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# Regulatory response guidelines

This is a guide on how we regulate financial markets and the responses we use in enforcing legislation. It is for all individuals and businesses involved in providing financial market products and services.

## Document history

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This version was issued in August 2016 and is based on legislation and regulations as at the date of issue.

[www.fma.govt.nz](http://www.fma.govt.nz)

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# Purpose of this document

This document describes how the Financial Markets Authority (FMA) regulates market conduct that contravenes the legislation that we enforce. Contraventions are market conduct that is unlawful. Our response is aimed at any misconduct most likely to harm fair, transparent and efficient financial markets.

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1. The FMA has issued these regulatory response guidelines (guidelines) to:
  - describe how we enforce contravention of the financial markets legislation, set out in part 1 of schedule 1 of the Financial Markets Authority Act 2011 (FMA Act)
  - provide an outline of our response options
  - provide transparency on how we decide our regulatory response.
2. We are committed to regulatory action which targets conduct that harms or presents the greatest likelihood of harm to promote fair, transparent, and efficient financial markets.
3. The guide is not exhaustive, and not legally binding. We may revise the guidelines from time to time to meet our organisational objectives and priorities.

## Supporting documents

4. The guidelines should be read alongside these related documents:
  - our [enforcement policy](#) — these criteria apply at every stage of an investigation and enforcement process, and are referred to later in these guidelines
  - our [co-operation policy](#) — this policy outlines circumstances where we might exercise our discretion to take a lower level regulatory response or no action at all, against an individual or business in exchange for information and full, continuing and complete co-operation
  - our [model litigant policy](#) — this policy outlines our approach to litigation and conducting investigations
  - Crown law's prosecution guidelines (CPG) – the CPG explains the principles and processes that apply when we are deciding whether to pursue criminal prosecution
  - our [Strategic Risk Outlook](#).

## Our role

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We have a critical role in regulating capital markets and financial services in New Zealand. Our main objective is to promote and facilitate the development of fair, efficient and transparent financial markets.

5. We directly regulate the conduct of over 11,000 market participants including banks, financial advisers, KiwiSaver providers, listed markets, issuers, supervisors, fund managers and reporting entities<sup>1</sup>. Indirectly, our regulatory mandate touches thousands more.
6. As a risk-based conduct regulator, we focus our resources on conduct that we think poses the most significant risk to achieving this objective.
7. With our increased mandate and our expanded regulatory role under the Financial Markets Conduct Act 2013 (FMC Act), it is important that we focus on what really matters. We cannot eliminate all harm or fix every problem, nor should we seek to remove all risk from the market.

## Our approach to regulatory responses

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As a risk-based conduct regulator, we focus our resources on conduct that we think poses the most significant risk to achieving our objective of promoting and facilitating the development of fair, efficient and transparent financial markets.

### Our risk outlook and strategic priorities

8. Our [Strategic Risk Outlook](#) describes what we believe are the current and main drivers of risk to fair, efficient and transparent financial markets.
9. Based on the drivers of risks identified, we have seven strategic priorities that will guide our operations over the next three years. Our goal is to raise trust and confidence in our financial markets, which we believe will deliver better outcomes for investors, businesses and our economy as a whole.
10. Our strategic priorities and areas of focus will help determine what we look at, whether an issue or problem identified requires our attention and should be prioritised.
11. Our strategic priorities help us decide the most appropriate action to take, and ensure that our regulatory response is appropriate and proportionate.

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<sup>1</sup> Financial markets participants is a term defined in the FMA Act. It includes:

- persons who are or are required to be (and those who would be required, unless they have an exemption) registered, licensed, appointed, accredited or authorised under an Act listed in schedule 1 of the FMA Act
- certain persons who participate in or offer financial products to the public and certain related persons and entities (including in some cases, directors and managers).

For a full definition please see the FMA Act. We refer to financial markets participants as 'participants' in this guidance.

## Our functions to support regulation

12. Our approach to regulation is based on proactive and extensive engagement with firms and professionals. Specifically, our functions for regulation include:

- monitoring and supervision
- investigations and enforcement
- policy and guidance
- education and information
- licensing.

## Our regulatory framework

13. Our regulatory framework is designed to help us achieve our objective of ensuring the effective and credible regulation of financial markets.

14. Our monitoring and surveillance work is outcome focused, so we consider whether compliance is achieved and whether the desired outcomes for customers are delivered.

15. We focus on proactive, timely and proportionate use of appropriate, fit-for-purpose regulatory tools.

16. To achieve this we need to:

- consider the benefits of our regulatory approach and the impact on New Zealand financial markets
- be aware of the potential burden created by regulatory decisions so that what is required of participants is proportionate and fair, our regulatory intervention is minimal (and the resources used are proportionate) and will be most effective in addressing the problem
- be fair, consistent and transparent with participants.

17. The goal is to achieve consistent, effective and visible outcomes listed here:

- timely responses or action taken
- appropriate, proportionate action taken using fit-for-purpose tools
- efficient use of resources
- visible outcomes and greater transparency of our approach
- a consistent approach to intervention
- a high level of compliance from and engagement with participants
- well-functioning financial markets with products and services that investors have a high level of trust and confidence in.

## Working with the market

18. Most participants will comply willingly with the regulatory requirements placed on them if they know how. We will look at educating and meeting with these participants.
19. Other participants (including minimalists, opportunists and deliberate or reckless non-compliers) require further incentives to encourage them to comply. For these participants, a range of regulatory tools are available — ranging from meetings, to feedback letters and warnings, through to directions or stop and prohibition orders.
20. For others who engage in serious misconduct, prompt and effective prosecution or civil litigation is required to hold the offender to account, to punish the misconduct, to denounce and deter and/or to achieve compensation for the aggrieved parties. The choice of tool depends on the seriousness of the non-compliance, the impact and potential harm on investors, and on the market.
21. If an entity has concerns around the conduct of one or more of its employees, then we are prepared to meet with the entity on how best to address this. We also have processes in place that enable individuals who want to report misconduct within an entity to do so in a secure and confidential manner.
22. To achieve compliance across a broad group of participants, it is essential to demonstrate there are real and credible consequences of misconduct or non-compliance.
23. We know it is important to continue building relationships with participants and to ensure they can approach us with ease and confidence. We also need to be consistent in our responses and in how we use our regulatory tools.
24. As we rely on participants to hear about potential misconduct and harm in the market, a lack of willingness to report misconduct poses a risk to our effectiveness, and to the market.

## Who can be subject to a regulatory response?

25. In our enforcement, we may take action against different parties, including individuals and entities.
26. Individuals may be primarily liable or have secondary liability for helping others (including companies) to breach the law. An entity can also be primarily liable or have secondary liability for the acts of its employees, officers or agents.
27. We may also take action against third parties in some cases. Third parties include, but are not limited to, legal advisers, trustees, auditors, and expert advisers. Where unlawful market misconduct can fairly be attributed to third parties, we will consider taking action against those parties.

# Our range of regulatory responses

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We have a wide range of regulatory tools (both statutory and non-statutory tools) to ensure market participants comply with regulatory obligations and/or to punish, deter and denounce serious misconduct, as well as to help investors seek remedies.

## Choosing our regulatory response

28. We have a wide range of functions and powers to achieve our statutory objectives.
29. We intend to use the full range of the tools available to ensure the most appropriate fit-for-purpose regulatory response to achieve the desired outcome. We have adopted a principled and consistent approach to choosing our regulatory responses.
30. In the event of a breach of financial markets legislation, we may intervene on an informal basis or at a low level where such action is proportionate to the misconduct and will achieve an appropriate market outcome. However, where appropriate, we will take strong action and hold individuals and entities accountable when they break the law and fail to meet the standards that are expected of them. If harm has been identified, we may also take regulatory action of some sort even though no 'rules' appear to have been broken.
31. Our statutory tools include:
  - revoking licences
  - criminal prosecution and civil proceedings
  - publishing warnings
  - imposing conditions
  - giving directions
  - stopping promotion or distribution of financial products and services.
32. We also have our more flexible non-statutory tools (both formal and informal) such as monitoring reports and feedback letters, compliance warning letters and general market guidance.
33. The range of regulatory tools available for dealing with a particular issue may be determined by the statutes or regulations governing the misconduct or non-compliant activity. Some may involve a number of breaches across several pieces of legislation with penalties of different severity.
34. The duties and responsibilities under the FMC Act 2013 are underpinned by liability provisions. It is important that market participants understand how the liability provisions work under the FMC Act to give meaning to their duties and responsibilities, and to know what the consequences of breaching are.
35. We have set out, in Appendix A, a comprehensive list of the regulatory responses we can take together with the intended aim of each response.
36. In addition, Appendix B provides a non-exhaustive guide to the criteria that might be applied in determining the appropriate regulatory responses.



## Resolution

37. In any matter, our choice of appropriate regulatory response will be aimed at achieving specific regulatory objectives. If those regulatory objectives can be met by an alternative resolution that differs from the regulatory response chosen, then we will decide whether such a resolution is suitable.
38. We will consider all reasonable proposals for resolution. That consideration will be guided by our model litigant, co-operation and enforcement policies (and the CPG where relevant), as appropriate.

## Publication of outcomes

39. We have an obligation to be open and transparent about the regulatory outcomes we achieve. We will publish details of the regulatory outcome achieved (including relevant facts and the reasons for choosing that response) on our website unless exceptional circumstances apply, or if the effect of publication would be disproportionate to the misconduct.

## Appendix A: Range of regulatory responses

Response	Broad criteria	Aim
Engagement/guidance (can include monitoring reports, feedback letters, compliance letters and general market guidance)	The conduct is likely not compliant, but engagement around the FMA's expectations and how they can be met is likely to be effective.	<ul style="list-style-type: none"> <li>Educate and guide the participant</li> <li>Confirm the FMA's expectations of standards</li> <li>Deter future unlawful behaviour by that participant</li> <li>Achieve a constructive dialogue</li> <li>Achieve compliance</li> </ul>
No further action	No contravention, or insufficient evidence, or matter is not sufficiently serious and does not fall within strategic priorities.	<ul style="list-style-type: none"> <li>Regulatory response is timely, appropriate and proportionate</li> <li>Resources used appropriately</li> </ul>
Referral to other agency (eg, Police, SFO, Companies Office, IRD)	More appropriate for another agency or affected party to respond to the matter.	<ul style="list-style-type: none"> <li>Correct agency is aware of the matter and makes appropriate enforcement decision in accordance with its mandate</li> <li>Regulatory response is timely, appropriate and proportionate</li> <li>Resources used appropriately</li> </ul>
Warning letter	There has been or is likely to have been a contravention of the legislation and no greater sanction is justified. May be appropriate where participant has remedied breach and co-operated with the FMA.	<ul style="list-style-type: none"> <li>Stop unlawful behaviour</li> <li>Deter participant from repeat behaviour</li> <li>Notify that subsequent breaches may be treated more seriously</li> </ul>

Response	Broad criteria	Aim
Public warning	There has been, or is likely to have, a moderate or serious contravention of the legislation and censure and/or protection of the public is required.	<ul style="list-style-type: none"> <li>• Inform and warn public/market about unlawful behaviour</li> <li>• Minimise impact of the behaviour</li> <li>• Deter future unlawful behaviour by other market participants</li> <li>• Raise awareness about standards expected by the FMA</li> <li>• Censure</li> </ul>
Market information and guidance	There is likely a moderate or serious contravention of the legislation by one or more financial market participants that FMA considers may occur more broadly.	<ul style="list-style-type: none"> <li>• Inform market about participant responsibilities</li> <li>• Modify behaviour of other participants</li> <li>• Raise standards across the market</li> </ul>
Enforceable undertaking	There is a moderate or serious contravention of the legislation, and participant acknowledges the FMA's view and the need for to take remedial or other action.	<ul style="list-style-type: none"> <li>• Stop behaviour in question</li> <li>• Restrict or prevent participant from engaging in further misconduct</li> <li>• Compel the participant to take steps designed to minimise the risk of repeat unlawful behaviour</li> <li>• Denounce and deter</li> <li>• Compensate affected parties</li> <li>• Censure</li> </ul>

Response	Broad criteria	Aim
Undertaking to make payment in lieu of penalty or compensation (s46A FMA Act)	There is moderate or serious contravention of the legislation and participant agrees to make payment.	<ul style="list-style-type: none"> <li>• Compensate affected parties</li> <li>• Penalise the participant</li> <li>• Denounce and hold to account</li> <li>• Deter conduct of participant and other participants</li> <li>• Raise standards and confidence across the market</li> </ul>
Infringement notices	There is a contravention of an infringement offence and more than a warning is required. Usually first-time contravention or low level offence.	<ul style="list-style-type: none"> <li>• Modify or stop behaviour</li> <li>• Sanction participant</li> <li>• Modify participant behaviour</li> <li>• Use the FMA's resources effectively</li> </ul>
Administrative action (exercise of statutory / regulatory powers) <sup>2</sup>	There is a moderate or serious contravention of the legislation. This includes the ability to issue stop orders and direction orders, and to make these orders on an urgent basis.	<ul style="list-style-type: none"> <li>• Modify or stop behaviour</li> <li>• Protect investors and integrity of market</li> <li>• Compel the participant to take steps designed to minimise the risk of repeat unlawful behaviour</li> </ul>
Financial Advisers Disciplinary Committee <sup>3</sup>	There is a breach of the Code of Professional Conduct for authorised financial advisers which needs to be referred to the Financial Advisers Disciplinary Committee.	<ul style="list-style-type: none"> <li>• Modify or stop the behaviour and sanction the participant</li> <li>• Inform and modify the behaviour of others</li> <li>• Denounce and deter</li> </ul>

<sup>2</sup> Available under FMCA (stop orders, direction orders, prohibition orders), Securities Act (suspend allotments, cancel offer documents), Auditor Regulation Act (issuing directions, suspending accreditation, censure), Financial Advisers Act (varying conditions or status of authorisation), Securities Trustees and Statutory Supervisors Act (varying a licence)

<sup>3</sup> Applicable to Financial Advisers Act (cancel or suspend authorisation, debar, censure, fine, order training or supervision). Can be pursued in addition to other enforcement action.

Response	Broad criteria	Aim
Settlement	There is a serious contravention of the legislation, which the participant acknowledges and/or is prepared to compensate and/or implement a change that addresses the breach.	<ul style="list-style-type: none"> <li>• Modify or stop the behaviour and sanction the participant</li> <li>• Inform and modify the behaviour of others</li> <li>• Seek redress for affected parties through the terms of the settlement</li> </ul>
Conditioning licences	There is a moderate to serious contravention which justifies conditions being attached to licence that allows the participant to operate in the market.	<ul style="list-style-type: none"> <li>• Modify or stop behaviour of participant and others</li> <li>• Deter</li> <li>• Modify participant behaviour</li> <li>• Protect investors and the market</li> </ul>
Revoking licence or banning orders	There is a serious and persistent contravention and removal of participation from the market is justified to protect investors and the integrity of the market.	<ul style="list-style-type: none"> <li>• Stop behaviour of participant and others</li> <li>• Denounce and deter</li> <li>• Penalise the participant</li> <li>• Protect investors and the market</li> </ul>
Asset preservation orders	An investigation into suspected contravention is on foot and orders are required to protect assets to which aggrieved persons may have a claim.	<ul style="list-style-type: none"> <li>• Preservation of assets for potential claims</li> <li>• Protection of investor interests</li> <li>• Preserve the status quo</li> </ul>
Injunction	A court order to restrain a person from conduct that constitutes or would constitute a contravention (or involvement in a contravention) of the FMC Act or the Regulations.	<ul style="list-style-type: none"> <li>• Protect investors and the market</li> <li>• Stop behaviour of participant</li> <li>• Preserve dissipation of assets that may be used to compensate investors</li> </ul>

Response	Broad criteria	Aim
Civil proceedings (including seeking injunctions and freezing orders)	<p>There is a serious contravention of the legislation on the balance of probabilities. Conduct may not be reckless or intentional. Can include the seeking of:</p> <ul style="list-style-type: none"> <li>• a declaration of contravention</li> <li>• compensation</li> <li>• pecuniary penalties</li> </ul>	<ul style="list-style-type: none"> <li>• Stop behaviour and sanction participant</li> <li>• Holds participant to account</li> <li>• Denounce and deter</li> <li>• Inform and modify behaviour of others</li> <li>• Where appropriate, seek redress for affected parties</li> </ul>
Civil proceedings under s34 of the FMA Act	<p>There is a serious contravention of the legislation. Taking action progresses the FMA's regulatory objectives, our strategic priorities and the statutory criteria under the FMA Act.</p>	<ul style="list-style-type: none"> <li>• Stop behaviour and sanction participant</li> <li>• Holds participant to account</li> <li>• Denounce and deter</li> <li>• Secure compensation / rights for investors</li> <li>• Educate market participants</li> </ul>
Criminal proceedings	<p>There is a serious contravention of the legislation and the participant intended, or was reckless as to unlawful conduct. Criminal standard of proof is met.</p>	<ul style="list-style-type: none"> <li>• Stop behaviour and sanction participant</li> <li>• Hold participant to account</li> <li>• Denounce and deter</li> <li>• Inform and modify behaviour of participant and others.</li> <li>• Educate market participants</li> </ul>

## Appendix B: Our response criteria

Criteria	Factors to consider
Strategic priorities	<ul style="list-style-type: none"> <li>• Does the conduct in question relate to one or more of the FMA's strategic priorities?</li> </ul>
General questions	<ul style="list-style-type: none"> <li>• Is there a prima facie case (all ingredients of the offence are satisfied)?</li> <li>• Is there a reasonable prospect of success?</li> <li>• Are there any other express statutory requirements (such as 'public interest' or 'seriousness' factors)?</li> <li>• Is another agency or party (i.e., receiver, liquidator, investor group) better placed to address the issue?</li> <li>• Does the behaviour constitute a category 1, 2 or 3 offence under the Criminal Procedure Act 2011?</li> </ul>
Seriousness of conduct	<ul style="list-style-type: none"> <li>• What is the maximum penalty/tariff for this type of offence?</li> <li>• Is there evidence of deliberate, intentional or reckless conduct?</li> <li>• Does the incident represent simple negligence, gross negligence, error of judgment or genuine mistake?</li> <li>• Is it merely a technical breach? Is there evidence of a genuine attempt to comply?</li> <li>• How prevalent is the offence? Is it being repeated or imitated?</li> <li>• Has the offender taken remedial action (preventative measures, reparation, etc)?</li> <li>• Is there a serious departure from expected lawful commercial behaviour?</li> <li>• Is the conduct/information difficult for investors to detect?</li> <li>• Can the conduct be undone?</li> <li>• Are there any other aggravating or mitigating circumstances? (E.g., does it involve abuse of trust or authority, vulnerable victims, history of recurring misconduct, etc?)</li> </ul>
Market impact or detriment	<ul style="list-style-type: none"> <li>• Has the offence resulted in serious financial loss (amount of capital impacted)?</li> </ul>

Criteria	Factors to consider
	<ul style="list-style-type: none"> <li>• Are investors likely to suffer loss and to what extent?</li> <li>• Are a wide range and/or large number of investors likely to be affected?</li> <li>• Are more vulnerable individuals targeted by the behaviour?</li> <li>• How prevalent is the offence? Is it being repeated or imitated?</li> <li>• Is the incidence of this behaviour increasing and/or on-going?</li> <li>• Does the activity involve significant product risk, including complexity, new development(s) or difficulty in detecting wrongdoing?</li> <li>• Does it involve products, markets, transactions or practices that the FMA has otherwise identified as priorities?</li> <li>• Does it provide an opportunity to pursue joint interests with other regulators, including overseas, on a co-ordinated basis?</li> <li>• Is the behaviour likely to have significant impact on financial markets on: <ul style="list-style-type: none"> <li>○ fairness?</li> <li>○ efficiency?</li> <li>○ transparency?</li> <li>○ development?</li> <li>○ integrity?</li> <li>○ confidence?</li> </ul> </li> <li>• Is the level of market impact and consequences of contravention serious or minimal?</li> </ul>
Public interest	<ul style="list-style-type: none"> <li>• The FMA must consider the wider public's interest. In assessing public interest, the FMA must consider the following questions: <ul style="list-style-type: none"> <li>○ Is there likely to be widespread public interest in the issue?</li> <li>○ Would a decision not to commence or continue enforcement action likely undermine public confidence in the</li> </ul> </li> </ul>



Criteria	Factors to consider
	<p>regulation of the financial markets?</p> <ul style="list-style-type: none"> <li>○ Is it more appropriate for the FMA, rather than another agency or an affected party, to address the issue?</li> <li>○ Are there mitigating or aggravating features involved?</li> <li>○ Do the personal circumstances of the parties involved argue for or against enforcement actions?</li> <li>○ Is there a significant need to clarify, or define the boundaries of, the law?</li> <li>○ Is it necessary to reinforce the application of the legislation?</li> </ul>
Deterrence	<ul style="list-style-type: none"> <li>● How prevalent is the offence? Is it being repeated or imitated?</li> <li>● Is the incidence of this behaviour on-going and/or increasing?</li> <li>● Did the offender self-report and proactively address the contravention?</li> <li>● What is the likely effect of enforcement action in this area?</li> <li>● Will enforcement action modify or stop the behaviour of the offender?</li> <li>● Will enforcement action modify the behaviour of others by demonstrating or explaining the consequences of failure to comply? (Consider whether other similar cases have sufficiently sent a deterrence message).</li> <li>● Will it inform and educate investors as to their rights and options?</li> <li>● Are there other cases of similar nature already completed or in progress? (balancing precedent value with need for consistency)?</li> <li>● Is there potential for successful litigation in this instance to be counter-productive?</li> <li>● Would the action be disproportionate or the defendant be seen as a martyr?</li> </ul>
Education	<ul style="list-style-type: none"> <li>● Is there likely to be widespread public interest in the issue?</li> <li>● Is there a need to publicly denounce the activity or behaviour?</li> <li>● Is it necessary to reinforce the application of the legislation?</li> </ul>

Criteria	Factors to consider
	<ul style="list-style-type: none"> <li>• Will it educate financial markets participants of their obligations?</li> <li>• Will it inform and educate investors on their rights and options?</li> <li>• Will it modify the behaviour of others by demonstrating or explaining the consequences of failure to comply?</li> </ul>
Maintenance of law/justice	<ul style="list-style-type: none"> <li>• Would formal proceedings promote the policy objectives of the particular legislation?</li> <li>• Would formal proceedings contribute to performance of FMA's regulatory objectives? Specifically: <ul style="list-style-type: none"> <li>○ Will it help with specific or general compliance with law?</li> <li>○ Will it enhance confidence in capital markets?</li> <li>○ Will it resolve difficult questions of interpretation or application of law?</li> <li>○ Would the consequences of any resulting judgment to be unduly harsh or oppressive?</li> <li>○ Do the particular circumstances of the parties argue for or against enforcement action?</li> <li>○ Is the proposed enforcement response consistent with previous/future decisions?</li> <li>○ Is the particular law obscure or obsolete?</li> <li>○ Is the offending recent or historic? (Nb, consider limitations issues)</li> <li>○ If historic, was delay caused by factors such as obstructive suspect(s) or complex offending resulting in lengthy investigation, or offence only recently coming to light?</li> <li>○ Will the proposed enforcement action appropriately stop the behaviour and or appropriately penalise the offender?</li> <li>○ How does the matter rank in the context of the FMA's identified regulatory risks and priorities?</li> <li>○ What is the estimated cost to the FMA of taking legal action in this matter?</li> <li>○ What is the likely impact on the FMA's staff availability and litigation resources, and for how long?</li> <li>○ Is the cost to the FMA of taking action proportionate to the actual or possible loss?</li> <li>○ Are there any applicable/more appropriate alternatives to litigation available?</li> </ul> </li> </ul>

Criteria	Factors to consider
	<ul style="list-style-type: none"> <li>○ What is the likely penalty to be imposed in the event of a favourable judgment?</li> <li>○ Is successful litigation likely to result in compensation, reparation or forfeiture to the benefit of third parties (eg, investors)?</li> <li>○ If the FMA does not take legal action, what would be the impact on public opinion and/or market confidence?</li> <li>○ Are there any other aggravating or mitigating circumstances?</li> </ul>
Compensation	<ul style="list-style-type: none"> <li>● What weighting should be given to achieving compensation for investors?</li> <li>● Is the conduct so serious to justify criminal rather than civil proceedings?</li> <li>● Do the potential defendants have available assets to provide readdress to investors?</li> </ul>

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