

The benefits of cooperating with the SFC

January 2018

On 12 December 2017, the Securities and Futures Commission ("**SFC**") issued a new "Guidance Note on Cooperation with the SFC" ("**Guidance Note**") and related FAQs.

The Guidance Note replaces the previous version issued in March 2006 and contains an updated section on disciplinary proceedings and a new section on proceedings in civil courts and the Market Misconduct Tribunal ("**MMT**"). It does not apply to criminal cases, which are subject to the unfettered discretion of the Department of Justice.

The key issues covered by the Guidance Note are:

1. the types of conduct that will be recognised as cooperation by the SFC;
2. the factors the SFC will use to assess the value of cooperation; and
3. the ways in which the SFC may reward cooperation.

What constitutes cooperation?

The Guidance Note identifies various ways in which a person may cooperate with the SFC including:

1. Voluntarily and promptly reporting any breaches or failings under the Securities and Futures Ordinance ("**SFO**") to the SFC;
2. Providing true and complete information regarding breaches or failings;
3. Accepting liability for any breaches at the earliest opportunity and taking proactive steps to assist the SFC in its investigation; and
4. Taking appropriate rectification measures to contain breaches or failings and making full and prompt compensation to affected investors.

Mere compliance with statutory or regulatory requirements (for instance, complying with an investigator's direction or notice issued under sections 179 and 183 of the SFO or self-reporting under paragraph 12.5 of the Code of Conduct) does not amount to cooperation.

How is cooperation measured?

The SFC will consider the following factors in assessing cooperation:

1. The value of the assistance provided in investigation and enforcement proceedings, for example, the timeliness of the cooperation and the quality, truthfulness and completeness of any information provided;

2. The nature and seriousness of breaches or failings and their impact on the market; and
3. The general conduct of the party after the breaches or failings and other circumstances of the party.

Any uncooperative conduct which has the effect of impeding investigations or enforcement proceedings may also be taken into account by the SFC in considering the appropriate outcome.

How is cooperation rewarded?

Disciplinary matters

As a general principal, the SFC will be more willing to enter into agreements to resolve disciplinary proceedings at an early stage (pursuant to section 201 of the SFO) where cooperation has been demonstrated, including where:

1. the regulated person agrees jointly with the SFC to appoint a third-party to conduct a fact finding review in respect of the breaches or failings and agrees to bear the costs of that review and to be bound by its findings^[1]; and
2. the directors of the regulated entity give undertakings to address the SFC's concerns, including for instance, undertakings to remedy deficiencies within a specified period of time.

The Guidance Note encourages cooperation early in disciplinary matters by prescribing the maximum reduction in sanction that will apply depending on the stage in the disciplinary process at which cooperation is received^[2]:

1. Stage 1 - from the detection of the misconduct or regulatory failings up to the issuance of the Notice of Proposed Disciplinary Action ("**NPDA**"): the sanction may be reduced by up to 30%;
2. Stage 2 – from issuance of the NPDA up to the deadline for the regulated person to provide written submissions in response to the NPDA: the sanction may be reduced by up to 20%; and
3. Stage 3 – from the deadline for the response to the NPDA to the issuance of the Decision Notice: the sanction imposed may be reduced by up to 10%.

Further reductions in sanctions may be possible in cases where the regulated person has provided "exceptional and substantial cooperation", however, little guidance is given on what form such cooperation may take.

Civil court and MMT proceedings

The Guidance Note contains a new section setting out the potential benefits of cooperating with the SFC in section 214 proceedings (by adopting the Carecraft Schedule) and in section 213 and MMT proceedings by agreeing to a statement of agreed facts and proposed orders to be submitted to the court or MMT to consider.

The SFC may also reward cooperation by agreeing to a reduced proposed sanction and / or mitigation submissions in support of the proposed orders.

The new Guidance Note also refers to cooperation letters, which the SFC may issue to another regulator / law enforcement agency describing the cooperation provided by the regulated party.

Conclusion

The Guidance Note and FAQs set out the specific types of conduct that may gain the benefits of cooperating with the SFC. However, it is important to note that the Guidance Note expressly states that they do not confer any right or create any legitimate expectations on any persons under investigation.

[1] The FAQs highlight that the SFC will continue to favour third-party reviews as part of its efforts to tackle systemic problems in a company or corporate group.

[2] The previous version prescribed a maximum reduction in sanction by one order of magnitude (e.g. from a revocation of licence to a suspension) or 33%.

Contacts



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