

Guidance Note on Cooperation with the HKMA in Investigations and Enforcement Proceedings

Introduction

1. The Hong Kong Monetary Authority (“HKMA”) is issuing this Guidance Note to explain and provide guidance on the HKMA’s approach to cooperation in its investigations and enforcement proceedings. It provides an overview of what amounts to cooperation, how to cooperate and the benefits of cooperation. By elaborating on its policy, the HKMA seeks to encourage cooperation in investigations and enforcement proceedings.
2. The HKMA encourages and recognises cooperation because it facilitates the early detection, efficient investigation and prompt rectification of statutory and regulatory breaches and misconduct and fosters a culture of responsibility and self-improvement. Furthermore, cooperation will generally result in significant savings in time, costs and resources for both the HKMA and the institution or individual concerned (referred to herein as “person”). While cooperation does not preclude enforcement action, the HKMA takes cooperation into consideration when determining the outcome of enforcement action and may reduce the sanctions when this is appropriate in all the circumstances of the case¹.
3. This Guidance Note will not operate in criminal cases as the Department of Justice has the sole discretion over criminal prosecutions.

Forms of cooperation

4. A person may cooperate with the HKMA in many ways before, during and after investigation.

¹ See for example the references to cooperation in the *Guideline on Exercising Power to Impose Pecuniary Penalty* issued by the Monetary Authority (“MA”) under section 23(1) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Chapter 615), the *Guideline on Exercising Power to Order a Pecuniary Penalty* issued by the MA under section 203C(1) of the Securities and Futures Ordinance (Chapter 571) (“SFO”) in respect of the OTC derivatives regime and the *Guideline on Exercising Power to Order a Pecuniary Penalty* issued by the MA under section 54(1E) of the Payment Systems and Stored Value Facilities Ordinance (Chapter 584) (“PSSVFO”).

(i) Examples of cooperation prior to and during investigation include but are not limited to the following:

- early and voluntary reporting of any suspected breach or misconduct;
- early identification and preservation of relevant evidence;
- making full and frank disclosure of all relevant information;
- making timely arrangements to provide evidence and information;
- providing useful intelligence;
- taking a proactive approach to assist the HKMA's investigation (e.g. agreeing a statement of admitted facts and regulatory breaches)
- accepting responsibility;
- proactively carrying out effective remediation and rectification (e.g. appointing a third-party reviewer and implementing recommendations) to address the HKMA's regulatory concerns; and
- making appropriate settlement with or compensation to affected customers.

(ii) Examples of cooperation at the conclusion of investigation or after commencement of enforcement proceedings include but are not limited to the following:

- accepting investigation findings and proposed sanctions; and
- confirming acceptance of the findings and sanctions at the earliest opportunity.

5. Merely fulfilling statutory or regulatory obligations (e.g. self-reporting obligations and compliance with statutory investigation requirements) does not constitute cooperation for the purpose of this Guidance Note.

Factors to be taken into account in assessing the degree of cooperation

6. The HKMA takes into consideration all relevant circumstances when assessing cooperation. The factors the HKMA generally considers include but are not limited to:

- (i) the nature of the cooperation provided, including:
 - timeliness, substance, reliability and quality of the cooperation;
 - amount of time, costs and resources saved by the HKMA as a result of the cooperation;
 - sufficiency of the evidence or information provided; and
 - usefulness of intelligence provided;
 - (ii) the nature, seriousness and impact of the breach or misconduct and the degree of cooperation relative to those matters; and
 - (iii) the general conduct of the person after the breach or misconduct.
7. Where a person engages in uncooperative conduct or acts that jeopardise or may prejudice the HKMA's investigation or enforcement proceedings, the HKMA may take this into consideration when determining the appropriate enforcement action. Uncooperative conduct includes:
- delaying the reporting of a breach or misconduct without reasonable excuse;
 - intentionally prolonging the investigation by the HKMA;
 - failing to comply, within the stipulated timeframe and without reasonable excuse, with notices to produce information and attend interviews;
 - lack of care in ensuring that information provided in response to investigation notices is accurate and complete;
 - concealing relevant information relating to the breach or misconduct; and
 - being evasive in the HKMA's investigation.

Legal professional privilege

8. The HKMA fully respects a person's right to exercise legal professional privilege and the assertion of this right will not be regarded as uncooperative conduct. Nevertheless, voluntary waiver of legal professional privilege in respect of one or more documents, even on a limited basis, may assist the HKMA's investigation and will be taken into consideration when the HKMA assesses the degree of cooperation provided.

The HKMA's approach to cooperation

9. The HKMA takes into account cooperation provided prior to and during investigation, such as the examples in paragraph 4(i) above, and all relevant circumstances when determining the appropriate enforcement action. When cooperation has been taken into account in determining the proposed sanctions, this is generally stated in the Notice of Intention to take Disciplinary Action (“NID”), the Notice of Disciplinary Decision (“NDD”) or any resolution agreement (defined below) (as the case may be) and the HKMA’s press releases and statements of disciplinary action. Cooperation after the issue of the NID, such as the examples in paragraph 4(ii) above, may be recognised by reducing the proposed sanctions if appropriate in all the circumstances of the case.

10. Where applicable², the MA may enter into an agreement with a person to resolve concerns in relation to which the MA is contemplating or considering the exercise of a disciplinary power (“resolution agreement”). The MA may take cooperation into account when deciding whether to enter into a resolution agreement and, if so, on what terms. The person may approach the HKMA at any time after regulatory concerns have been identified until issue of a NDD with a view to resolving those concerns. Whether and, if so, at what stage the MA is willing to consider resolution depends on the circumstances of each case. Resolution will not be considered until the facts of a case have been established and the MA is contemplating or considering the exercise of a disciplinary power. If a person has cooperated during the investigation and is willing to further cooperate by resolving the regulatory concerns, this may be recognised in the resolution agreement in the form of reduced sanctions if appropriate in all the circumstances. The reductions may vary according to when the resolution agreement is made.

11. In cases where the HKMA refers its investigation findings to other regulators for their consideration of taking disciplinary action under the relevant ordinances, such as the SFO, the Mandatory Provident Fund Schemes Ordinance (Chapter 485) and the Insurance Ordinance (Chapter 41), the HKMA will convey to the relevant regulator³, for its

² See for example section 203D of the SFO and section 33T of the PSSVFO.

³ Please refer to the HKMA’s Circular *Guidance Note Issued by the Securities and Futures*

consideration, the HKMA's observations regarding the degree of cooperation rendered by a person.

Recognition for cooperation

12. In giving recognition for cooperation, the HKMA has divided its disciplinary proceedings into three stages:

- Stage 1 – from the detection of the breach or misconduct up to the issuance of a NID;
- Stage 2 – from the issuance of a NID up to the deadline for the person under disciplinary proceedings to make written representations in response to the NID; and
- Stage 3 – from the deadline for making representations up to the issuance of a NDD.

13. As a general principle,

- where a person cooperates with the HKMA and a resolution agreement is reached in Stage 1, the MA may reduce the proposed sanctions (e.g. pecuniary penalty and period of suspension or prohibition) by up to 30%;
- where a person cooperates with the HKMA and a resolution agreement is reached in Stage 2, or the person accepts the HKMA's investigation findings and proposed sanctions in Stage 2, the MA may reduce the proposed sanctions by up to 20%; and
- where a person cooperates with the HKMA and a resolution agreement is reached in Stage 3, or the person accepts the HKMA's investigation findings and proposed sanctions in Stage 3, the MA may reduce the proposed sanctions by up to 10%.

14. Where a person has provided exceptional and substantial cooperation to the HKMA, further reductions in proposed sanctions may be possible.
15. Offers to resolve regulatory concerns on a “no admission of liability” basis or without publicity are unlikely to be regarded as cooperation or accepted as the basis for a resolution agreement since deterrence is an important objective of enforcement action and therefore the HKMA requires public accountability.
16. While cooperation is a factor that is taken into account, each case turns on its own facts. Nothing in this Guidance Note confers any right or creates any legitimate expectation in favour of the person concerned: (i) to be informed, prior to the conclusion of the HKMA’s investigation, of the HKMA’s preliminary view regarding potential disciplinary proceedings; (ii) where applicable, that a resolution agreement will be made; or (iii) that there will be a reduction in the proposed sanctions.

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