

Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2019

HIS Excellency the President, in terms of section 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], hereby makes the following regulations:—

Title

1. These regulations may be cited as the Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2019.

Amendment of section 2 of Cap. 22:05

2. The Exchange Control Act [*Chapter 22:05*] (“the principal Act”) is amended in section 2 (“Regulatory powers of President”)(1) by the insertion of the following paragraph after paragraph (c)—

“and

(d) the enforcement of the exclusive use of Zimbabwe dollar for domestic transactions;”.

New section inserted in Cap. 22:15

3. Section 5 (“Offences and penalties”) of the principal Act is amended by the insertion of the following subsection after subsection (4d)—

“(4e) A contravention of any regulations made under section 2(1)(d) prohibiting the sale, offering for sale, quoting, displaying, charging, receipt or payment in any currency other than the Zimbabwe dollar for goods and services whose purchase, sale or disposal are or are deemed to be a domestic transaction, is a civil default for which the defaulter or alleged defaulter is liable to a civil penalty of the category specified in those regulations.

New section inserted in Cap. 22:15

4. The principal Act is amended—

(a) by the insertion of the following section after section 10—

“11 Civil penalty orders

The provisions of the Schedule apply to any infringement of this Act in respect of which it is provided that a civil penalty is payable.

(b) by the insertion of the following schedule thereto—

“SCHEDULE (*Section 11*)

CIVIL PENALTY ORDERS

ARRANGEMENT OF PARAGRAPHS

Section

1. Interpretation in Schedule.
2. Power of Reserve Bank to issue civil penalty orders and categories thereof.
3. Variation of certain penalties and limitation of multiple of penalties.
4. Service and enforcement of civil penalties and destination of proceeds thereof.
5. Limitation on issuance and enforcement of civil penalty orders.
6. Additional due process requirements before service of certain civil penalty orders.
7. Judicial review of civil penalty orders.
8. Evidentiary provisions in connection with civil penalty orders.
9. Designated officers.

Interpretation in Schedule

1. In this Schedule, unless the context otherwise requires—

“citation clause”, in relation to a civil penalty order, is the part of the order in which the Reserve Bank names the defaulter and cites the provision of this Act in respect of which the default was made or is alleged, together with (if necessary) a brief statement of the facts constituting the default;

“designated officer” means an employee or the Reserve Bank or other person designated and authorised by the Governor of the Reserve Bank to undertake duties in connection with the implementation of this Schedule;

“penalty clause”, in relation to a civil penalty order, is the part of the order that fixes the penalty to be paid by the defaulter, and “fixed

penalty clause” and “cumulative penalty clause” shall be construed accordingly;

“remediation clause” in relation to a civil penalty order, is the part of the order that stipulates the remedial action to be taken by the defaulter;

Power of Reserve Bank to issue civil penalty orders and categories thereof

2. (1) Where default is made in complying with any provision of this Act or of regulations or order made under this Act for which a civil penalty is specified to be leviable, the Reserve Bank may, in addition to, and without derogating from, any criminal or non-criminal penalty that may be imposed by this Act or any other law for the conduct constituting the default, serve upon the defaulter a civil penalty order of the appropriate category specified in subparagraph (2), (3), (4), (5) or (6) or any combination of such orders as the provision in question may allow.

(2) A category 1 civil penalty order provides for a combination of a fixed penalty and a cumulative penalty over a period not exceeding ninety days for a specified completed and irremediable default (that is to say a default in respect of which no remediation is sought by the Reserve Bank or is possible), of which—

- (a) the fixed penalty shall be the maximum amount specified for level 10 (or the penalty specified in paragraph 3, as the case may be); and
- (b) the cumulative penalty shall be a penalty of the maximum amount of level 3 for each day (beginning on the day after the service of a civil penalty order) during which the defaulter fails to pay the fixed penalty under paragraph (a);

(3) A category 2 civil penalty order provides for a cumulative civil penalty for a specified completed but remediable default which—

- (a) must be suspended conditionally upon the defaulter taking the remedial action specified in the civil penalty order immediately (that is to say, within twenty-four hours after the civil penalty is served on him or her);
- (b) upon the civil penalty becoming operative because of non-compliance with the requested remedial action, shall provide for a penalty of the maximum amount of level 3 for each day, not exceeding 90 days, during which the defaulter continues to be in default (beginning on the day after the last day on which the defaulter fails to take the remedial action).

(4) A category 3 civil penalty order provides for a combination of a fixed penalty and potentially two cumulative penalties for a specified completed but partially remediable default, of which—

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- (a) the fixed penalty shall be the maximum amount specified for level 5; and
- (b) the cumulative penalty—
 - (i) relating to paragraph (a) shall be a penalty of the maximum amount of level 3 for each day (beginning on the day after the service of a civil penalty order) during which the defaulter fails to pay the civil penalty under paragraph (a); and
 - (ii) relating to the taking of the specified remedial action—
 - A. shall be the maximum amount of level 3 for each day, not exceeding 90 days, that the defaulter fails to take the specified remedial action with effect from a specified date; and
 - B. must be suspended conditionally upon the defaulter taking the remedial action specified in the civil penalty order within the time specified in the order.

(5) A category 4 civil penalty order provides for a cumulative penalty for a continuing default which—

- (a) must be suspended conditionally upon the defaulter immediately (that is to say, within twenty-four hours after the civil penalty is served on him or her) ceasing the default;
- (b) upon the civil penalty becoming operative because of failure to cease the default immediately, shall be the maximum amount fixed for level 6 for each day during which the default continues, not exceeding a period of 90 days.

(6) A category 5 civil penalty order provides for a combination of a fixed penalty and a cumulative penalty for a specified continuing default where the time of compliance is of the essence—

- (a) both of which penalties must be suspended conditionally upon the defaulter taking the remedial action specified in the civil penalty order within the time specified in the order;
- (b) which, upon the civil penalty becoming operative because of non-compliance with the requested remedial action, shall provide—
 - (i) a fixed penalty of the maximum amount for level 10 for not meeting the specified deadline; and
 - (ii) a cumulative penalty of the maximum amount of level 3 for each day, not exceeding 90 days, for which the defaulter fails to pay the amount specified in subparagraph (i).

Variation of certain penalties and limitation of multiple of penalties

3. (1) Any regulations or orders made under or for the purpose of section 2(1)(d) that prohibit the sale, offering for sale, quoting, displaying, charging,

receipt or payment in any currency other than the Zimbabwe dollar for goods and services whose purchase, sale or disposal are or are deemed to be a domestic transaction, may vary the fixed penalty for any category of civil penalty specified in paragraph 2 by specifying the fixed penalty of twice the value attributed by the defaulter to the goods or services in question.

(2) If the attributed value of the goods or services referred to in subparagraph (1) was in United States dollars or another foreign currency, for the purposes of fixing the penalty the Zimbabwe dollar equivalent of the value shall be the interbank rate of exchange of the Zimbabwe dollar for the United States dollar prevailing on the day the civil penalty order is issued.

(3) A single civil penalty order may be served in respect of two or more defaults committed by the defaulter within a single period not exceeding six months, but if the aggregate of such defaults results in the defaulter becoming liable (either immediately or within seven days from the service of the civil penalty order) to a penalty or combined penalties in excess of the equivalent of fifty thousand dollars, the Reserve Bank may select one or any combination of those defaults which will not result in the defaulter becoming so liable, while reserving the right to serve a second or further additional civil penalty orders in respect of the defaults not so selected if the defaulter does not comply with the first civil penalty order.

Service and enforcement of civil penalties and destination of proceeds thereof

4. (1) References to the Reserve Bank serving upon a defaulter any civil penalty order in terms of this Act (or serving upon an alleged defaulter a show cause notice referred to in paragraph 6 (“Additional due process requirements before service of certain civil penalty orders”)), are to be interpreted as requiring the Reserve Bank to deliver such order (or such notice) in writing to the defaulter (or alleged defaulter) concerned in any of the following ways—

- (a) by registered post addressed to the defaulter’s (or alleged defaulter’s) principal office in Zimbabwe or other place of business of the defaulter (or alleged defaulter); or
- (b) by hand delivery to the director, manager, secretary or accounting officer of the defaulter (or alleged defaulter) in person (or through an inspector or other person employed in the Financial Intelligence Unit, or a police officer), or to a responsible individual at the place of business of the defaulter; or
- (c) by delivery through a commercial courier service to the defaulter’s (or alleged defaulter’s) principal office in Zimbabwe or other place of business of the defaulter (or alleged defaulter); or
- (d) by electronic mail or telefacsimile at the electronic mail or telefacsimile address furnished by the defaulter (or alleged defaulter) to the Reserve Bank:

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Provided that in this case a copy of the order or notice shall also be sent to the electronic mail or telefacsimile address of the defaulter's (or alleged defaulter's) legal practitioner in Zimbabwe.

(2) The Reserve Bank shall not extend the period specified in a civil penalty order for compliance therewith except upon good cause shown to him or her by the defaulter, and any extension of time so granted shall be noted by the Reserve Bank in the civil penalty enforcement register referred to in paragraph 8 ("Evidentiary provisions in connection with civil penalty orders").

(3) If in this Act both the defaulting company and every officer of the company who is in default are said to be liable to a civil penalty order, the Reserve Bank may—

- (a) in the same civil penalty order, name the defaulting company and every officer concerned as being so liable separately, or issue separate civil penalty orders in respect of the defaulting company and each of the officers concerned;
- (b) may choose to serve the order only upon the defaulting company if, in his or her opinion (which opinion the Director shall note in the civil penalty enforcement register referred to in paragraph 8, there may be a substantial dispute of fact about the identity of the particular officer or officers who may be in default:

Provided that nothing in this section affects the default liability of officers of the company mentioned in subparagraph (8).

(4) The Reserve Bank may, in the citation clause of a single civil penalty order, cite two or more defaults relating to different provisions of this Act if the defaults in question—

- (a) occurred concurrently or within a period not exceeding six months from the first default or defaults to the last default or defaults; or
- (b) arose in connection with the same set of facts.

(5) Where in this Act the same acts or omissions are liable to both criminal and civil penalty proceedings, the Reserve Bank may serve a civil penalty order at any time before the commencement of the criminal proceedings in relation to that default, that is to say at any time before—

- (a) summons is issued to the accused person for the prosecution of the offence; or
- (b) a statement of the charge is lodged with the clerk of the magistrates court before which the accused is to be tried, where the offence is to be tried summarily; or
- (c) an indictment has been served upon the accused person, where the person is to be tried before the High Court;

as the case may be, but may not serve any civil penalty order after the commencement of the criminal proceedings until after those proceedings are concluded (the criminal proceedings are deemed for this purpose to be concluded even if they are appealed or taken on review). (For the avoidance of doubt it is declared that the acquittal of an alleged defaulter in criminal proceedings does not excuse the defaulter from liability for civil penalty proceedings).

(6) Upon the expiry of the 90 day period within which any civil penalty order of any category must be paid, the defaulter shall be guilty of an offence and liable to a fine not exceeding level 6 or to imprisonment for a period not exceeding one year or to both.

(7) The amount of any civil penalty shall—

- (a) be payable to the Reserve Bank and shall form part of the funds of the Reserve Bank; and
- (b) be a debt due to the Reserve Bank and shall be sued for in any proceedings in the name of the Reserve Bank in any court of competent civil jurisdiction.

(8) If the defaulter is a company, private business corporation or other body corporate, every officer of the company, corporation or body corporate, mentioned in the civil penalty order by name or by office, is deemed to be in default and any one of them can, on the basis of joint and several liability, be made by the Reserve Bank to pay the civil penalty in the event that the company, corporation or body corporate does not pay.

(9) If the Reserve Bank in terms of subsection (7)(b) desires to institute proceedings to recover the amounts of two or more civil penalties in any court of competent civil jurisdiction, it may, after notice to all interested parties, bring a single action in relation to the recovery of those penalties if the orders relating to those penalties—

- (a) were all served within the period of 12 months preceding the institution of the proceedings; and
- (b) were served—
 - (i) on the same company or private business corporation; or
 - (ii) in relation to the same default or set of defaults, whether committed by the same company or private business corporation or different companies or private business corporations; or
 - (iii) on two or more companies or private business corporations whose registered offices are in the same area of jurisdiction of the court before which the proceedings are instituted.

(10) Unless the Reserve Bank has earlier recovered in civil court the amount outstanding under a civil penalty order, a court convicting a person

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of an offence against subparagraph (6), may on its own motion or on the application of the prosecutor and in addition to any penalty which it may impose give summary judgement in favour of the Reserve Bank for the amount of any outstanding civil penalty due from the convicted defaulter.

Limitation on issuance and enforcement of civil penalty orders

5. (1) No civil penalty order may be issued more than 12 months from the date when the infringement or alleged infringement occurred or ceased to occur.

(2) Any amount owing under a civil penalty order is a debt owed to the State for the purposes of section 15(b) of the Prescription Act [Chapter 8:11].

Additional due process requirements before service of certain civil penalty orders

6. (1) Except in relation to any civil penalty order which the Reserve Bank is satisfied that it does not involve any substantive dispute of fact, the Reserve Bank must notify the alleged defaulter in writing of the Reserve Bank's intention to serve the civil penalty order (which notice shall hereafter be called a "show cause notice") and the Reserve Bank's reasons for doing so and shall call upon the alleged defaulter to show cause within the period specified in the notice (which period shall not be less than 48 hours or more than seven days from the date of service of the notice) why the civil penalty order should not be served upon him or her, and, if the alleged defaulter—

- (a) makes no representations thereto within the notice period, the Reserve Bank shall proceed to serve the civil penalty order, or
- (b) makes representations showing that the alleged default in question was not wilful or was due to circumstances beyond the alleged defaulter's control or for any other reason specified in the civil penalty provision in question, the Reserve Bank shall not proceed to serve the civil penalty order; or
- (c) makes no representations of the kind referred to in paragraph (b) the Reserve Bank shall proceed to serve the civil penalty order.

(2) In addition, where it appears to the Reserve Bank from written representations received under subparagraph (1) that there may be a material dispute of fact concerning the existence or any salient aspect of the alleged default, the Reserve Bank must afford the alleged defaulter an opportunity to be heard by making oral representations before the Reserve Bank, for which purpose the Reserve Bank shall have the same powers, rights and privileges as are conferred upon a commissioner by the Commissions of Inquiry Act [Chapter 10:07], other than the power to order a person to be detained in custody, and sections 9 to 13 and 15 to 19 of that Act shall apply with necessary changes

in relation to the hearing and determination before the Reserve Bank of the alleged default in question, and to any person summoned to give evidence or giving evidence before the Registrar.

(3) Any person who is aggrieved by a civil penalty order made after the making of representations in terms of this section may appeal against the order to a judge of the High Court, and the judge may make such order as he or she thinks fit:

Provided that the lodging of the appeal shall not of itself suspend the obligation of the defaulter to comply with the civil penalty order.

Judicial review of civil penalty orders

7. If the Reserve Bank does not issue a show cause order under paragraph 6 before issuing and serving a civil penalty order under paragraph 5. the defaulter or alleged defaulter may seek review of the Reserve Bank's action by the High Court, but the lodging of the application for review shall not of itself suspend the obligation of the defaulter to comply with the civil penalty order.

Evidentiary provisions in connection with civil penalty orders

8. (1) For the purposes of this Schedule the Reserve Bank shall keep a civil penalty enforcement register wherein shall be recorded—

- (a) the date of service of every show cause notice, the name and the physical or registered office address of the person upon whom it was served, the civil penalty provision in relation to which the alleged defaulter was alleged to be in default, and whether or not the show cause notice was followed by the service of a civil penalty order:

Provided that a record or an adequate summary of any representations made in response to a show cause notice shall be made by way of an entry or cross-reference in, or annexure to, the register, and if recorded by way of annexure or cross-reference, the representations must be preserved for a period of at least three years from the date when they were made to the Reserve Bank;

- (b) the date of service of every civil penalty order, the name and the physical or registered office address of the person upon whom it was served, the civil penalty provision in relation to which the defaulter was in default, and the date on which the civil penalty order was complied with or the penalty thereunder was recovered as the case may be.

(2) A copy of—

- (a) any entry in the civil penalty enforcement register, and of any annexure thereto or record cross-referenced therein, authenticated

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by the Reserve Bank as a true copy of the original, shall on its mere production in any civil or criminal proceedings by any person, be *prima facie* proof of the contents therein; or

- (b) any civil penalty order that has been served in terms of this Act, authenticated by the Reserve Bank as a true copy of the original, shall on its mere production in any civil or criminal proceedings by any person, be *prima facie* proof of the service of the order on the date stated therein upon the defaulter named therein, and of the contents of the order.

Designated officers

9. (1) Any reference to the Reserve Bank in this Schedule shall be construed as a reference to a designated officer.

(2) The Governor of the Reserve Bank shall furnish each designated officer with a certificate signed by or on behalf of the Governor stating that he or she has been appointed as an designated officer for the purpose of this Schedule.

(3) A designated officer shall, on demand by any person affected by the exercise of the powers conferred upon the Reserve Bank under this Schedule, exhibit the certificate issued to him or her in terms of subsection (2).”