

# Don't Make It Worse: Responding Properly to US and UK Investigations

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February 7, 2019



# Overview

- Failure to react promptly and appropriately to suspected misconduct can be costly
  - A series of well-publicized cases has shown wide-disparity in penalties for the same misconduct
  - Consider possible large regulatory fines, criminal prosecution, reputational harm, and loss of license and/or trading privileges. (Conversely, acting promptly and appropriately can have significant benefits)
- Situations differ, but best practice is normally early identification and evaluation of suspected misconduct
  - Offers the opportunity for the most efficient and effective response
  - Ideally in advance of any external investigation



# Overview (cont'd)

- Three (overlapping) phases of an investigation:
  - Commencement
  - Fact gathering and legal analysis
  - Resolution
- Benefits of expedited, preliminary, internal inquiry:
  - Early diagnosis and remediation
  - Informed prognosis and right sizing of any internal investigation
  - Maximize opportunity to make informed decision on self reporting
- Best Practice: Anticipate, Anticipate, Anticipate
  - Process is normally dynamic
  - Need to balance competing considerations
  - May involve multiple agencies and jurisdictions



# Hypotheticals

We will use three hypotheticals with variations to illustrate the process and issues that may arise. These are as follows:

1. A complaint letter is received from a market participant (the “complainant”) alleging that your firm has made market manipulating trades and threatening to inform the regulators if not repaid for its losses.
2. Later, your firm receives a letter from the regulator referencing the complaint and requesting trader identities and document preservation.
3. Subsequently, your firm receives subpoenas from the regulator as well as criminal authorities for all documents relating to its derivatives and cash market positions and transactions relating to the transactions identified by the previously complaining market participant.



# Hypothetical 1

Your firm has received a letter from a market participant complaining that it has suffered losses on its derivative positions due to certain specified types of transactions by your firm in particular derivatives contracts during a specified time period that improperly influenced market prices, and that it will commence a lawsuit and notify regulators of the allegedly improper conduct, if it is not repaid in full for its resulting loss by a date certain.

## Issues to Consider

- Respond to letter?
- Document retention?
- Investigation plan?
  - Responsibility, supervision
  - Scope, depth, resources
  - Conflicts, qualification, privilege
- Reporting/disclosure obligations?
  - FCA Principle 11
- Is the complainant a whistleblower?



# Hypothetical 1A

As part of your firm's response to the letter from a market participant, counsel seeks to interview the employees who may have material information. One of those individuals, who is still employed by the firm, refuses to answer questions. Another individual, who is a former employee, also refuses to speak with counsel.

## Issues to Consider

- Paying for separate counsel?
  - US Attorney's Manual § 9-28.730
  - Delaware Code § 145
- Joint defense?
  - Privilege
  - Limitations
- Discipline?
  - Disclosure obligations
- Separation agreement terms for former employees?



# Hypothetical 1B

The company reaches a commercial resolution with the complainant and prepares a draft settlement agreement that includes a non-disclosure agreement and a compromise of any other claims the complainant may have arising out of the subject matter of their complaint.

## Issues to Consider

- NDA: permissible/binding?
  - Whistleblower concerns
  - US Attorney's Manual § 9-28.730
  - CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (January 19, 2017)
- Self-reporting/disclosure obligations?
  - Size/amount of settlement? Mere nuisance?



# Hypothetical 1C

Alternatively, no commercial resolution is reached and after the specified deadline has passed, but before your preliminary investigation can be completed, the complainant sends a copy of its letter to the regulatory authorities.

## Issues to Consider

- Impact on investigation plan?
- Prepare for regulatory investigations:
  - Report to regulatory authorities?
  - Continue internal investigation?
- Further negotiations with complainant?
  - Obstruction of justice: *United States v. Landgarten*





# Hypothetical 2

Your firm next receives a letter from the relevant regulatory enforcement authority requesting the identity of the trader(s) who engaged in the types of transactions previously identified by the complaining market participant as well as the preservation of all documents relating to those transactions.

## Issues to Consider

- Document retention obligations?
- Should the firm conduct an additional or different type of investigation?
- Nature of response?
  - Self-reporting
  - Privilege concerns
- Accuracy of information: *U.S. Commodity Futures Trading Comm'n v. Arista LLC, Abdul Sultan Walji, and Reniero Francisco*
- Any change to reporting/disclosure obligations?



# Hypothetical 2A

Assuming that the initial regulatory authority was the CFTC, your firm now also receives a letter from the FCA requesting a meeting to discuss its interest in your firm's related trading activities in the UK.

## Issues to Consider

- Change to investigation plan?
  - FCA position on internal investigations
- Nature of response
- Coordination?
  - Parity of information
  - U.S. Attorney's Manual § 1-12.100
- Privilege concerns?



# Hypothetical 2B

While conducting a further investigation in response to the CFTC and FCA information requests, the firm uncovers (i) documents suggesting that your firm's trader coordinated the trades in question with a trader at another firm or (ii) other potential problems that are not directly related to the matters raised by the complainant.

## Issues to Consider

- Change to investigative plan?
- Should the firm self-disclose?
  - DOJ Antitrust Division's Corporate Leniency Policy
  - CFTC Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation (September 25, 2017)
- What constitutes adequate self-disclosure?
  - U.S. Attorney's Manual § 9-28.720
- Timing of any self-disclosure?



# Hypothetical 3

Your firm next receives subpoenas from the regulator(s) as well as criminal authorities for all documents relating to its derivatives and cash market positions and transactions relating to the transactions identified by the previously complaining market participant.

## Issues to Consider

- What additional investigatory methods might a criminal prosecutor use?
  - Wiretaps (18 U.S.C. §§ 2510-22)
  - Search Warrants (18 U.S.C. §§ 3101-18; Fed. R. Crim. P. 41)
  - Stored Communications Act / CLOUD Act (18 U.S.C. §§ 2510, 2701-12)
- Coordination with regulators?
  - Limitations?
  - Piling on? (U.S. Attorney's Manual § 1-12.100)



# Hypothetical 3A

The firm determines that both documents and witnesses potentially relevant to the investigations of the regulatory and criminal authorities are located in another jurisdiction which has a blocking statute.

## Issues to Consider

- When do you tell the investigating authorities?
- What can be done to facilitate document production?
  - Mutual Legal Assistance Treaties
  - Memoranda of Understandings
  - Letters Rogatory
- Are you obligated to provide the documents?
  - Local access to documents
  - *In re Grand Jury Subpoena*



# Hypothetical 3B

The criminal authorities tell you that they would prefer that you do not speak further with the former and current employees concerned, so that they are able to interview them and get a first account of the facts.

## Issues to Consider

- Can the firm refuse?
- How does this affect the firm's ability to cooperate with other authorities?
- Can this affect proceeding in other jurisdictions?

# Hypothetical 3C

The criminal authorities request copies of the notes of all witness interviews conducted by both internal and external counsel for your firm.

## Issues to Consider

- Is privilege available?
  - Applicable law
- Investigative agency position on privilege?
  - U.S. Attorney's Manual § 9-28.750
  - CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (January 18, 2017)
- Privilege in other jurisdictions?
  - *In re Parmalat Sec. Litig.*
  - *Director of the SFO v ENRC*



# Key contacts



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**FIA**

The logo consists of three characters: 'F', 'I', and 'A'. The 'F' is a solid dark grey block letter. The 'I' is a solid dark grey block letter. The 'A' is composed of several overlapping geometric shapes: a light green triangle on the left, a darker green triangle on the right, and a light blue triangle on the right that overlaps the darker green one. Below the 'A' is a horizontal blue bar that overlaps the bottom of the light blue triangle.