. To contribute to public confidence in the regulated sectors
3. To deter deceptive or fraudulent conduct, practices and activities by the regulated sectors
4. In respect of the financial services sectors, to promote high standards of business conduct and protect the rights and interests of consumers
5. In respect of pension plans, to promote good administration of pension plans and protect and safeguard the pension benefits and rights of pension plan beneficiaries.

Additionally, FSRA's exercise of discretion is informed by the following principles, which are derived from FSRA's statutory obligations, legal precedent, and sound regulatory practices:

1. **Objectivity:** FSRA assesses the Statutory Purposes and related factors based on the facts and circumstances of each case, ensuring fair and reasonable decisions that further FSRA's statutory objects
2. **Transparency:** FSRA ensures that the rationale and findings relating to the imposition of AMPs are communicated in a clear manner to the persons on whom AMPs are to be imposed, compliant with the relevant Sector Statutes and considering the perspective of consumers and other stakeholders.^[4]
3. **Fairness:** FSRA ensures persons on whom AMPs are proposed to be imposed have the opportunity to understand the basis and are advised of their right to request a hearing or appeal before the FST.
4. **Consistency:** FSRA strives to apply the relevant Statutory Purposes and Statutory Criteria consistently and treat similar contraventions and/or failures to comply in a similar manner, recognizing that sanctions must fit the specific facts. FSRA takes into account previous AMPs imposed on similar contraventions or failures to comply when imposing an AMP.

The Guidance lays out FSRA's consistent and uniform interpretation and application of AMP- related provisions which are aligned with FSRA's statutory mandate and strategic priorities, applicable case law, procedural fairness, and sound regulatory practices.^[5]

Interpretation and Approach

A. Determining whether an administrative penalty will be imposed

A.1 Interpretation: FSRA Imposes AMPs in accordance with the statutory purposes

FSRA exercises discretion when determining whether an AMP is an appropriate response to a contravention or failure to comply with a Sector Statute. After determining that a contravention or failure to comply with a statutory requirement has occurred, FSRA may impose an AMP for one or both of the Statutory Purposes for all General AMPs and Summary AMPs.

FSRA must be satisfied that the AMP will satisfy at least one of the Statutory Purposes and its interpretation of those purposes is set out below. Not all of the considerations identified are present in every case and the basis for determining whether one of the Statutory Purposes is met varies depending on the nature of the AMP, the severity of the contravention or non-compliance, and the unique circumstances of the case.

1. **To promote compliance with statutory requirements:** The following considerations and objectives are relevant to this Statutory Purpose:
 - i. AMPs promote voluntary compliance by deterring non-compliance. This is necessary to reduce the cost of the relevant regulatory scheme while improving its effectiveness^[6];
 - ii. General and specific deterrence promote compliance with statutory requirements:
 - “specific” deterrence deters the person on whom an AMP is imposed from engaging in non-compliant behaviour in the future; and
 - “general” deterrence deters others in the sector from future non-compliance.

Both types of deterrence promote compliance with statutory requirements;

- iii. An AMP can be imposed when it is an effective method for addressing a contravention or failure to comply. An AMP may be imposed in isolation or in combination with other regulatory sanctions;
- iv. Every regulatory requirement serves a purpose. A licensed and/or regulated person or entity's failure to comply with seemingly "minor" or "technical" provisions creates concerns that such person or entity lacks the minimum level of diligence and competence required in a regulatory regime^[7];
- v. A contravention need not be severe or cause consumer harm for an AMP to be imposed. The relative amount of an AMP is used to emphasize the importance of certain statutory requirements^[8]; and
- vi. AMPs and their deterrent effect re-enforce the importance of licenced roles, especially those with specific obligations to oversee compliance within a regulated entity, including Principal Brokers, Principal Representatives, Mortgage Administrators, Insurers, and Pension Plan Administrators, and emphasize to licensees and the sectors the standards associated with such roles.^[9]

2. **To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with statutory requirements:** The following objectives and factors are taken into account when determining if economic benefit has been or may be derived by a non-compliant person or entity,

- i. Economic benefits include both actual and potential benefits that a person has a reasonable likelihood of obtaining and receiving;
- ii. An AMP is an effective method of disincentivizing regulatory misconduct by neutralizing the economic benefit;
- iii. It is not necessary for the economic benefit to include some form of monetary gain. Expense avoided as a result of a contravention or failure to comply with statutory provisions, such as not obtaining required Errors & Omissions insurance

or not complying with the requirements to properly store client files, is an indirect economic benefit,^[10] and

- iv. Similarly, time saved as a result of a contravention or failure to comply is an indirect economic benefit.^[11]

A.2 Interpretation: Additional FSRA considerations for determining whether an AMP will be imposed

The determination to impose AMPs is made on a case-by-case basis consistent with the discretion granted to FSRA.

In the case of Summary AMPs, the Sector Statutes have identified specific contraventions for which a specific AMP may be imposed with a more streamlined summary process. This is because Summary AMPs are a critical tool to promote compliance with regulatory requirements. Accordingly, where the specific requirements to which Summary AMPs apply are met, a Summary AMP typically serves the statutory purpose of promoting compliance and deterring non-compliance.

Provisions to which General AMPs apply usually deal with more severe forms of misconduct and have higher imposable penalty amounts than are available for Summary AMPs. Therefore, FSRA may among other things consider:

1. The Statutory Purposes for the imposition of AMPs described above;
2. Severity of the contravention or failure to comply and its effect on consumers of financial services and the public;
3. Availability of and effectiveness of alternative enforcement options;^[12]
4. Pattern of non-compliant behaviour;
5. Prevalence of similar contraventions or failures to comply in the regulated sector and the need for deterrence;
6. Achievement of the objectives of the concerned Sector Statute(s); and
7. FSRA's statutory mandate, priorities and strategic enforcement objectives.

A.3 Interpretation and Approach: Imposing general AMPs where there is a pattern of misconduct

AMPs may be imposed in addition to any other enforcement sanction, including licensing actions and compliance orders. FSRA considers sanctions cumulatively, where applicable, to ensure that the overall response to non-compliance is measured, proportionate, and achieves FSRA's statutory objects by protecting the rights and interests of consumers, promoting high standards of business conduct, and contributing to public confidence.

The Sector Statutes permit FSRA to impose a General AMP for every instance of a contravention or failure to comply to which the AMP applies.

Where a person contravenes or fails to comply with two or more statutory requirements, FSRA may impose General AMPs for the contravention of, or failure to comply with, each statutory requirement, provided that the relevant factual circumstances and/or the harm caused are sufficiently distinct.

Where there has been a pattern or overall scheme of misconduct resulting in multiple contraventions of, or instances of contravention or failure to comply with the same statutory requirement, FSRA may impose a single General AMP to ensure that the pattern of conduct is addressed holistically. In such cases the amount of the AMP imposed takes into account the repetitive nature of the conduct and the overall consumer harm and economic benefit.

B. Determining the amount of a general AMP

B.1 Interpretation: FSRA determines the amount of general AMPs in accordance with statutory criteria^[13]

The Sector Statutes provide the maximum of imposable General AMPs and Statutory Criteria for determining the amount of General AMPs in the circumstances of each case.^[14]

Unless the General AMP amount for a specific contravention is prescribed, FSRA determines the amount within the statutory maximums in accordance with the following Statutory Criteria, as interpreted in this Guidance. The Sector Statutes restrict FSRA to the Statutory Criteria and do not permit consideration of additional or alternate factors.

1. **Degree to which the contravention or failure was intentional, reckless, or negligent:** FSRA situates misconduct on a spectrum of the level of intention involved in a particular contravention or failure to comply, ranging from intentional disobedience to negligence.^[15] FSRA takes all relevant and available evidence into account when situating such conduct:
 - i. FSRA treats intentional disobedience of statutory or regulatory requirements with the most severity when determining the amount of a General AMP.^[16] Evidence relating to prior knowledge of consequences, professional experience as a licensee in the relevant sector, selection of affected consumers, and patterns of misconduct are taken into account while determining intentionality.
 - ii. A reckless breach of a statutory requirement is treated as a more severe attitude of disobedience than a negligent one, and therefore attracts higher General AMPs. Negligence reflects a lack of the required degree of care and regard for the interests of the public. Recklessness involves acting in a manner that creates the risk of a contravention while disregarding or not considering the possibility of such risk.
 - iii. FSRA considers ignorance of statutory and regulatory requirements as reckless or negligent behaviour and imposes General AMPs accordingly. Persons involved in regulated activities are responsible to inform themselves of the requirements and conduct themselves accordingly.^[17]
 - iv. FSRA considers repeated contraventions to be an indicator of intentional conduct and not consistent with recklessness or negligence. This is particularly the case if the proposed subject has been sanctioned, warned, or cautioned in the past about their conduct.
 - v. Situations of hardship do not excuse non-compliance with statutory and regulatory requirements. Regulated persons are expected to make alternative arrangements to meet regulatory requirements.^[18] However, demonstrated personal hardship may indicate that the non-compliance is lower on the spectrum of intent.

2. **Extent of the harm or potential harm to others resulting from the contravention or failure to comply:** FSRA takes into consideration the degree and extent of the harm caused or which may have been caused by a contravention or failure to comply when determining the amount of a General AMP. FSRA takes into account the following while assessing harm:

- i. Harm may be direct or indirect and be caused to the public, consumers, plan members, other licensees, FSRA, and/or to the relevant sector as a whole;
- ii. Harm includes both actual and potential harm. Both kinds of harm are assessed and, where possible, quantified by FSRA based on available evidence;
- iii. Harm includes both monetary and non-monetary harm. Non-monetary harm may include the loss of reputation and loss of consumer confidence in the regulated sectors. Non-monetary harm cannot be quantified, but can be considered on a spectrum of severity;
- iv. Harm includes adverse affects on FSRA's ability to effectively regulate the sectors and to the potential for loss of public confidence in FSRA; and
- v. Where someone other than the subject of the proposed General AMP mitigates the harm by providing compensation or otherwise remediating the issue, this is not considered mitigating against the subject. The full extent of the reduced, mitigated, or avoided harm is included to determine the appropriate amount.

3. **Extent to which the person tried to mitigate any loss or to take other remedial action:**

Mitigation and remedial actions may result in the reduction of the amount of a proposed General AMP. This criterion applies to positive steps taken by the non-compliant person and not to unintended results or outside circumstances^[19], and/or the efforts of others. FSRA examines relevant evidence and determines whether there has been an attempt to mitigate and its extent based on the following factors:

- i. Nature of the mitigating/remedial action. For example, mitigating/remedial actions would include,
 - compensating affected parties;
 - voluntarily correcting non-compliant practices;

- immediately and fully self-reporting to FSRA after the discovery of a contravention or non-compliance; and
 - setting up business processes to avoid future contraventions and non-compliance.
- ii. Impact of the mitigating/remedial action on the harm caused or avoided;
 - iii. Timing of the mitigating/remedial action, including whether such action was initiated pro-actively by the wrongdoer, or after a complaint to FSRA, legal action, or other process;
 - iv. Whether the mitigating/remedial action was compelled by contractual or any other legal obligation; and
 - v. Co-operating with FSRA at any point, including during an examination or investigation is not usually considered to be a mitigating or remedial action as such compliance is statutorily required.
4. **Economic benefit derived or reasonably expected to be derived by person or entity from the contravention or failure to comply:** FSRA takes into account all economic benefit, including indirect and potential benefit, when determining the amount of a General AMP. Furthermore,
- i. Economic benefits include not only the actual economic benefit derived but also any benefit that the non-compliant person would be reasonably expected to derive, even if the benefit was not fully realized;
 - ii. Economic benefits include costs avoided or time saved as a result of a contravention or failure to comply;^[20]
 - iii. The amount of economic benefit is based on the benefit obtained as a result of the contravention or non-compliant conduct. Future loss of such benefit is not taken into consideration while applying this criterion;

- iv. Economic benefit is assessed by FSRA in a manner consistent with the prescribed purposes for which General AMPs may be imposed, to prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with statutory requirements; and
 - v. A General AMP seeks to neutralize all economic benefits of a contravention, to the extent permitted within the statutory maximum. However, a General AMP should not simply negate the economic benefit arising from a contravention, as such an approach could lead to an AMP being considered a “cost of doing business”. The economic benefit is the starting point for the appropriate General AMP, since a General AMP that only puts a wrongdoer back on the same footing they would have been in, but for the sanction, does not adequately deter non-compliance. Subject to statutory maximums, a General AMP that exceeds the economic benefit, if any, is generally imposed to incentivize compliance. The degree of excess depends on the evidence applied to the other Statutory Criteria.
5. **Prior history of contraventions or failures to comply:** FSRA takes into account the regulatory history of a person while determining the severity of a General AMP. A history of regulatory misconduct indicates greater need for specific deterrence and escalated consequences. Prior contraventions of all financial services legislation are taken into account. The following factors, among others, affect the severity of a General AMP:
- i. Whether the prior contravention involved the same statute as the present contravention;
 - ii. Severity of the prior contravention and if such contravention arose from the same or similar factual circumstances;
 - iii. Whether the person was aware of the prior contravention and had an opportunity to challenge the finding; and
 - iv. Compliance with any sanction imposed for the prior contravention.

B.2 Interpretation: FSRA ensures that general AMPs are not punitive^[21]

The final stage of the General AMP amount determination is to ensure that the AMP is not punitive in nature.^[22] A General AMP amount is punitive if it is disproportionate to the amount required to achieve the Statutory Purposes for imposing the General AMP, as described in Section B.1 of this Guidance.^[23] The magnitude of the General AMP is not determinative, but the amount must reflect the Statutory Purposes, including the objective of promoting compliance and deterring non-compliance with regulatory requirements.

FSRA takes a holistic approach when making a determination on the proportionality of a General AMP amount. FSRA takes into account all relevant factors including the overall factual circumstances associated with the General AMP, the conduct of the non-compliant person or entity, and the totality of the sanctions imposed.

If the amount of the General AMP is determined as punitive, FSRA reduces the General AMP to bring it in compliance with the Statutory Purposes described in Section B.1. of this Guidance in accordance with the Statutory Criteria discussed in Section C. of this Guidance.

Where FSRA imposes the prescribed amount for a Summary AMP, it cannot be punitive as the amount is predetermined by the legislature.

C. Approach: FSRA may reduce AMP amounts in settlements

FSRA may decide to add or remove an AMP proposed, or modify the amount of such AMP, as a result of a settlement. However, FSRA does so only when satisfied that the AMP imposed by settlement is consistent with the Statutory Purposes and Statutory Criteria described above. FSRA may also consider:

- Actions of the concerned person after the commencement of the enforcement action proposing to impose the AMP
- Any new information or evidence brought to the notice of FSRA after the commencement of the enforcement action; and
- The overall sanctions and outcomes that will be achieved through settlement.

Effective date and future review

This guidance became effective on **[TBD]** and will be reviewed no later than **[TBD]**.

About this Guidance

This document is consistent with [FSRA's Guidance Framework](#). As an Interpretation guidance, it describes FSRA's view of requirements under its legislative mandate (i.e., legislation, regulations and rules). Further, as an Approach Guidance it describes FSRA's internal principles, processes and practices for supervisory action and application of Chief Executive Officer discretion.