

## How to avoid being referred to JFSC Enforcement - and what to do if you are

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With the JFSC taking - and wanting to be seen to be taking - an increasingly robust approach with regulated firms, it is only natural for firms to ask what they can do to avoid a referral to Enforcement and, if they are referred, what steps they can take to manage the risk of formal sanction.

### | Avoiding a referral to Enforcement

On a positive note, there are a number of steps that a firm can take now to minimise the prospects of a referral to Enforcement.

First, firms should review (and if necessary enhance) their compliance resource as a matter of priority. The JFSC has been clear (from its Compliance Monitoring guidance in 2013 [\[1\]](#) through to its most recent public statements and civil penalties) that firms must have a Compliance Function that is adequately resourced. Importantly, this requires an assessment of both the quantity and quality of that resource. Further, firms must prepare and implement an effective Compliance Monitoring Plan that is tailored to the specific risks faced by the firm, and which is reviewed and updated to reflect the changes in those risks over time.

Second, the Board must be able to show that it is discharging its role as the firm's governing body effectively. Questions that Board-members should ask themselves regularly include:

- Is the right information being put before the Board and with sufficient frequency?
- Are the key points in Board packs explained clearly to avoid "information overload"?
- Can the Board evidence constructive debate, support and challenge?
- Are actions recorded clearly in the minutes, assigned to a specific person and progress then reported back to the Board?

If the answer to any of these questions is not a resounding "yes", urgent improvements are needed.

Third, it is crucial that responsibilities are apportioned clearly within the firm. Job descriptions should be reviewed to ensure they set out clearly the individual's role and responsibilities, and each individual should be clear as to their reporting line and (where relevant) authorisation levels. Managers should also ensure that they exercise appropriate oversight over those they supervise.

Fourth, firms should seek appropriate independent validation (for example, by group internal audit or an external consultant) of their Compliance function and Board effectiveness. Such review and feedback by an objective party can be invaluable in challenging "group think" and identifying areas for improvement.

Fifth, firms must keep adequate, orderly and up-to-date business and customer records. Firms often view record-keeping as a second-tier regulatory obligation, of less importance than other "substantive" obligations. This is a serious error: adequate records build a "corporate memory", and also provide the necessary audit trail by which the firm can demonstrate compliance with wider regulatory requirements to the JFSC.

Sixth, firms must deal with the JFSC in an open and co-operative manner at all times. The JFSC's ability to supervise firms depends on the quality of the information it receives, which means it takes a dim view of firms that fail to be candid and co-operative. It is therefore in each firm's interest to cultivate a strong relationship with their regulator, both when responding to JFSC requests and in recognising when to make proactive disclosures.

## **Managing the risks of an Enforcement referral**

Unfortunately, no firm has unlimited resources, which means that even the best-run firm will encounter problems. Often what is key is how the firm reacts.

The JFSC has confirmed [2] that "[w]here appropriate [it] will try to ensure that contraventions or instances of misconduct are rectified in conjunction with the person concerned through the normal supervisory processes", with an enforcement referral envisaged "[w]here such action is not considered to be sufficient or where co-operation is lacking".

It is clear from the JFSC's published policies [3] that it will take into account a number of factors when deciding on what (if any) penalty to impose, such as:

- the seriousness of the contravention (including whether it was committed intentionally/recklessly and the risk of harm flowing from it)
- whether the firm knew, or ought to have known, of the contravention
- whether the firm voluntarily reported the contravention

- whether the firm has been co-operative, and has taken steps to rectify the contravention and to prevent its recurrence

As such, when issues are identified the firm should be proactive, conveying to the JFSC that it takes the matter seriously and is committed to making all necessary improvements:

- if the firm identifies the issue, it should report it to the JFSC promptly, along with a remediation plan or (if not possible in the time available) confirmation of when that plan will be put forward
- if the JFSC identifies the issue, the firm should investigate as a matter of urgency the true nature and scope of the issue and identify the steps needed to remediate it. If the issue arose on a JFSC visit, the firm should review the draft Report carefully and should not be shy about proposing factual corrections: once the Report is finalised the JFSC will be reluctant to move away from its contents (at least without clear evidence)

If the firm is unable to avoid an Enforcement referral, it can nonetheless take steps to manage the risk/severity of formal sanction. At the earliest opportunity the firm should ensure that it understands the focus of the investigation, and should take legal advice on the possible outcomes (which may be against not only the firm but its principal persons) and how best to proceed. The firm must also remember that it continues to remain subject to Principle 6.

The JFSC recognises that "[e]arly acknowledgement by a Subject of breaches of regulatory requirements - which effectively saves time and investigative resources - will always be considered favourably by the JFSC", and so has set out a formal settlement process that applies in cases of breaches of regulatory requirements. [4] If offered the opportunity to discuss settlement, firms should take it seriously: it gives the firm the opportunity (not otherwise available to it) to comment on the wording of any public statement and to gain up to a 50% discount on any financial penalty, whilst avoiding the costly and time-consuming decision-making process before the JFSC's Review Committee and (potentially) the Courts.

## Conclusion

No firm wants to find itself facing a referral to the JFSC's Enforcement division. Firms would therefore be well advised to satisfy themselves that their governance arrangements and systems and controls remain fit for purpose and, if issues do arise, they should engage with the JFSC proactively and ensure the issues are remediated promptly. Taking these steps can help persuade the JFSC that a less severe sanction ought to be imposed than might otherwise have been the case - and may even avoid a referral altogether.

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[1] <https://www.jerseyfsc.org/industry/guidance-and-policy/compliance-monitoring/>

[2] <https://www.jerseyfsc.org/industry/guidance-and-policy/jfsc-use-of-enforcement-powers/>

[3] See for example <https://www.jerseyfsc.org/industry/guidance-and-policy/our-use-of-public-statements/>, <https://www.jerseyfsc.org/industry/guidance-and-policy/civil-financial-penalties-on-registered-persons/> and <https://www.jerseyfsc.org/industry/guidance-and-policy/civil-financial-penalties-on-principal-persons/>

[4] <https://www.jerseyfsc.org/industry/guidance-and-policy/decision-making-process/>

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