

C L I F F O R D

C H A N C E



DON'T MAKE IT WORSE: RESPONDING PROPERLY TO US AND UK INVESTIGATIONS

FIA WEBINAR

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DAVID YERES, CELESTE KOELEVELD, KELWIN NICHOLLS AND BENJAMIN BERRINGER

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
- 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: expedited, preliminary, internal inquiry
 - Early diagnosis and remediation
 - Informed prognosis and right sizing of any investigation
 - Maximize opportunity to make informed decision on self reporting
- Golden Rule: Anticipate, Anticipate, Anticipate
 - Process is normally dynamic
 - Need to balance competing considerations
 - May involve multiple jurisdictions, agencies

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. Your firm now receives a letter from the regulator referencing the complaint and requesting trader identities and document preservation.
3. Your firm next 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
 - Delaware Code
- 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

- Disclosure to the regulator?
 - More than nuisance payment?
 - NDA: permissible/binding?
- Self-reporting obligations/benefits?
- Other factors/considerations?

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?
- Further negotiations with complainant?
- Prepare for regulatory investigations:
 - Report to regulatory authorities?
 - Continue internal investigation?

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*
- Reporting/disclosure obligations?
 - FCA Principle 11

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
 - DOJ anti-piling on policy
- 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 Leniency Program
 - CFTC's Self-Reporting and Cooperation Program
- What constitutes adequate self-disclosure?
- 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
 - Search Warrants
 - CLOUD Act
- Coordination?
 - DOJ anti-piling on policy
- Public company/other disclosures?

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
 - CFTC's Self-Reporting and Cooperation Program
- Privilege in other jurisdictions?
 - *In re Parmalat Sec. Litig.*
 - *Director of the SFO v ENRC*

CONTACTS



CELESTE KOELEVELD
Partner, Litigation

T: +1 212 878 3051
E: celeste.koeleveld
@cliffordchance.com



KELWIN NICHOLLS
Partner, London

T : +44 20 7006 4879
E: kelwin.nicholls
@cliffordchance.com



DAVID YERES
Senior Counsel, Litigation

T: +1 212 878 8075
E: david.yeres
@cliffordchance.com



BENJAMIN BERRINGER
Associate, Litigation

T: +1 212 878 3372
E: benjamin.berringer
@cliffordchance.com

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Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA
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