

Administrative Monetary Penalties

Ministry of Consumer Services

October 4, 2013

Introduction

The purpose of this paper is to seek input from businesses and the public on how the use of administrative monetary penalties (AMPs) might be adopted more broadly to enhance consumer protection and public safety in Ontario.

An AMP is a financial penalty that can be established for a range of regulatory violations. AMPs are an additional enforcement tool that helps regulators quickly deal with non-compliance with the law. AMPs are used in several regulated sectors in Ontario, as well as at the federal level and in other provinces.

This paper provides background information on AMPs, including how they are used in Ontario and elsewhere. It sets out key considerations around broadening the use of AMPs in areas overseen by the Ministry of Consumer Services. These areas include sectors regulated by administrative authorities on behalf of the ministry, such as real estate and travel sales, as well as a number of sectors the ministry regulates directly. Each administrative authority would be able to decide whether to implement an AMP framework.

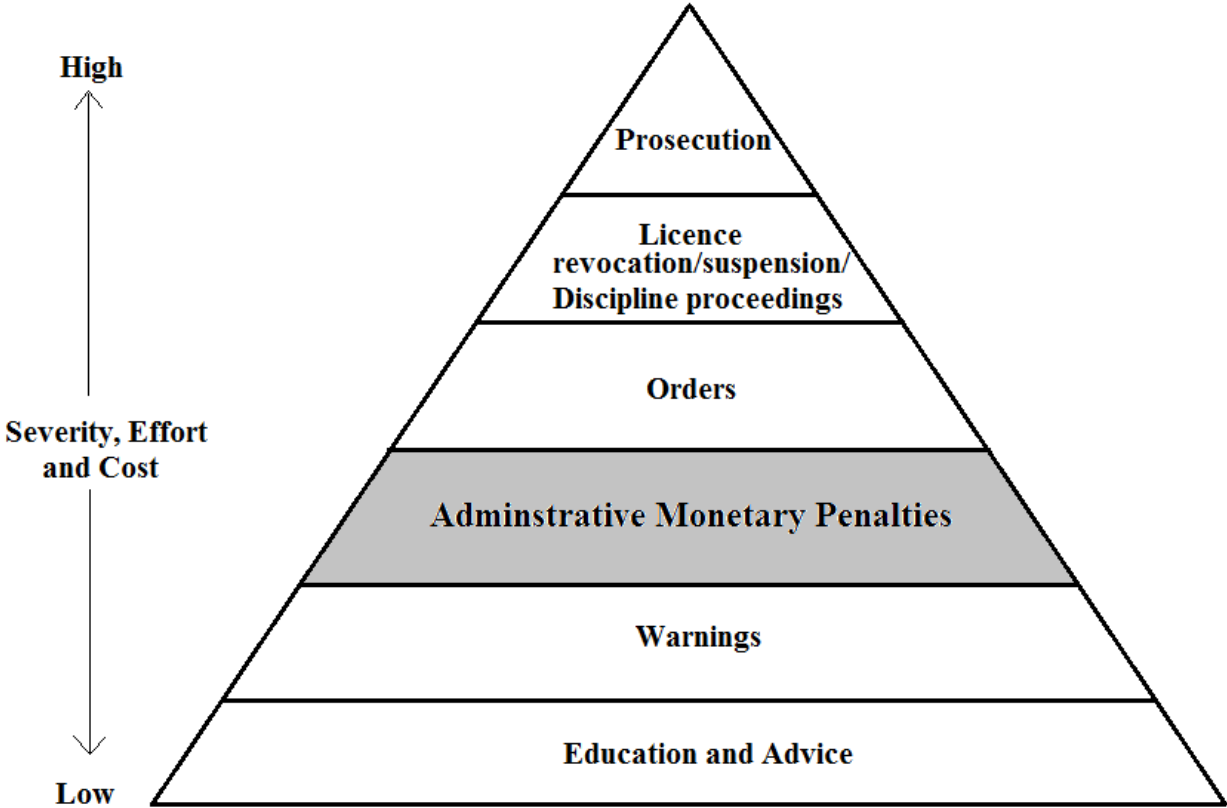
We encourage you to provide feedback on this proposal by following directions on the regulatory registry at www.ontariocanada.com/registry by December 12, 2013.

Context for action

As an enforcement tool, the purpose of an AMP is to reduce the risk of harm and level the field for businesses that operate fairly and in accordance with the law. An AMP is a financial penalty that may be issued against a business or other party operating in a regulated sector for failure to comply with the law.

An AMP may be applied when there is clear evidence that a business or individual is not complying with the law (e.g., a business that fails to post a required notice to consumers on its premises or omits required information from a consumer contract). An AMP can be positioned as an intermediate penalty situated between a simple warning and prosecution or suspension of a licence or registration (where available). It also provides regulators with an added tool when working with licensees, registrants, non-licensed sectors and others to deal with non-compliance with the law.

Thus, AMPs complement existing compliance tools along a spectrum of compliance actions. Prosecutions are at the higher end of the spectrum since prosecution may result in imprisonment and/or fines. Slightly below prosecutions are administrative actions such as revoking or suspending a licence in cases where a licence is required in order to engage in a particular activity. In this case, such a business may be denied the right to operate or required to significantly alter its service delivery model to comply. As a result, these tools are generally only used for more serious violations. In addition, both tools involve relatively expensive and time-consuming court or tribunal proceedings. At the low end of the spectrum, examples of educational approaches include providing written information to a business regarding their compliance with the law and sending materials to a sector on new regulatory or policy requirements.



As the diagram above shows, AMPs represent a useful middle ground. They send a stronger signal than a warning letter and can be less costly and more efficient than more severe responses such as prosecution. They widen the range of enforcement options available to regulators and allow them the flexibility to fine-tune responses to specific compliance issues. This can better ensure that the regulator’s action is proportionate to the situation.

Imposing an AMP may reinforce a non-compliant business or person to comply with the law and motivate them to modify their behaviour facing additional AMPs, or more

serious enforcement measures. This provides regulators with a valuable tool which can accomplish more than simply punish past behaviour.

There is additional value in giving regulators the authority to use AMPs. Those who administer rules that apply to a particular sector are often in the best position to understand the consumer protection or public safety impact, and calculate any economic gain from not complying with the law. This information can be used to help tailor the AMP amount to the specific circumstances. Consideration must also be given to setting the AMP at an appropriate level so that an AMP does not simply become “a cost of doing business” when breaking the rules.

Please see Appendix A for a list of current enforcement tools available to regulators.

The widening use of AMPs

AMPs fit very well in today’s modern approach to regulation. Using AMPs as a tool for regulators to respond quickly and effectively is important to reduce potential harm to the public and level the field for businesses that operate fairly and in accordance with the law.

AMPs increasingly are being used as an option in the regulator’s toolkit. AMPs are quick, clear and tangible when compared to sanctions such as prosecutions. Typically, an AMPs framework sets out the circumstances under which a monetary penalty may be issued, the penalty amount or formula for determining that amount, and provision for review.

Some examples of the use of AMPs in Ontario:

- Under the Payday Loans Act, the Ministry of Consumer Services can issue an AMP to licensees in a variety of non-compliance situations, such as failing to provide required dates on a loan agreement, with AMP amounts varying from \$100 to \$3,000.
- The Ontario Energy Board can apply AMPs of between \$5,000 and \$20,000 per day against energy marketers and retailers who violate licence conditions, rules of conduct and orders.
- Ontario’s Ministry of the Environment can issue penalties of up to \$100,000 a day, with the exact amount determined by a formula, for harmful spills from facilities operated by a range of sectors that it regulates.
- The Financial Services Commission of Ontario has recently introduced an AMPs framework for unfair or deceptive insurance sector acts or practices by insurers, agents, brokers and adjusters, with maximum penalties of \$50,000 for an individual and \$100,000 for other entities.

Other provinces and the federal government also use this compliance tool. For example:

- The federal Competition Bureau includes AMPs as one of its tools to deal with deceptive marketing practices, such as misleading advertising and misleading claims about ordinary selling prices, with a maximum penalty of \$1 million for a serious, continuing violation.
- The Canada Consumer Product Safety Act provides for AMPs for failing to comply with various provisions of the act, or a Minister's order under the act, including those relating to product recalls, up to a \$25,000 maximum.
- Under British Columbia's Business Practices and Consumer Protection Act, which sets out the regulatory regimes for a number of sectors, AMPs can be imposed for specific non-compliance situations, as well as for violations of licence conditions, compliance orders and other undertakings, with the maximum penalty for an individual set at \$5,000 and for a corporation at \$50,000.

Regulation of many other sectors, including transportation, agriculture, liquor licensing, tax and securities regulation, includes provision for AMPs.

Extending AMPs in Ontario

The Ontario government is considering extending AMPs to some of the statutes administered by the Ministry of Consumer Services as well as to statutes administered by its regulatory administrative authorities. Each regulator choosing to implement an AMP would first be required to develop a policy prior to being granted the legal authority to issue AMPs. Any decision by a regulator to use AMPs would be based on consultation with its sector. Appendix B lists the current acts and relevant regulators.

The administrative authorities and their areas of responsibility are:

- The Board of Funeral Services, which oversees members of the funeral service sector, such as funeral directors.
- The Electrical Safety Authority, which enhances electrical safety in Ontario including administering Part VIII of the Electricity Act and the Ontario Electrical Safety Code, the licensing of electrical contractors and master electricians, and the safety of electricity distribution systems and electrical products.
- The Ontario Motor Vehicle Industry Council, which oversees motor vehicle sales by automobile dealers and salespersons.
- The Real Estate Council of Ontario, which oversees real estate salespersons and brokers.
- Tarion Warranty Corporation, which administers a new home warranty program, as well as licensing of builders.

- The Travel Industry Council of Ontario, which oversees travel retailers and travel wholesalers.
- The Technical Standards and Safety Authority, which oversees the safety of amusement park rides and similar devices, fuels, pressure devices and boilers, elevators, and upholstered and stuffed articles, and certifies persons who work on equipment.
- The Vintners Quality Alliance Ontario, which oversees an appellation of origin system for Ontario-produced wines, as well as winemaking and labelling standards.

The ministry also has direct regulatory responsibility for collection agencies, payday lenders and loan brokers, bailiffs, cemeteries, professional athletic competitions and film theatres.

Key elements of the proposed AMPs framework

The proposed AMPs framework would be set out in legislation. It would also reflect several underlying key principles. The proposed framework would:

- Deter non-compliance and future violations quickly and effectively.
- Allow publication of information about the compliance records of businesses to better inform consumers.
- Ensure fairness to those being regulated.
- Provide for the use of proceeds for education, consumer awareness and public safety initiatives.

Details of Proposals

The following sections deal with a number of important proposals for the AMPs framework.

1. Responsibility for the AMP framework

Regulators would be responsible for developing their own specific AMP policies that meet criteria that would be established in legislation. Regulators would be responsible for specifying which situations might be subject to an AMP and how AMPs would be applied. Regulators could tailor their AMP policies to their specific mandate and enforcement needs, while balancing enforcement with experience.

Each regulator choosing to implement an AMP would first be required to develop a policy prior to being granted the legal authority to issue AMPs. Any decision by a

regulator to use AMPs would be based on consultation with its sector. It is expected that regulators would initially take a fairly narrow and focused approach to using AMPs. The ministry would provide training materials and support to regulators. Administrative authorities would be encouraged to share best practices with one another and work collaboratively to develop consistent approaches. Once regulator policies were finalized, proposed legislation would provide a means by which the policies would be recognized by the government and then have the force of law.

The law would require regulators to make their AMP policies available to the public: for example, by posting them on their website. In addition, requirements would be established to measure and report on the use and effectiveness of AMPs. Those requirements would be established by agreements between the ministry and administrative authorities. This reporting would help the ministry to monitor and oversee the regulators' use of AMPs.

The ministry would also need to develop an AMP policy consistent with the principles above for the areas that it regulates directly.

Example of how an AMP may be used – Certificate of registration

After receiving a complaint, the regulator carried out an inspection and requested the salesperson's certificate of registration. The law requires a salesperson to produce the certificate of registration at the request of any person. The salesperson failed to produce proof of registration on request of the inspector, claiming that she had forgotten it at home. The inspector verbally advised the salesperson of her duty to produce the certificate of registration. A week later, the same request was made of the salesperson who again indicated it was not available. The regulator issued a written warning about the salesperson's obligations under the law. If AMPs had been available, the regulator may have been able to issue an AMP to the salesperson sooner, underlining the importance of meeting the requirements of the law.

2. The monetary level of penalties

It is proposed that the legislation would set out three ranges of AMPs. Regulators would have discretion to determine monetary amounts for violations within those levels.

Regulators would be given specific criteria, established in legislation, to consider when determining a penalty amount. The criteria would include the nature and severity of the violation, history of the business' non-compliance, scale of the business, whether the violation was intentional or through negligence or recklessness, and whether there was an economic gain to the business from its behaviour.

Conversely, evidence that the regulated party was actively working to achieve compliance might be a mitigating consideration.

The ministry is proposing three penalty levels, the ranges for each and some indications of when they might be used (amounts are per infraction):

Level 1 \$100-\$2,000: for minor non-compliance violations.

Level 2 \$1,000-\$5,000: for more serious instances of non-compliance creating a risk to public safety, or financial or other potential harm to consumers, or where there has been past non-compliance.

Level 3 \$2,500-\$10,000: for the most serious non-compliance cases resulting in a significant risk to public safety or financial or other potential harm to consumers, particularly in combination with ongoing or repeat contraventions and/or economic benefit from non-compliance.

Example of how an AMP may be used – Late financial statements

A company holding a registration as a travel agency was habitually late in providing mandatory financial statements to the regulator. In fact, the company had not sold travel services for some time, but wanted to keep its registration active. A notice of proposal to revoke registration was issued, the financial statements were eventually filed, and the notice was withdrawn. The company ultimately allowed the registration to lapse, but in the meantime, the regulator's efforts to enforce compliance cost it time and money. If it had been possible for the regulator to issue an AMP, the registrant might have provided the statements on time, or might have decided sooner not to maintain the registration.

3. Review Process

To ensure fairness, an AMP could be reviewed under certain circumstances. Proposed legislation would provide rules about when a review might take place and who would hear and decide the review.

Depending on the nature of the non-compliance, a review might be permitted only if the level of penalty was miscalculated or the AMP was issued to the wrong person. Beyond those limited circumstances, regulatory requirements would include standards of reasonableness or due diligence. An AMP issued for violating these provisions might be reviewed on those grounds. For example, if a business or individual was required to take "all reasonable steps" to avoid or mitigate a situation, then the AMP could be reviewed and examined to verify whether it was issued for violating that provision. If

someone was supposed to exercise due diligence, then the examination would focus on whether the individual ought to have known that he or she was not in compliance.

The legislation would establish who could conduct a review. The reviewers would be independent of the enforcement chain: for example, a director of a branch not involved in enforcement activities might review a case related to a statute administered directly by the ministry. Legislation would establish the powers of the individual or body hearing a review, which would include the ability to confirm, cancel or vary the AMP.

4. Publishing compliance information

It is proposed that regulators would be required to publish information about issuing significant AMPs. An AMP would be “significant” if it fell into penalty level 2 or 3, discussed in the section on the monetary level of penalties. Regulators would have discretion to publish level 1 AMPs.

The information would remain public for a set period of time, e.g., two years, and would appear on the Consumer Beware List if it related to statutes administered by the Ministry of Consumer Services, or on the appropriate administrative authority’s website for other statutes.

Publishing the more serious contraventions would provide relevant information to the public about the risks of doing business with the parties involved. Additionally, publicity involving more serious violations would create disincentives for non-compliance in addition to those provided by an AMP. It is also in line with a graduated approach to enforcement that places more emphasis on higher-risk and more serious violations. As well, it would avoid drawing attention to relatively minor violations by businesses. The proposed approach would also recognize that there may be circumstances where it may be appropriate for the regulator to publish lower level AMPs.

5. Proceeds to enhance consumer protection and public safety

Proceeds from AMPs would be used exclusively for education, consumer awareness or public safety initiatives (depending on the administrative authority’s area of responsibility). The ministry is seeking input on two proposed options.

One option would allow the administrative authorities to retain and earmark funds generated by issuing AMPs. Retaining proceeds is consistent with the administrative authority self-funding model. The ministry would use oversight, performance and accountability arrangements in existing administrative agreements to ensure that proceeds are earmarked as required.

An alternative option would require administrative authorities to flow proceeds to a pooled fund established by legislation. The fund would be administered by an arm’s-

length board whose members would represent the administrative authorities and the ministry.

The board would decide how to allocate the proceeds received by reviewing grant applications from administrative authorities and others. The applications could propose initiatives to improve consumer protection and public safety, and the board of the fund would decide which proposals to support. Proceeds used for these initiatives would strengthen the overall regulatory framework across sectors and benefit consumers. This approach could also alleviate concerns that AMPs might be used simply to generate revenue for the regulator. The board would publish an annual report that would include financial statements and dispersal of funds, thus increasing public awareness.

Next steps

The Ministry of Consumer Services welcomes feedback and encourages anyone interested to provide comments on its proposal, which will be posted on the government's regulatory registry website from **October 28** to **December 12, 2013**.

To submit directly through the Regulatory Registry website, please visit:
www.ontariocanada.com/registry

Submissions may also be sent by email with "AMPs Consultation" in the subject line, to:
consumerpolicy@ontario.ca

or by regular mail to:

Administrative Monetary Penalties Consultation
Consumer Policy and Liaison Branch
Ministry of Consumer Services
777 Bay St, 5th Floor
Toronto, ON M7A 2J3

The Ministry of Consumer Services plans to review and analyze the feedback it receives during the consultative process and then clarify any outstanding concerns in fall 2013 with stakeholders, industry and other interested parties.

Privacy Statement

Please note that unless agreed otherwise by the Ministry of Consumer Services, all responses received from organizations in response to this consultation will be considered public information and may be used and disclosed by the ministry to assist the ministry in evaluating and revising the proposal. This may involve disclosing any response received to other interested parties.

An individual who provides a response and who indicates an affiliation with an organization will be considered to have submitted the response on behalf of that organization.

Responses received from individuals who do not indicate an affiliation with an organization will not be considered public information. Responses from individuals may be used and disclosed by the ministry to assist in evaluating and revising the proposal. Any personal information such as an individual's name and contact details will not be disclosed by the ministry without the individual's consent unless required by law.

If you have any questions about the collection of this information, please contact consumerpolicy@ontario.ca.

Appendix A: Current Enforcement Tools

A number of tools are currently available to regulators in Ontario. Examples of the more common compliance tools include:

- In some sectors, issuing an order to stop the circulation of advertising or other public materials believed to be false or misleading, and requiring retraction/correction.
- Where the party being regulated has access to a trust or similar fund, issuing a “freeze order” that prevents assets from being withdrawn from the fund.
- In some sectors, referring matters to a disciplinary committee with the power to impose fines, or require further professional education.
- Applying for a court order directing compliance with a provision of the relevant act or related regulations.
- In those sectors requiring registration or a licence, suspending, revoking, or refusing to renew a registration/licence, or refusing to register/license an applicant.
- Pursuing a provincial regulatory prosecution where legislation allows.

Appendix B: Current Regulators and Acts

Regulator	Act
Board of Funeral Services (BOFS)	Funeral, Burial and Cremation Services Act (in conjunction with MCS)
Electrical Safety Authority (ESA)	Electricity Act
Ontario Motor Vehicle Industry Council (OMVIC)	Motor Vehicle Dealers Act
Real Estate Council of Ontario (RECO)	Real Estate and Business Brokers Act
Tarion Warranty Corporation (Tarion)	Ontario New Home Warranties Plan Act
Travel Industry Council of Ontario (TICO)	Travel Industry Act
Technical Standards and Safety Authority (TSSA)	Technical Standards and Safety Act
Vintners Quality Alliance Ontario (VQAO)	Vintners Quality Alliance Act
Ministry of Consumer Services - Consumer Protection Branch (CPB)	Consumer Protection Act, Collection Agencies Act, Payday Loans Act, Consumer Reporting Act, Bailiffs Act, Athletics Control Act, Film Classification Act, and Funeral, Burial and Cremation Services Act (in conjunction with BOFS)