

SFC Enforcement: Do's and Don'ts for Firms Receiving Investigation Notices

The SFC has taken an increasingly robust approach to enforcement with firms themselves being routinely penalized. Firms often mistakenly assume that they have done nothing wrong and as a result, do not engage legal counsel at an early stage. Proper preparation with legal counsel at an early stage is, in fact, a highly effective means of limiting the risk of disciplinary action. In this article, we set out some do's and don'ts for firms who receive an investigation notice.

The SFC continues to take a more robust approach to enforcement. Criminal prosecutions for wrongdoing are becoming increasingly common. At the same time, over the past 3 years, the focus of enforcement action has shifted from action against individual representatives of a firm for malfeasance to action against such individuals as well as the firms for failure to supervise such individuals. It would not be surprising to see in the near future an expanded focus on responsible officers in addition to firms and individual wrongdoers.

Do ensure that staff are aware of their duty to disclose a notice of investigation.

SFC investigations are subject to statutory secrecy provisions. Consequently, recipients of SFC investigation notices are generally prohibited from disclosing the fact that they have received an investigation notice. However, the SFC has given standing consent for disclosure of the receipt of an investigation notice by an employee of a firm to his firm's responsible officer, compliance officer or in-house lawyer. In this regard, the employee may disclose the general nature of the matter (but without revealing anything specific about it) which has given rise to the secrecy obligation.

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Don't assume you are safe if your firm is not a person specified to be under investigation.

The SFC may begin with the idea that a firm is not a target of the investigation and then decide later that the firm is. Alternatively, an investigation into a person may arise incidental to a separate investigation. For example, in the course of an investigation into possible market misconduct, the SFC may request documents from a firm. These documents may suggest regulatory compliance failings on the part of the firm and this may, in turn, result in a separate enquiry into the firm or its staff.

The fact that an employee receives an investigation notice is cause for concern within the firm as any wrongdoing by an employee may give rise to subsequent action against the firm itself and potentially, management of the firm.

Do involve legal counsel at an early stage.

The time for a firm to prepare its case begins with the initial enquiry from the SFC, not with the receipt of a notice of disciplinary action, a letter from the Market Misconduct Tribunal or the laying of criminal charges. Once the SFC has completed its investigation and has decided to take disciplinary action, counsel's ability to successfully represent a firm has already been limited. This is because once the SFC refers a matter from investigation for disciplinary action, the SFC has already determined certain facts adverse to that firm and the focus for the matter has shifted from fact finding to penalizing the person. In the absence of new and compelling facts, it then becomes more difficult to persuade the SFC to

consider the factual circumstances from a different perspective.

If involved at the outset, competent counsel can increase the probability that the matter ends at the investigation stage, thus precluding disciplinary action.

Do prepare.

The importance of preparation in conjunction with competent counsel cannot be understated, particularly in cases where the infraction lies in a breach of the SFC's own regulatory codes and guidelines rather than statutory provisions. The SFC has wide administrative law discretion to determine whether a licensed or registered person is "fit and proper" and for this purpose, sound presentation of the facts is a far more effective strategy in demonstrating fitness and properness than a technical legal argument.

The most important role legal counsel can play is to objectively and impartially identify applicable laws and regulations and assist the firm to emphasize areas of compliance, de-emphasize areas of non-compliance and present the facts generally in the manner that would best fall within the spirit of the regulatory framework. This is not to say that legal counsel should (or would) assist the firm to fabricate a story. Rather, it is to say that legal counsel can assist the firm to present the facts, putting its case in the best possible light.

SFC investigation interviews form an important part of the factual record. Each person interviewed by the SFC must, naturally, be truthful in his or her responses to questions raised by the SFC and should never be coached as to what to say. Nevertheless, where a firm is lawfully aware of an SFC investigation or potential

Counsel can assist in ensuring that the record presents the facts in the best possible light, giving due emphasis to strong points and providing mitigating context, if possible, for weak points. Counsel may help to elicit the necessary elements for a successful defence of a case.

investigation, there is nothing improper about legal counsel conducting an internal investigation, involving interviews of staff who are likely to be interviewed by the SFC and a review of relevant documents, to identify strengths and weaknesses in any case which the SFC may ultimately elect to pursue. Equally, there is nothing improper about circulating the results of such an internal investigation amongst staff who may be interviewed by the SFC.

Do ensure that staff are accompanied by counsel.

SFC interviews can be very lengthy, lasting hours and sometimes days. There is a natural desire to rush to complete the interview and be done with it. However, interviews are recorded, generally by transcription but also possibly by video or audio taping, thereby creating an important and permanent factual record. Mis-statements can undermine credibility or suggest malfeasance where there is none.

Counsel can assist in ensuring that the record presents the facts with due emphasis on strong points and mitigating

factors. Counsel can also help elicit the necessary elements for a successful defence of a case.

Moreover, an interviewee may consult privately with counsel mid-way through an interview, thus affording the interviewee an opportunity to reflect confidentially upon applicable laws and regulations as the interview develops.

Don't Assume The Firm Has Done Nothing Wrong

Recipients of SFC investigation notices often assume that they have done nothing wrong. Possibly, they believe that because they are and have been honest, they have nothing to fear. This is a mistake. The regulatory framework is complex and it is not uncommon for a firm to breach regulatory requirements unknowingly. Competent counsel can provide an objective and independent review to ensure that the firm has complied with applicable regulatory requirements. Whilst the cost of such a review may be regarded as high, the cost of defending SFC's proposed sanction is substantially higher and the reputational and financial costs of a successful SFC disciplinary action are even higher.