



Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
Question No.	081
Topic	Retention of penalties
Reference	Spoken, 30 April 2024, Hansard page 17
Committee member	Senator SCARR

Question

Senator SCARR: ... There does seem to be a disconnect in relation to how the civil penalties, which are ultimately charged or found that respondents must pay—which the deputy chair referred to in table 3—simply go into consolidated revenue as opposed to helping ASIC discharge its functions, whether or not it's increasing the capacity of ASIC, in the people within ASIC, as you outlined, or going more directly into enforcement actions. Maybe you can take on notice what model is used overseas by the SEC and the UK regulators. Do any portion of the civil penalties which are ultimately levied against companies go back into the coffers of the regulator and enforcement agency to actually support its functions, or do they go into consolidated revenue? Are there any differences in terms of how those civil penalties are applied?

Mr Mullaly: We might need to take that on notice. My understanding is that in the US it doesn't go back to the SEC to be utilised for their day-to-day functions, although I note that they do have a whistleblower program where whistleblowers, in relation to successful matters, can receive some payment in respect of the information they've provided. In the UK, their system has changed a little bit over last 10 or so years. At one point, I think they were able to utilise some of the funds for their operations that they got from penalties, but I'd rather check that and be accurate about it.

Senator SCARR: Could you take that on notice. Table 3 in the submission from ASIC refers to \$185.44 million in civil penalties being awarded in the 2022-23 financial year. That's obviously a considerable sum of money, and it begs the question in my mind as to whether or not some of that should be funnelled back to ASIC in order to support ASIC's activities, including capacity building in terms of things like data analytics, reinvestment in staff et cetera, for all the reasons Chair Longo expressed. If you could take that on notice that would be very useful, thank you.

Answer

As outlined below, the US Securities and Exchange Commission (the SEC) and UK Financial Conduct Authority (the FCA) have adopted common practice of paying civil penalties to their respective Treasury, with the withdrawal of a certain amount set aside.

While ASIC's industry funding model is a matter for government, we note that the issue of retaining penalties was mentioned in Treasury's 2023 Final Report on the Review of the Australian Securities and Investments Commission Industry Funding Model. The Final Report observed that stakeholders frequently suggested that court-awarded penalties and fines should be used to offset industry levies.

The Final Report did not recommend the use of fines and penalties to offset ASIC's regulatory costs. Treasury observed that penalties are imposed as a deterrent for misconduct, are not calculated with reference to ASIC's regulatory costs and that the treatment of penalties and fines was consistent across the Commonwealth, where they are returned to the Consolidated Revenue Fund.

As part of the Review, Treasury published a discussion paper in September 2022 which suggested that the use of penalties and fines to offset industry levies could be perceived as industry 'benefiting' from misconduct and create perverse incentives (for example, the risk that enforcement activity is driven by revenue considerations rather than efforts to reduce non-compliance).

Securities and Exchange Commission (SEC)

The SEC's civil penalties are divided between three general categories: the general fund at the U.S. Treasury, the Investor Protection Fund (sourced from funds that would have been deposited to the U.S. Treasury), or another separate case-specific fund used to compensate harmed investors.

Civil penalties held in the Investor Protection Fund are allocated to the payment of awards to whistleblowers. The SEC's Commission is authorised to provide monetary awards to eligible individuals who come forward with high-quality original information that leads to an SEC enforcement action. This applies when over \$1,000,000 in sanctions is ordered, and subsequently the individual may receive between 10% and 30% of monetary sanctions (including penalties, disgorgement, and interest) collected. The Investor Protection Fund can also be allocated towards the activities of the Office of the Inspector General of the Commission.

Finally, the distribution fund, which may include disgorgement and prejudgment interest in addition to penalties, for victims of violations of securities laws is described in the Sarbanes-Oxley Act of 2002, which indicates that any civil penalties obtained in settlement may constitute or be added to a fair fund established for the benefit of victims.

Financial Conduct Authority (FCA)

The FCA similarly divides funds, passing most collected civil penalties to the UK's HM Treasury after deducting its enforcement costs. These are allocated to the Financial Penalty Scheme. The funds allocated to this scheme, called retained penalties, are equivalent to the FCA's enforcement costs during the financial year penalties were incurred. The FCA applies these retained penalties, received in any financial year, as a rebate to the periodic fees paid in the following financial year by firms. If a firm has been required to pay a penalty, they are ineligible for the rebates. The UK's Financial Services and Markets Act (2000) requires the FCA not to consider their enforcement costs when discharging their functions. This includes determining penalty charges.