

***Administrative Monetary Penalties:
A Framework for Earlier and More Effective
Regulatory Compliance***

A DISCUSSION PAPER

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Table of Contents

Executive Summary	1
Questions for Discussion	2
Introduction	4
Common Characteristics of an AMP Scheme	4
Advantages of an AMP Scheme	6
As Part of a Comprehensive Enforcement Scheme.....	10
Proposed Elements of an AMP Enforcement Scheme	13
Conclusion	17

Executive Summary

Purpose - to prompt discussion about an effective framework for an AMP scheme

The purpose of this paper is to prompt discussion about an effective framework and essential elements for designing an Administrative Monetary Penalty (AMP) scheme for government officials to achieve compliance with regulated activities and protect the public interest. It is intended to be used as a tool for statutory decision-makers (SDMs) to assess the value of AMPs in achieving compliance with their regulatory functions and to possibly develop a framework to be used by policy makers when establishing a new enforcement scheme. Other readers may also find the discussion to be of interest.

Context

SDMs need effective means to ensure compliance with regulatory schemes that are intended to promote and protect the public interest. Effective compliance tools can prevent, or at least reduce, the need for more costly and time consuming enforcement actions such as criminal prosecutions. AMPs can be an effective means to achieve compliance.

AMPs are financial penalties or fines imposed for the contravention of a regulatory scheme, without having to go to court. An effective AMP scheme will be responsive, proportionate, fair and equitable. It may also provide a means to repair the damage caused by the contravention. AMPs can provide greater flexibility and can be more efficient and economical than criminal prosecutions. Using AMPs for less serious contraventions helps achieve higher levels of compliance. However, not all SDMs have this tool available to them.

The information presented in this paper encompasses the broad range of issues related to the design of a framework for AMPs, and is part of a larger project related to the powers and authorities of SDMs, more fully described in the Introduction.

Overview of Contents

This paper poses a series of questions and highlights some of the common characteristics as well as the advantages and necessary elements of an AMP scheme. Some related issues are also identified.

- ***Common characteristics***

Responsiveness, proportionality, fairness and equity, deterrence, punishment, reparation for damage caused, time limits and a restriction on proceeding with criminal prosecutions are some of the common elements of an effective AMP scheme.

- ***Advantages***

AMPs have reduced procedural and legal requirements, making them an effective enforcement alternative to criminal prosecution. Also, the SDM's specialized knowledge of the scheme and its purposes can allow for a more nuanced approach. Other factors can also come into play, like the ability to impose an AMP on an "absolute liability"

basis. Using an AMP scheme for less serious infractions can mean that more costly and time-consuming criminal prosecution can be reserved for the most serious cases of regulatory non-compliance.

- ***A Comprehensive Enforcement Scheme***

AMPs can be most effective when used as one of a complete “tool box” of options that includes, for example, compliance agreements. Using an AMP can raise issues of proportionality, the SDM’s discretion (when to use each option and the amount of any AMP to be imposed) and the various safeguards to ensure fairness (i.e. who to impose the penalty, the use of the funds, protection from prosecution).

- ***Essential Elements of an AMP Scheme***

While enforcement schemes should be specifically tailored to the applicable regulatory scheme, some common elements of a framework for AMPs include:

- making a range of enforcement options available;
- clear indication of the amount of discretion and how to be exercise this discretion;
- limits on the penalty amount that can be levied;
- notice, including the amount, reasons, due date, any appeals or reviews;
- separation of inspection and enforcement roles;
- sentencing guidelines for criminal prosecution;
- communication of penalties to the regulated community at large;
- provisions for the penalization of directors and/or officers of corporations;
- provisions for appeals of AMPs to specialized agencies, if practical; and
- penalty funds collected should not be directed to the benefit of the regulator.

While some of these may need to be expressly set out in the legislative scheme, others are more policy oriented and could perhaps simply be included in the supporting documentation.

Questions for Discussion

Some issues that might be discussed when considering the use of and framework for AMP schemes include:

1. How effective are current AMP-based enforcement schemes in British Columbia at ensuring compliance? What, if any, problems have arisen in those schemes?
2. In what circumstances should SDMs be given the ability to use AMPs? Are there criteria that would assist in identifying those circumstances? What might those criteria be?
3. What would an effective framework for an AMP scheme look like? Are there essential elements to be included in any AMP scheme?
4. Can effective guidance be given on the exercise of discretion regarding AMPs, without losing the desired flexibility?

5. Is the separation of roles of inspection and enforcement critical? Is it always practical? Are there other alternatives?
6. Can/should the use of AMP funds be directed to repair damage or perhaps to other activities like better education?
7. What kind of time limits need to be considered for imposing and paying AMPs? What should happen if an AMP is not paid?
8. When should compliance agreements be used with AMPs?
9. What other compliance tools could be made available, as an alternative to criminal prosecutions?
10. Would a single legislative framework for AMPs, like the *Administrative Tribunals Act*, be useful? Or would legislation specific to each scheme be better and why?
11. Should the use of AMPs be restricted to only regulatory schemes or are there other types of programs or schemes that could benefit from their use?
12. Are there any programs or schemes that should only use AMPs and not criminal prosecutions? If so, which ones and do they share any common characteristics?
13. Are there circumstances where the disadvantages of using AMPs should restrict their use? Are there any common criteria that might apply to identify which SDMs should be restricted from using AMPs? What might those criteria be?
14. What skills and training would assist SDM in using AMPs? Would checklists or guidelines be helpful?

This list does not purport to be all-inclusive; there will no doubt be other questions and, hopefully, answers that readers may identify.

You are invited to share your thoughts, ideas and comments on these issues, or any others you may have on this topic, with the Ministry of Attorney General's Administrative Justice Office (AJO) at:

PO Box 9210 Stn Prov Govt
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Or you can use the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo

Submission of comments by **November 14, 2008** would be appreciated.

Introduction

Government wants a justice system where problems can be solved simply, quickly and affordably, achieving earlier solutions and faster justice.

Statutory decision-makers' (SDMs) powers and authorities to enforce regulatory schemes are a critical component of the justice system. The outcomes of their enforcement actions can have a significant impact on individuals, businesses and the public. Effective enforcement procedures and processes need to be clear, consistent and proportionate to the nature and impact of the activity. Effective enforcement can save time and expense by reducing the need for criminal prosecutions.

The Ministry of Attorney General, through the Administrative Justice Office (AJO), is leading a systemic review of SDMs' powers, procedures and authorities, involving research, consultation and recommendations to ensure SDMs have appropriate powers and proportionate enforcement powers, procedures and authorities to achieve earlier compliance within their respective mandates. Recommendations for broad-based, systemic reform legislation may be a result, similar to the standard framework provided for tribunals by the *Administrative Tribunals Act*.

This paper is the second in a series of research papers from the AJO and is intended to prompt discussion about an effective framework and essential elements for designing an Administrative Monetary Penalty (AMP) scheme for government officials to achieve compliance with regulated activities and protect the public interest. To provide some context for the discussion, this paper:

- poses a series of questions (set out at the end of the Executive Summary);
- describes common characteristics of an AMP and an effective AMP scheme;
- highlights advantages of an AMP scheme;
- describes the need for a comprehensive tool kit of enforcement options;
- discusses the essential elements of a successful AMP scheme; and
- identifies other related issues.

You are invited to share your thoughts, ideas and comments on the issues identified in this paper, or any other issues related to AMPs, with the AJO.

Common Characteristics of an AMP Scheme

AMPs are described as:

- a financial penalty or fine imposed by a SDM acting under statutory authority for the contravention of a regulatory scheme, without having to go to court;
- applicable where the contravention is not as socially repugnant as a criminal offence; and

- appealable to the court (or other oversight body) by the person against whom the penalty is imposed.¹

While AMPs are considered a type of fine, they differ from “ordinary” fines, such as parking tickets, in several ways. Typically:

- the legislation under which the AMP may be imposed applies to a narrower segment of the general population (for example, a regulated industry);
- imposing an AMP involves a number of steps, for instance, the person may first be given a warning and/or an opportunity to address the SDM’s concerns (that is, to comply with the scheme);
- the decision to impose an AMP is made by a senior official such as a Director or a person designated by that Director under the relevant legislation;
- the criteria to guide the determination whether to impose and how to set the amount of an AMP is set out in the legislation;
- within those criteria, the person empowered to levy the penalty may be given significant discretion to decide whether to impose an AMP and to determine the appropriate amount of the AMP²; and
- the legislation allows for the reconsideration or review/appeal of an AMP by the SDM and/or an independent, specialized tribunal.

The overarching goal of an AMP scheme is to encourage compliance, and thus prevent or at least reduce non-compliance with regulatory requirements which have been established to protect the public. This goal is achieved through:

- **Responsiveness:** A critical element of an AMP scheme is the ability of the SDM to act promptly and effectively, supporting and enhancing compliance through speedy responses to and speedy resolution of any contravention or suspected non-compliance with the regulatory scheme.³
- **Proportionality:** The amount and type of penalties imposed by the scheme should be proportionate to the nature of the scheme, the matters being regulated and the alleged contravention. The penalties imposed should reflect the public

¹ This definition was drawn from a number of sources, including: Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective* (London UK: Cabinet Office, 2006); Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement* (London UK: HM Treasury, 2005); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission, 2002), Jill MacIntyre, “The Use of Administrative Monetary Penalties: Report for the Administrative Justice Office” (unpublished discussion draft, Administrative Justice Office, 2004).

² While some suggest that under a true AMP scheme the SDM has no discretion, other commentators do not see this as a key characteristic. For the purposes of this paper, the latter view is adopted: an AMP scheme may give the SDM discretion as to whether to impose a penalty and/or discretion about the amount of the penalty to be imposed. Discretionary AMPs have been in use in some BC regulatory schemes for some time, for example, under the *Workers’ Compensation Act*, R.S.B.C. 1996 c. 492.

³ MacIntyre, *supra* note 1 at 5; Macrory, *supra* note 1 at para. 2.11, pp. 29-31.

interests protected by the scheme, the seriousness of the contravention, and its effects on maintaining the scheme.⁴

- **Fairness and Equity:** The procedures (responsiveness) and the sanctions of the scheme (proportionality) should be fair, in terms of *what* they are and in *how* they are applied to those persons or entities subject to the regulatory scheme.⁵
- **Deterrence:** Ultimately, the threat of imposing a penalty is intended to deter persons from undertaking non-compliant activity in the first place. Some suggest that, as an additional element of deterrence, AMPs can also be structured and used as an effective means to remove any financial benefit that may have been derived as a result of the non-compliance.⁶
- **Punishment:** Not everyone accepts that an AMP scheme should seek to punish those who fail to comply with regulatory requirements. Some suggest that the concept of punishment should be restricted to the criminal courts.⁷
- **Reparation for Damage Caused:** An AMP regime may provide that the revenue collected from the penalties will be paid into a special fund to be used only to pay for the repair of any damage caused by non-compliance. Compensating for the negative effects of non-compliance may be easier where the damage caused is physical, as opposed to economic.⁸

Most AMP schemes require the penalty be imposed within a limited period of time after the SDM becomes aware of the violation; the most common time limit to impose an AMP in British Columbia seems to be two years.

An AMP scheme will also typically require the SDM to choose whether to proceed with *either* an AMP *or* a criminal charge for an alleged contravention of the regulatory scheme, with many AMP schemes expressly prohibiting criminal prosecution if an AMP is imposed, regardless of whether the AMP is in fact paid.⁹ If the AMP is not paid, the legislation will often provide that notice can be filed in court and the civil court judgment processes used to enforce payment.

Advantages of an AMP Scheme

AMPs are considered to have significant benefits, most notably as a more effective alternative to criminal prosecution. However, most commentators are careful to stress

⁴ Macrory, *supra* note 1 at para. 2.11, pp. 29-31.

⁵ MacIntyre, *supra* note 1 at 5.

⁶ Macrory, *supra* note 1 at para. 2.11, pp. 29-31.

⁷ Australian Law Reform Commission, *supra* note 1 at paras. 2.25-2.28.; MacIntyre, *supra* note 1 at 5.

⁸ *Ibid.*; Macrory, *supra* note 1 at para. 2.11, pp. 29-31.

⁹ Some AMP schemes, such as Alberta's *Environmental Protection and Enhancement Act*, prohibit proceeding with a criminal prosecution for a contravention only where an AMP has been imposed *and paid* for that contravention (s. 237(3)).

that AMPs should form only one part of a comprehensive enforcement scheme and that criminal sanctions and other options are also useful as part of such a scheme.

An AMP is likely to be more effective than a criminal prosecution and, as a result, increase compliance with the regulatory scheme. The reasons for increased effectiveness are:

- **Reduced Procedural and Legal Requirements**

Both the administrative process and the legal requirements of AMPs are much less onerous than those associated with the criminal court process. Specifically:

- The time required to apply and complete the process to impose an AMP will almost always be less than the amount of time required to enforce regulatory requirements through a criminal prosecution (which may include a trial);
- AMPs can provide an enforcement tool that is more expeditious, informal and cost-effective, and that represents less of a stigma than criminal prosecution or other administrative actions, such as suspending or revoking a licence;
- An AMP scheme can be more flexible and can take a more customized approach to dealing with regulatory non-compliance than criminal prosecution;¹⁰ and
- Many pieces of legislation that authorize the use of AMPs allow the SDM to impose an AMP where he or she believes on a balance of probabilities that a person has contravened a regulatory scheme. This standard of proof is lower than that required in criminal trials for regulatory offences, where the judge must find responsibility for the contravention beyond a reasonable doubt.

- **Specialized Knowledge of the Person Imposing the AMP**

AMPs are imposed by SDMs with a high degree of experience and knowledge of the regulatory scheme, the regulated community and the context of the activity. These SDMs can use that experience and knowledge to impose a penalty that fits the contravention.¹¹

Where an alleged violator appeals an AMP to the courts, the court will often defer to the specialized knowledge of the SDM or a reviewing tribunal and uphold the

¹⁰ Macrory, supra note 1 at paras 3.24-3.25, p. 42.

¹¹ In addition, some believe that implementing a new AMP regime will not require significant additional staff training where regulatory enforcement staff is already trained in conducting investigations into potential prosecutions. However, significant training may be required for senior officials that will act as the SDMs, and not just investigators, under the AMP scheme (BC Ministry of Forests and Range presentation to the Ministry of Environment's Administrative Monetary Penalties Forum, April 19, 2007).

initial decision, particularly where such decisions are protected by privative clauses.¹²

In contrast, criminal penalties are imposed by judges who may lack experience in dealing with regulatory offences generally, and will typically have little or no knowledge of the specific regulatory scheme, the regulated community or the impact of the contravention in the context of the overall scheme. This lack of knowledge can result in penalties that are so low as to have little or no deterrent value and thus fail to achieve a primary objective of taking enforcement action in the first place.

- **Better Guidance on Setting Penalty Amounts**

An AMP scheme may be able to provide more guidance and clarity to those operating within the scheme about the consequences of non-compliance. An AMP scheme may also provide greater flexibility in addressing individual contraventions than the criminal law.

Clear direction on the penalties to be imposed can be set out, based on clearly set and known criteria such as the context of the violation (for example, whether it occurred in a commercial or not-for-profit context), the size of the offending enterprise, the severity and consequences of the violation and the number of previous penalties or warnings respecting non-compliance. These directions may be clearly communicated to the regulated community through the on-going relationship between its members and the SDM.

The courts, on the other hand, may lack a similar, detailed sentencing context for regulatory offences, so the person and others who are also regulated under the scheme (the “regulated community”) may not understand as clearly the consequences of non-compliance.¹³ Further, the ability to communicate the consequences to the regulated community at large may be more limited due to the lack of an ongoing relationship that may be more prevalent between the regulated community and SDMs.

- **Strict Liability versus Absolute Liability**

Most regulatory offences, when enforced through the criminal courts, are treated as “strict liability” offences because most statutes creating an offence do not expressly address if intent to commit the offence is necessary in order to find a person guilty of an offence. Without intent being explicitly addressed in the legislation, the courts (typically being unwilling to find a person guilty in the absence of intent), will infer that a defence of due diligence can be claimed.¹⁴

¹² Privative clauses are statutory provisions that attempt to limit the extent of the court’s review of SDM’s actions.

¹³ Richard Brown and Murray Rankin, “Persuasion, Penalties and Prosecution: Administrative v. Criminal Sanctions”, in *Securing Compliance: Seven Case Studies*, M.L. Friedman ed. (Toronto: University of Toronto Press, 1990) at 347.

¹⁴ *Ibid.* at 343.

This means that a person who is prosecuted for a regulatory offence can assert a defence of due diligence, claiming they should be excused from responsibility because they took all reasonable precautions to prevent the event from occurring. The availability of a due diligence defence can make SDMs reluctant to undertake the expense of criminal prosecution, except in the case of the most wilful and harmful contraventions. As such, enforcement action might not be taken with respect to less serious contraventions.

While a due diligence defence may be presumed available in the case of AMPs,¹⁵ an AMP scheme can override this presumption by expressly providing the offence is one of absolute liability and due diligence is not available as a defence.¹⁶ Allowing SDMs to impose AMPs on an absolute liability basis makes it easier for SDMs to take enforcement action in a greater number of cases and because AMPs do not carry the stigma of a criminal conviction, this can be justifiable in terms of risk management (discussed below). In this way, the express characterization of an AMP scheme as one of absolute liability can enhance the deterrent value of the enforcement scheme, and encourage early action in relation to minor offences before they become more serious.¹⁷

- **A Risk-Based Approach**

Modern regulation is typically based on a principle of risk management that seeks to reduce risk wherever possible. An enforcement scheme, such as an AMP scheme, that allows a penalty to be imposed simply for the creation of a risk of harm is considered more likely to prevent actual harm than a system that only imposes a penalty when actual harm has occurred. The theory behind this is that imposing a penalty for creating a risk of harm will have the effect of encouraging regulatory compliance so that actual harm never occurs.

At least one study has indicated that regulatory schemes that rely on criminal prosecution tend to enforce regulatory requirements only where clear harm has actually resulted, whereas schemes that used AMPs impose penalties more frequently, even where no actual harm has occurred.¹⁸ Consequently, the opportunity to use an AMP may improve compliance and reduce the risk, and occurrence, of harm.

- **Stigma**

The higher level of stigma attached to a criminal conviction compared to an AMP may make some judges more reluctant to convict, which may in turn make government officials reluctant to prosecute contraventions in the criminal courts.

¹⁵ *Consolidated Canadian Contractors Inc. v. Canada* [1999] 1 F.C. 209.

¹⁶ An example of this approach is found in section 18 of the federal government's *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

¹⁷ *Ibid.* at 343, 346.

¹⁸ Brown and Rankin, *supra* note 14 at 340-341. The authors speculated that this may reflect a cultural context because regulators/SDMs were more likely to see the potential risk as more serious than judges, who typically only deal with cases where actual, specific damage to property or people has resulted.

This reluctance, by both government officials and judges, to stigmatize behaviour as criminal (which may be particularly evident where the regulated business is perceived as providing a positive benefit, such as economic development) may decrease the perception in the regulated community of the need to comply.¹⁹ However, the stigma of criminal sanctions still carries a great deterrent effect and the judicious use of criminal penalties in the enforcement of regulatory law can help to alter public attitudes about the importance of regulations, especially environmental and health and safety regulations.²⁰

Using an AMP scheme can mean that criminal prosecution, which is more costly and time-consuming and engages more serious consequences, can be reserved for the most serious cases of regulatory non-compliance.²¹

Despite these advantages, it should be noted that some commentators suggest that reforms to the criminal justice system would make that system more effective in regulatory enforcement. Some of the possible reforms include:²²

- Specific sentencing guidelines to apply to the regulatory offences;
- Requiring prosecutors to make clear to courts the regulatory context of the alleged offence, as well as the financial benefit that accrued as a result of the contravention (although many would likely suggest that this is already done);
- Consolidating regulatory prosecutions into certain (sometimes region-specific) courts, to allow judges and court officials greater opportunity to gain familiarity with regulatory prosecutions; (This may only work where there is a sufficiently high caseload volume.) and
- Specialist training on regulatory offences for judges, magistrates and court officials. (Again, this may only work where caseload volume is high).

As Part of a Comprehensive Enforcement Scheme

AMPs can perhaps be most effective as a compliance tool when used as one of a complete “tool box” of options. AMPs may be especially useful where other enforcement options, such as suspending or revoking a licence, may be an overly severe consequence for individuals who make their living in the regulated industry, if the non-compliant activity is of a more minor nature.

¹⁹ *Ibid.* at 341-342.

²⁰ *Ibid.* at 348.

²¹ *Ibid.* at para. 3.23, p. 42. However, it should be noted that the cost of criminal prosecutions can also be avoided by the use of Alternative Measures, such as the Environmental Protection Alternative Measures (or EPAMs) available under the *Canadian Environmental Protection Act*, which (similar to compliance agreements) set out specified measures that must be taken to restore compliance and/or repair any damage caused by non-compliance. Unlike compliance agreements, Alternative Measures are only available where the regulated party has been charged with an offence, with the threat of the prosecution being reinstated if the alternative measures are not followed. The ability to successfully use Alternative Measures also depends on whether the regulator determines that an offence proceeding is warranted and the parties' estimation of the relative likelihood of a conviction.

²² Macroy, *supra* note 1 at paras 3.12-3.16, pp. 39-40

A particularly helpful description of the appropriate relationship between AMPs, criminal prosecutions and other options in regulatory enforcement is that of a pyramid, in which informal warnings and communications make up the bulk of enforcement action (i.e. the base of the pyramid), with sanctions progressing (i.e. moving up the pyramid) to formal warnings, compliance orders, possibly mediation, suspensions, AMPs, criminal prosecution, and finally license revocation, as the circumstances of each case warrant.²³ It is thought that this compliance enforcement model better achieves compliance from the regulated community than a model where the SDM has only one enforcement option, even where that option has the potential to put the regulated party out of business.²⁴

- **Compliance Agreements as an Additional AMP Enforcement Tool**

A good example of an additional tool in a customized and flexible AMP scheme is the ability to also use compliance agreements to obtain and ensure on-going compliance with a regulatory scheme.²⁵ Compliance agreements allow for the person who is subject to an AMP to enter into an agreement with the SDM, setting out a detailed plan of corrective and preventative actions that must be followed. Typically, a compliance agreement must be signed by both the SDM and the alleged violator, and will often include an admission of liability by the alleged violator.

Compliance agreements are an attractive option for those subject to an AMP because they generally allow for a reduction (or even a cancellation) of the original penalty, provided that the agreement is followed.²⁶ Because continued compliance is a requirement of the agreement, the SDM can effectively achieve his/her goals. To ensure its continued value as a compliance tool, the legislation allowing for the use of compliance agreements can also provide that the SDM may rescind the agreement and impose an even greater AMP than was initially imposed if the regulated party breaches their obligations under the agreement.

- **Related Issues**

Providing a toolbox of options raises some issues, including:

- **Proportionality**

Consideration might be given to using AMPs where they are the best means of ensuring proportionality between the contravention and the regulatory scheme, where they offer the ability to change behaviour, and where they can help eliminate any financial gain resulting from the contravention, with

²³ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 35.

²⁴ *Ibid.*

²⁵ For examples of the use of compliance agreements, see BC's *Local Government Bylaw Notice Enforcement* [SBC 2003] CHAPTER 60, and Canada's *Agriculture and Agri-Food Administrative Monetary Penalties Act* (1995, c. 40).

²⁶ Even where an AMP is cancelled under a compliance agreement, the regulated party may well be required under the agreement to take preventative and corrective measures that require it to spend as much, or even more, than the value of the original penalty.

criminal prosecution reserved for “deliberate, reckless or repeated non-compliance.”²⁷

- **Exercise of the SDM’s Discretion**

A scheme that provides for AMPs, criminal prosecution and other options may require express guidance to the SDM on *when* to use each option and, if an AMP is to be used, on *the amount* of the penalty to be imposed.²⁸

When to use: One suggestion is to adopt a policy to use criminal prosecution only for those cases where there is serious culpability or serious risk of damage. All other (less serious) contraventions would be enforced through the use of AMPs. This approach may provide the best assurance that highly objectionable acts attract the condemnation of the criminal law, while best ensuring compliance.²⁹

Amount to be imposed: If an AMP is to be imposed, the degree of discretion to be given to SDMs in deciding the amount of the penalty may also need to be addressed as concerns have been expressed that allowing the SDM complete discretion to set penalty amounts could lead to issues of bias or unfairness.³⁰

Various safeguards have been proposed to ensure objectivity and fairness in deciding when to impose AMPs and in determining the amounts imposed, including:

- *Who to impose the penalty:* Most enforcement schemes rely heavily on informal communication and cooperation between the field staff or inspectors (who ultimately put forward allegations to the SDM) and the regulated persons or companies as an initial means of encouraging compliance. As such, designating only higher-level administrators (as opposed to the field staff or inspectors) as SDMs with the authority to impose variable AMPs can help maintain or preserve the day-to-day working relationship between the field staff (regulator) and the offender (regulated). If field staff were directly responsible for imposing and setting the amount of a variable AMP, it might cause relations to become adversarial, and discourage cooperation and compliance. Giving only senior staff / SDMs the responsibility for setting and imposing variable AMPs allows penalties to be used where required, while preserving a more cooperative day-to-day working relationship between field staff and the regulated community.

²⁷ Macrory, *supra* note 1 at para 3.36, p. 47.

²⁸ Department for Environment, Food and Rural Affairs, *Review of Enforcement in Environmental Regulation* (London: DEFRA, 2006) at para 6.3.32, p. 32.

²⁹ *Ibid.* at paras 6.3.36, 6.3.46-6.3.47, pp. 34-38.

³⁰ Anthony Ogus, “Enforcing regulation: do we need the criminal law?”, in *New Perspectives on Economic Crime*, Hans Sjögren and Göran Skough eds. (Northampton MA: Edward Elgar, 2004), 50.

- *Use of funds:* To eliminate any concern or perception that the SDM may impose penalties simply to raise revenue for its own operations may be to ensure that funds collected by means of AMPs are not directly accessible to the government ministry. One way of accomplishing this goal may be to require by statute that all AMP revenue is to be paid into a special fund to be used for repairing damages caused by non-compliance (although not limited to only damages arising from the specific related incident). Any such proposal should still permit the government ministry to recover its direct costs of imposing an AMP.
- *Protection from Prosecution:* Consideration should be given as to whether individuals who are sanctioned using AMPs should be protected from criminal prosecution for the same transgression. One possibility may be to require the court's permission to prosecute in such situations.³¹

Proposed Elements of an AMP Enforcement Scheme

Any enforcement scheme should be specifically tailored to the larger regulatory scheme within which it is to work. However, there are some common elements of a general framework for an enforcement scheme that incorporates AMPs. Some of these elements need to be expressly set out in the legislative scheme, others are more policy oriented and can simply be included in the supporting documentation. A number of these elements have been discussed above, but for completeness are also included here.³²

- ***A range of enforcement options, including a range of AMPs and criminal prosecution, should be available to be most effective in obtaining compliance***

As discussed above, proportionality is a key element of effective enforcement. SDMs are more likely to enforce contraventions where the available remedies are proportional to the risk or harm resulting from the contravention. Enforcement and compliance are closely related. If SDMs are more likely to enforce, the regulated community is more likely to comply. On the other hand, if the regulated community senses a reluctance to enforce (due to a lack of viable options, or a

³¹ *Ibid.* at paras. 3.44-3.45, 3.48, pp. 50-51.

³² For specific examples of a legislative framework for an AMP scheme, see the *Business Practices and Consumer Protection Act*, [S.B.C. 2004] c. 2, ss. 164-170 and also the *Local Government Bylaw Enforcement Act*, [S.B.C. 2003] c. 60. And in the spring 2008 Legislative session, AMPs were included in four new BC Acts: Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act, Greenhouse Gas Reduction (Cap and Trade) Act, Greenhouse Gas Reduction (Emissions Standards) Statutes Amendment Act and Greenhouse Gas Reduction (Vehicle Emissions Standards) Act. The AMP aspects of the Bills share several commonalities, for example, "automatic" administrative penalties (absolute liability offences), personal liability of directors, officers and agents of a corporation if they authorized, permitted or acquiesced in the offence, and for appeals to the Environmental Appeal Board.

reluctance to use the criminal court for reasons of cost or otherwise), it may be less likely to comply. Alternative dispute resolution may also be a valuable tool that could be used to arrive at an appropriate outcome.

- **Clear policy guidance should be given to SDMs on which option to use**
If enforcement options are to be available to SDMs, they must be given guidance on when specific options should be used. Guidelines should stipulate the types of actions that would merit the pursuit of higher-stigma criminal penalties or other more significant options such as licence revocation, and the types of actions that would be best sanctioned through the quicker AMP process. Guidance might also be given about when to progress from lower level to higher level enforcement measures, to enhance fairness in applying the scheme.
- **A clear indication of the amount of discretion a SDM may have whether to impose an AMP and the amount to be imposed**
In setting up an enforcement regime involving AMPs, consideration should be given as to what extent the SDM will be given discretion to decide whether to impose a penalty and in setting the amount of the penalty to be imposed. Failure to clearly set out the extent of the SDM's discretion and how to exercise it could lead to uncertainty, unfairness and a loss of efficiency.

While the amount of any AMP will depend on the nature of the enforcement scheme and the nature of the contravention, where discretion is given to the SDM to decide whether to impose an AMP and/or to decide on the amount to be imposed, the factors to be considered when exercising the discretion should be clear.

Those factors may include: the seriousness of the risk or harm of non-compliance, cooperation (or lack thereof) from the offender, any efforts undertaken to mitigate or reduce the harm, the violator's due diligence in preventing the harm from occurring, the wilfulness or lack of care of the offender in causing the contravention, and any repeated violations.

- **Limits on the amount that can be levied as an AMP**
If AMPs exceed a certain amount (which will vary depending on the regulatory context and the specific transgressor in question), there could be an increased likelihood of the penalized party seeking an appeal. If penalties are too high, courts may begin to see them as punitive and may require that a higher level of procedural protection, such as an oral hearing, be provided in order for the penalty to be imposed (thus offsetting many of the advantages of using an AMP instead of criminal prosecution).³³

³³ Ogus, *supra* note 25 at 49-51.

- ***Notification of the imposition of an AMP should occur as soon as possible, including the amount of the AMP, the reason for its imposition, the due date for payment, any appeals or reviews available***

Fairness and the goal of achieving early compliance and speedy resolution require notice of these matters be given to the regulated party as soon as possible.

- ***Separation of inspection and enforcement roles within the regulatory agency***

The decision whether to impose an AMP or to pursue criminal charges should be taken by senior administrators within the regulatory agency, instead of the field staff, in order to preserve the day-to-day working relationship between the regulator's field staff and the regulated community and to also help prevent any perception that that relationship might unduly influence those enforcement decisions (either negatively or positively).

- ***Sentencing guidelines for criminal prosecution should be provided as appropriate***

Studies have shown that courts tend to impose lower criminal penalties for non-compliance than those amounts typically imposed under administrative processes, likely due to unfamiliarity with the specific scheme, regulatory environment and impact of the contravention on the scheme and that environment.

Sentencing guidelines for criminal offences may help eliminate this disparity, but if put in place they should be revised regularly to ensure that the guidelines continue to reflect what is happening in terms of specific and general levels of compliance. Those guidelines may also be set with the goal of removing any possible financial or economic benefit that might otherwise be gained by the contravention.

- ***Communication of penalties to the offender and to the regulated community at large, in advance and on imposition***

The amount of the AMP must be set out in any notice of penalty to an offender along with information about when and how to pay the AMP. The guidelines or criteria to be applied when determining whether to impose an AMP, and in setting the amount of an AMP, should be clearly communicated to the regulated community when the framework is established. Advance knowledge of the potential penalty provides fair warning and should also enhance compliance with the scheme.

Broad notice across the sector about penalties that have been imposed should also promote compliance as the regulated community becomes aware of the enforcement activity.

- **Provisions for the penalization of directors and/or officers of corporations**
An effective enforcement system may also need to allow SDMs to impose AMPs against the directors and officers of a corporation personally and to prosecute directors and officers under the criminal law for corporate actions that violate regulations. This would encourage directors and officers to ensure the corporations they lead comply with regulations, and it would ensure payment of any penalties if the corporation became insolvent or had no assets.
- **Provisions for appeals of AMPs to specialized agencies, if practical**
Most enforcement schemes provide for some type of appeal or review, typically by a court or a specialized tribunal. This allows the person subject to the AMP an opportunity to have the penalty reviewed by an independent body if he or she thinks the penalty was improperly imposed.

Administrative tribunals that focus on a small number of regulatory schemes may be better positioned than the courts to make these types of decisions, as tribunals typically have greater expertise and a more comprehensive understanding of the regulatory context and the implications of non-compliance.

In contrast, due to the number and variety of cases heard by the courts, judges are not as likely to become familiar with a specific regulatory scheme and the unique context of a specific regulatory contravention. This could lead to inconsistent results and penalties that are insufficient to act as a deterrent. As such, providing for AMP appeals to be heard by a tribunal should lead to greater consistency and more appropriate penalties. However, a tribunal can be costly to establish and operate, so utilizing an existing tribunal may be an effective alternative. Additionally, if the volume of appeals is expected to be low, the court may be a more appropriate forum for resolution. In either case, the appeal process should be proportionate to the matter at issue, in terms of the amount and type of process applied, including mediation where appropriate.³⁴

- **Penalty funds collected should not be directed to the benefit of the regulator**

As a further precaution against any allegation of possible regulator impropriety in enforcement, the AMP scheme should be structured so that the SDM could only recover their costs of successful enforcement and would not directly benefit from

³⁴ A recent example of an effective model for appeal of an AMP to a tribunal instead of the courts is the *Local Government Bylaw Notice Enforcement Act*, S.B.C. 2003, c. 60, which created a simple, fair and cost-effective system for dealing with minor bylaw infractions. Under this system municipal bylaw enforcement notices (which are a type of AMP enforcement scheme) can be appealed to qualified adjudicators, whose decisions (reached on the standard of balance of probabilities) are protected from judicial review by a strong privative clause (except where errors of law are found). The cities of West Vancouver and North Vancouver, as well as the District of North Vancouver, have used this legislation since 2004 and an evaluation of an eight-month pilot project found that the system resulted in fewer disputes, faster disposition of disputes, and improved rates of fine payment. Ministry of Attorney General et. al., *Local Government Toolkit: Bylaw Dispute Adjudication System* (Victoria: MAG, 2005), 4-5.

any penalty funds collected. In some programs, it may be desirable to provide that the penalty funds are to be paid into a fund to be used to repair any damage caused by this and any other contraventions.

Conclusion

Like many issues, the public policy considerations respecting SDMs' use of AMPs are inter-related and complex. Careful thought and analysis of those considerations will be required, and different approaches may be required for different SDMs.

Your thoughts and ideas about these, and any other issues you may identify, are important to assist the AJO in considering possible reforms to SDMs' abilities to use AMPS and you are invited to share those thoughts and ideas with the AJO at:

PO Box 9210 Stn Prov Govt
Victoria, BC V8W 9J1
Fax: 250-387-0079

Or you can use the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo

Submission of comments by **November 14, 2008** would be appreciated.