

Non-Compliant Filings Administrative Penalty Guideline

BC AUTHORIZED FINANCIAL INSTITUTIONS

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Financial
Institutions
Commission

INTRODUCTION

This guideline sets out the structure the Financial Institutions Commission (the Commission) uses when considering whether to administer penalties for late or non-compliant statutory filings or returns – the Non-Compliant Filings Administrative Penalty (NFAP) Guideline.

The NFAP guideline was developed to administer penalties ordered for contraventions of provisions that require a financial institution (FI¹) and/or its directors, officers, auditors or owners to file a statutory filings or return. The Commission is not bound to follow the guideline when making decisions on penalties. However, it does provide an approach to what would, in the normal course, influence the decision to order a penalty.

BACKGROUND

Section 253.1 of the *Financial Institutions Act* (FIA) permits the Commission² to order an administrative penalty for contraventions of prescribed provisions of the legislation. The Administrative Penalties Regulation (APR) sets out which provisions are subject to penalty, who can be liable for a penalty³, and the maximum amount that can be ordered⁴.

A list of legislative provisions subject to NFAP is set out in Appendix 1.

Updated lists of submissions required from different types of institutions are published on the Financial Institutions Commission's (FICOM) website. For more information about the statutory filings or returns required to be filed and related filing instructions, please go to the [FICOM](#) website.

EXPECTATIONS AND COMPLIANCE

FICOM expects regulated FIs to have appropriate processes in place to ensure that any statutory filing or return is submitted:

- in the form and manner prescribed in the relevant filing instructions;
- complete;
- error free; and
- by the required due date.

FICOM uses a risk-based supervisory framework to ensure sound business practices at FIs and if necessary to determine whether intervention is necessary. As part of its regulatory oversight and supervisory work, FICOM uses information contained in statutory filings and returns to make its regulatory decisions. Therefore, FICOM expects these filings and returns to not only be

¹ FI does not include captive insurance companies.

² The Commission has delegated its authority to the Superintendent of Financial Institutions to order penalties where the amount for a penalty sought is, in the case of an individual \$10,000 or less and in the case of a corporation \$25,000 or less. It is anticipated that most NFAP penalties will fall within that delegated authority.

³ Corporations and/or individuals can be liable for a penalty.

⁴ The amounts set out in the APR are maximum amounts. The actual amount of penalty ordered will depend on the scope, nature and severity of the contravention.

submitted on time, but also to be complete and error free. Ordering an administrative penalty⁵ is one way for the Commission to promote compliance with the filing requirements.

NFAP GUIDELINES

The purpose of this guideline is to encourage timely filing compliance and provision of accurate information. Penalties may be incurred on the basis of per diem, base rate or both. The following table outlines the penalty amounts for contraventions. The amounts are scaled based on the asset size of FIs.

Financial Institution Total Assets	Per Diem Penalty	Base Rate Penalty
Greater than \$1 billion	\$250	\$1,000
Greater than \$300 million but less than or equal to \$1 billion	\$150	\$600
Less than or equal to \$300 million	\$100	\$400
Individuals (no scaling)	\$50	\$75

For a first contravention, staff will recommend a penalty be given but that the amount of penalty be zero⁶. This warning reflects the non-punitive intent and provides FIs an opportunity to update non-compliant procedures. For subsequent contraventions, a penalty will be assessed to incentivize compliance. The initial penalty depends upon the scenario of non-compliant filing and is considered a “base amount” if non-compliance persists.

Scenarios⁷	Year 1	Year 2 (base amount)	Year 3 (base amount * escalation factor)
Late	Warning – no penalty	Per diem + base rate	Subsequent offence
Late + Incomplete	Warning – no penalty	Per diem + base rate	Subsequent offence
Incomplete	Warning – no penalty	Per diem	Subsequent offence

The base amount of the penalty is determined by the scenario of the non-compliant filings. “Incomplete” filing penalties will be decided based on the number of days it takes to remediate the non-compliance. Using a “per diem” is meant to encourage swift rectification of late or incomplete filings. Filings that are received “late” and “incomplete” have a per diem charge plus

⁵ Any funds collected from administrative penalties will go to the British Columbia government consolidated revenue fund and are not retained by FICOM.

⁶ The Commission is not bound by staff recommendations. See “Administrative Penalties” section. For section 105 contraventions, a penalty amount will be recommended.

⁷ See Appendix 2 for definitions.

a “base rate”. The base rate is intended to encourage filings to be made by the deadline date.

Penalties will be assessed using two potential components – the base amount and an “escalation factor” that is used for subsequent non-compliance. Escalating penalties will be imposed in circumstances of subsequent contraventions. In calculating the penalty, an escalation factor correspondent to the number of cumulative incidents of non-compliance is multiplied by the base amount in determining the final penalty amount. Please see Appendix 2 for further details and examples on the penalty structure.

After three years of continuous clean filings, the penalty structure set out above will be reset to zero. This would mean that the next contravention would result in a recommendation that a warning be issued.

ADMINISTRATIVE PENALTIES

If, in the opinion of the Commission⁸, a contravention has occurred, the Commission will then decide whether to order an administrative penalty. Assuming the result is to order an administrative penalty, the amount of the penalty to be applied is at the discretion of the Commission.

In applying discretion, the Commission may consider the following factors: a review of previous enforcement actions for contraventions of a similar nature by FIs and/or individual; the gravity and magnitude of the contravention; the extent of the harm to others resulting from the contravention; whether the contravention was repeated or continuous; whether the contravention was preventable; and the extent to which the FI and/or individual attempts to correct the cause of contravention.

There may be extenuating circumstances which do not allow for timely filing. FICOM is willing to forego assessing penalties where there are extenuating circumstances. Notification should be made as soon as possible in advance of the deadline. FIs should contact FICOM directly with requests.

Extenuating circumstances are circumstances that are exceptional or unforeseen and are outside the control of the FI or individual.

In the case of the FI, examples of extenuating circumstances are:

- significant disruption to the FI’s computer system due to virus attacks, fire, or flood;
- extraordinary work being undertaken by the external auditor or appointed actuary; and
- business disruption caused by an industrial action, natural disaster, state of emergency.

Situations that will not normally be considered as extenuating circumstances include:

- staff changes or absences;

⁸ See footnote 2.

- minor computer problems, partial system disruption, lack of system backup or contingency plan; and
- office closure due to statutory holidays.

In the case of an individual, examples of extenuating circumstances are:

- significant illness, accident or injury requiring hospitalization;
- absence caused by jury duty; and
- natural disaster or state of emergency.

Situations that will not normally be considered as extenuating circumstances include:

- personal or domestic events, such as moving house or attending a wedding;
- holiday or travel arrangements; and
- minor illnesses like cough and cold.

Advisory Notice

When staff identifies that a filing or return is late or incomplete, staff will provide the FI or filer with an advisory notice. The advisory notice is not a notice of penalty. Administrative penalties can be ordered up to two years after the date⁹ that the infraction first comes to the attention of the Commission. The purpose of this advisory is to bring the matter to the attention of the filer so that appropriate remediation action can be taken. Typically the decision on whether to order an administrative penalty will be made after a complete filing is received.

Notice of Penalty

If an administrative penalty is to be ordered, the party subject to the penalty will receive a written notice setting out:

- the contravention and any evidence supporting the finding of the contravention;
- the amount of the administrative penalty;
- the date by which the party must pay the penalty; and
- the process and deadlines for the party to dispute the penalty and/or amount of penalty.

If a penalty is ordered against a FI, the Commission may also impose an administrative penalty on any officer, director or agent of the FI who authorized, permitted or acquiesced in the contravention.

Upon receipt of a Notice of Penalty, the party receiving the notice has 14 days to either pay the penalty or deliver a written notice to the Commission stating that they are disputing the penalty and/or the amount of penalty.

⁹ The time limit of 2 years is set out in the legislation. Under FIA s 253.1(15), “The time limit for serving an administrative penalty notice under subsection (1) is 2 years after the date that the Superintendent or the Commission first had knowledge of the facts on which the notice of contravention is based, whichever is earlier”.

DISPUTE PROCESS

Every party subject to an administrative penalty has the right to dispute the penalty and/or amount as set out in sections 253.1(3) to 253.1(13) of the FIA. Below summarizes that process.

For penalties below a certain amount, (in the case of an FI, less than \$5,000, and in the case of an individual, less than \$2,000), the dispute must be through a written submission. If the penalty is above those amounts, (\$5,000 or more for an FI, or \$2,000 or more for an individual), the party subject to the penalty has the option of disputing the penalty by written submission or by an oral hearing. The Notice of Penalty will clearly state the dispute process available.

If a party wishes to dispute, they must provide the Commission with a written notice of intention within 14 days of receipt of the Notice of Penalty. This notice of intention needs to stipulate:

- what is being disputed (i.e., the penalty, the amount, or both); and
- the method of dispute (written or oral, if an oral hearing is an option).

The notice of intention does not need to articulate the dispute – such information can be provided through a later submission. However, if a party wishes to include a written submission with the notice they can do so.

Written Dispute

If a party is disputing by written submission, the complete submission must be received by the Commission no later than 30 days after receipt of the Notice of Penalty. The written submission must clearly articulate the reason for the dispute and the facts that the Commission should take into consideration as part of its review of the decision including any extenuating circumstances that prevented compliance from occurring.

The submission must be made by the individual named or their legal counsel, or in the case of a corporation, by its authorized representative.¹⁰

Requests received after the 30 days deadline will normally not be considered. Before the submission is considered, staff may seek clarification from the affected party on any points raised in the submission. Parties may provide evidence for consideration of the Commission and it may be in the form of a statutory declaration.

Oral Dispute

If a party wishes to proceed by oral hearing (where such an option is available), the Commission will acknowledge receipt of the request and will schedule a hearing. Hearings will be held within a reasonable time.

¹⁰ Acceptable representatives for corporations include a senior officer such as the Chief Executive Officer, the Chief Financial Officer, the Corporate Secretary, the Chief Compliance Officer, the Chief Agent (branches of foreign companies), or legal counsel.

Decision on Dispute

All disputes (written or oral) are considered by the original decision maker – the Commission¹¹. If the Commission confirms that a contravention has occurred, then the Commission may under section 253.1(8) of the FIA:

- by Order confirm the penalty specified in the Notice of Penalty;
- order a lesser penalty; or
- order no penalty.

If an Order is issued under section 253.1(8), the Order will set out the:

- contravention;
- amount of the administrative penalty (if applicable);
- payment due date (if there is an amount to be paid); and
- right to appeal.

If the Commission determines that a contravention has not occurred, then written confirmation will be provided that no penalty is ordered.

If any Order is issued then the party must, within 30 days after receiving the Order:

- pay the penalty; or
- file a Notice of Appeal.

If an Order is issued, that Order may be published by the Commission.

Penalties cannot be increased over the amount originally specified in the Notice of Penalty.

APPEAL PROCESS

If, after considering a dispute regarding an administrative penalty, the Commission confirms the contravention and issues an Order under section 253.1(8) of the FIA, then the party subject to the Order has the right to appeal that order.. Appeals can only be initiated after the penalty is disputed and an Order has been issued. The appeal process depends on who issues the Order. Any appeal of an Order stays that Order until disposition of the appeal. The appeal processes are set out in sections 242 to 242.4 of the FIA.

Commission Orders

If the Order is made by the Commission, any appeal must be made to the Supreme Court. Any such appeal is an appeal on the record which is:

- the record of oral evidence, if any, before the Commission;
- copies or originals of documentary evidence before the Commission;

¹¹ Or delegate, see footnote 2.

- other things received as evidence by the Commission;
- the Commission's decision;
- the written reasons for the decision, if any.

Superintendent Orders

If the Order is made by the Superintendent, any appeal must be made to the Financial Services Tribunal (FST).

Any such appeal is an appeal on the record and must be based on written submissions. The record consists of:

- the record of oral evidence, if any, before the Superintendent;
- copies or originals of documentary evidence before the Superintendent;
- other things received as evidence by the Superintendent; and
- the decision and written reasons for it, if any, given by the Superintendent.

The FST may also consider oral submissions. For further information about appealing a decision to the FST, refer to section 242.2 of the FIA and the [FST](#) website.



Financial Institutions Commission

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