

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.

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)

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 penalt