

## **COOPERATION WITH THE SFC**

1. This Guidance Note is issued with a view to clarifying the Commission's long-standing practice of giving credit to regulated persons for their cooperation with the SFC by imposing lighter disciplinary sanctions than would be imposed in the absence of cooperation.
2. By issuing this Guidance Note the SFC seeks to encourage regulated persons to cooperate with the SFC to the fullest extent possible and pledges its commitment to continue to reward cooperation.
3. Since each case will turn on its facts, it is not practicable to identify in percentage terms the penalty reductions awarded for varying degrees of cooperation. Neither is it possible to specify criteria that will be considered as evidencing cooperation in every case. Each case will be judged on its own particular facts and care will be taken to ensure that cooperation is acknowledged and given due credit.
4. In the absence of extraordinary circumstances, the maximum reduction of a disciplinary sanction that would be considered is either a reduction of the type of sanction by one order of magnitude (for example, from a revocation of licence to a suspension) or 33%.
5. Further reductions in penalty may be possible since the SFC may re-assess its initial view of the seriousness of a breach based on any new facts revealed during proceedings or without prejudice settlement discussions. This means that the final penalty is sometimes reduced by more than one-third.
6. The SFC may also be prepared to further reduce the penalty to take into account any extraordinary mitigating factors that come to light of which it previously was not aware.
7. This Guidance Note does not discuss these matters which are assessed on a purely case-by-case basis.
8. As a general rule, the earlier, the more spontaneous and the more extensive the cooperation provided to the SFC; the greater will be the credit given for it – and the lighter the disciplinary sanction imposed.
9. Even outstanding cooperation, however, will not lead the SFC to refrain from taking disciplinary action where it is considered appropriate to take it. Neither will cooperation result in the imposition of a disciplinary sanction which is disproportionately light.
10. It is important to notice that the matters stated in this Guidance Note are not exhaustive or definitive and will not prevent the SFC from relying on additional factors as evidencing cooperation in any particular case.

### **What does not amount to cooperation**

11. Compliance with a legal requirement or obligation under the Securities and Futures Ordinance (Cap. 571) (SFO) does not *alone* demonstrate cooperation with the SFC, such as where:
- in the case of an individual, he complies with an investigator's notice, issued under section 183 of the SFO, by producing documents or attending an interview; and
  - in the case of a firm, it complies with the obligation, under section 146(3) of the SFO, to notify the SFC that it is unable to comply, or to ascertain its compliance with, the Financial Resources Rules.

### **Forms of cooperation**

12. Though the Enforcement Division will in all cases consider the seriousness of any improper conduct that comes to its attention, and will have regard to these in considering the appropriate regulatory response, it will also take into account cooperation demonstrated by a regulated person in any of the following ways:
- spontaneously and promptly reporting to the SFC the occurrence of any material problem or improper conduct (the matter);
  - taking responsibility for the matter and fully and frankly discussing it with the SFC;
  - accepting disciplinary liability for the matter at an early stage in the investigation or in the disciplinary process;
  - taking a positive approach to bringing the disciplinary case to an early conclusion (e.g. indicating the facts or issues which are not in dispute) – whether or not a settlement is requested or reached;
  - where the problem or matter occurred outside Hong Kong (particularly where disciplinary orders may be made against an affiliated entity of the firm in that jurisdiction), promptly informing the SFC about the matter and providing updates and such relevant information about the matter as may be useful to the SFC in considering whether the problem might have an impact on the fitness and properness of the Hong Kong entity;
  - taking all practicable steps to contain and rectify the matter, within the constraints it faces in terms of resources and time;

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- taking the initiative to undertake a credible review to identify, e.g. the source of the matter, the means by which it was perpetrated, how it escaped discovery and any appropriate remedial actions to prevent its recurrence – such credibility usually derives from commissioning independent (i.e. without a pre-existing relationship with the firm) experts, such as external lawyers, auditors or forensic accountants;
- involving the SFC in devising the terms of reference for a review by independent experts and in subsequent stages;
- making available to the SFC the results of any independent or internal review;
- waiving legal professional privilege attaching to any document provided to the SFC;
- taking appropriate remedial measures in respect of personnel involved in or bearing responsibility for the matter, including dismissal or internal disciplinary action;
- instituting necessary improvements or modifications of the firm's processes, internal controls or line management, etc;
- promptly taking steps to ascertain whether the matter has caused any losses, e.g. to the firm's clients or investors in a fund operated by the firm – and, if so, taking steps to compensate those losses;
- devoting manpower and resources to assist the SFC in its evaluation or investigation of the matter;
- supplying to the SFC not only information requested or required but also other relevant information which the SFC might not otherwise have known about;
- involving senior management of the firm in liaison with the SFC (including instructing staff to cooperate fully with the SFC) and in overseeing the implementation of remedial measures or the payment of compensation;
- being receptive to the SFC's suggestions (if any) as to how future recurrence of the matter could be avoided; or
- providing intelligence useful to the SFC that contributes to successful enforcement action.

### **Non-cooperation**

13. In principle, the failure of a regulated person to cooperate with the SFC is not considered as an aggravating factor in assessing the appropriate disciplinary sanction – unless such non-cooperation amounts to obstruction or falls short of the standard of conduct expected of a fit and proper person.
14. In the same way, contesting disciplinary proceedings is not considered to be a failure to cooperate with the SFC – unless there are exceptional circumstances, such as malicious, frivolous or vexatious actions.

### **Waiver of legal professional privilege**

15. The SFC acknowledges that legal professional privilege is a fundamental right protected by the Basic Law and section 380(4) of the SFO. However, in certain circumstances, a regulated person may wish to waive legal professional privilege to any document if requested to do so by the SFC. The SFC recognises that such a waiver is not an end in itself but is a means to provide relevant information useful to the SFC's enforcement action which it may not otherwise obtain. The SFC will give appropriate discount in penalty to the regulated person who agrees to the waiver, depending on the extent of the waiver and the value it contributes to an enforcement action.
16. Any waiver of legal professional privilege operates on a voluntary basis. A regulated person is not obliged to waive legal professional privilege. Therefore, any refusal of a regulated person to agree to waive legal professional privilege attaching to a document sought by the SFC is not considered as a failure to cooperate and is not considered an aggravating factor in assessing the appropriate disciplinary sanction. However, refusal to waive legal professional privilege when this is requested will not entitle the regulated person to the same discount for cooperation that would have been given had privilege been waived.

### **Opportunities for cooperation**

17. The Enforcement Division may approach a regulated person, at some stage prior to opening or during an investigation or after a case has been referred to the Disciplinary Department, inviting the person to cooperate with the SFC in a certain way or by taking a specified course of action.
18. Whatever form of cooperation invited or sought by the SFC, the person's failure to accept that invitation or failure to agree ultimately to take the proposed course of action, is not considered to be an aggravating factor in assessing the appropriate disciplinary penalty. Again, failure to act in the manner requested will mean that the regulated person is not entitled to the same discount on penalty offered for cooperation.

### **The regulatory value of cooperation**

19. Cooperation by regulated persons with the SFC which facilitates it in the performance of its functions deserves to be rewarded tangibly by the imposition of lighter disciplinary penalties because (among other things) it:
- engenders the lifting of business and governance standards in the industry and the adoption of best practice by regulated persons, which in turn serves to better protect the interests of investors;
  - creates a culture of compliance with regulatory requirements, which serves to enhance and sustain the standing of Hong Kong as an international financial centre;
  - facilitates the early discovery and rectification of compliance failings, which serves the attainment of the SFC's regulatory objectives;
  - facilitates the taking of appropriate regulatory action at less cost in terms of manpower and resources for both the industry and the SFC; and
  - creates the constructive atmosphere in which regulated persons may volunteer to recompense investors who may have suffered loss as a result of their compliance failings, which the SFC has no power to order.
20. As a result, the SFC is facilitated in discharging its regulatory duties in the public interest and in a manner beneficial to the financial services industry in Hong Kong.

**Enforcement Division  
Securities and Futures Commission**

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