Self-reporting issues to FMA does not provide immunity from litigation

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The Financial Markets Authority (FMA) - Te Mana Tātai Hokohoko - has laid its expectations for how firms under its supervision should deal with the regulator when day-to-day interactions evolve in the event of an enforcement process.

Karen Chang, FMA acting General Counsel, said in a speech today*: "It's critical that industry should not be surprised by our approach to regulation, supervision and enforcement. That's why we strive to set visible expectations on how we implement the laws within our jurisdiction, our expectations for good conduct, and our enforcement strategy."

Ms Chang set out three key areas that should be a priority for every firm that holds a licence with the FMA (or will do in future, under the Conduct of Financial Institutions Bill):

- Self-reporting incidents or issues to the FMA;
- Remediation – fixing issues and errors with customers in a timely way; and
- Addressing inadvertent misconduct issues.

Financial services firms have discovered an increasing number of issues since the joint reviews of banks and life insurers by the FMA and the Reserve Bank of New Zealand in 2018/19. Ms Chang reiterated what the FMA considers to be best practice for informing the regulator when things go wrong.

"The right way involves promptly informing your Board, self-reporting to the FMA, and ensuring timely remediation and communication with customers. While entities may be tempted to wait until they have fully unraveled problems before making first contact with the FMA or their customers, we urge you to prioritise early engagement and stopping the harm.

"You can be confident that the choices made by an entity after discovering the problem will be relevant to the FMA's enforcement response and will often colour how we view the entity's overall conduct. At the same time, self-reporting cannot provide immunity from litigation, especially if the issues are significant, systemic or have led to customer harm.

"The nature of the underlying misconduct itself will always be the driving factor in assessing the appropriate response. The more serious the misconduct – to consumers or to the market - the more likely we will take strong enforcement action, irrespective of how it was reported. And that makes sense, for any law enforcement agency. A confession does not absolve responsibility.

"Delayed, incomplete self-reporting is considered an aggravating factor. So, it's not just the fact of the self-reporting which is important, but also the manner."

Given the length of time that the Financial Markets Conduct Act has been in force, firms should not be surprised that the FMA will take enforcement action when there are issues that reveal egregious conduct, or system errors that should have been fixed early, or products that remained on market when they were no longer fit for purpose, Ms Chang said.

In closing, Ms Chang reminded the industry of the purpose for the relationships between financial services firms and their customers, and the relationship between those firms and the regulator.

"We all want New Zealanders to have trust and confidence in the financial services they receive. That means investing in systems that put customer interests first and showing a willingness to deal with the regulator in a way that is open, transparent and engaged. And this doesn't need to break down when it gets to the pointy end of the enforcement stick.

While investigations and cases will come and go – this relationship endures."

**Karen Chang was invited by Minter Ellison Rudd Watts to speak to an audience of financial service firms.*

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- Offer disclosure for equity and debt offers
- Financial advice provider
- Financial adviser
- Financial market infrastructures
- Independent trustees
- Interposed persons under new financial advice regime
- Managed investment scheme manager
- Market operators
- New Financial Advice Regime
- Peer-to-peer lending service providers
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