

UPDATE

GFSC Investigations: Do you say it best, when you say nothing at all?

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The Right to Silence and the Privilege Against Self Incrimination are established concepts in criminal and civil investigations. But do they apply in GFSC investigations or should you consider alternative tactics?

The Guernsey Financial Services Commission (**GFSC**) is the regulatory body for the finance industry in the Bailiwick of Guernsey. The GFSC has both supervisory and regulatory functions, but it does not have the powers of a criminal prosecutor. It does however have a number of powers to compel the provision of information. Regulators' investigations naturally have a degree of crossover with the risk of civil and criminal actions. What are the risks that your co-operation in a regulatory GFSC investigation may be used against you in these other proceedings?

Right to Silence

In Guernsey, a subject of a police interview under caution has an absolute right to silence. The subject has an absolute right not to respond to some or all of the questions put to them. No negative inference may be drawn from the subject's refusal to answer questions in such circumstances.

This absolute right contrasts with the position in other jurisdictions such as England and Wales where a qualified right to silence applies. In such jurisdictions adverse inferences can be drawn from a failure to respond to questions.

Privilege Against Self-Incrimination

The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 at section 8 confirms the privilege against self-incrimination in civil matters. This means that subjects being questioned in legal proceedings, other than criminal proceedings, may refuse to answer any question or produce any document if to do so might expose them to proceedings for an offence (i.e. criminal proceedings) or for the recovery of a penalty.

GFSC Investigations

How do the right to silence and the privilege against self-incrimination interact with the GFSC's powers of investigation and enforcement?

Compelled Interviews

The GFSC has powers under a suite of regulatory laws to compel subjects to be questioned. The power in section 27E(4)(b) of The Protection of Investors (Bailiwick of Guernsey) Law, 1987 is representative of that found across the regulatory laws. This section states:

.... any person who is or has been a director, controller, manager, partner, employee, agent, banker, auditor, advocate or other legal adviser of a licensee or company being so investigated, or who has been appointed to make a report in respect of such a licensee or company or who is or has been a significant shareholder in relation to such a licensee or company –

...

(b) shall attend before an inspector at such time and place as the inspector may require and answer such questions as the inspector may put to him in relation to that licensee or company, and

Criminal Consequences

A subject in a GFSC investigation does not have an absolute right to silence or any right to silence at all. Rather failure to comply with a requirement to answer questions in the context of a GFSC investigation, without reasonable excuse, carries criminal consequences. Criminal sanctions of up to two years imprisonment plus an unlimited fine may be imposed.

As to what may constitute a 'reasonable excuse', the legislation does not appear to contemplate risk of self-incrimination as constituting such an excuse. On the face of the regulatory laws, therefore, the interviewee must either respond to questioning or risk the criminal consequences of not doing so.

The Nature of a GFSC Investigation

The characterisation of a GFSC investigation is a key factor. GFSC investigations constitute the discharge by the GFSC of its regulatory functions. Even where the matter evolves into regulatory enforcement actions, the character of the investigation does not change. The GFSC is classified as being in a process of decision making in respect of its enforcement action, rather than in adversarial proceedings. This is so, in spite of the common features of enforcement actions and civil litigation or criminal proceedings.

In the Jersey case of *Smith v SVM Ltd* [2017] JRC026, the Master held that the exercise of powers by the Jersey regulator was not adversarial and that the dominant purpose of the regulator obtaining information was to allow it to discharge its regulatory responsibilities. The Master found that this proposition was not changed by the fact that the regulator may be investigating matters subject to actual or threatened parallel proceedings. In the *SVM* case, civil proceedings were in issue, and criminal proceedings were not expressly considered. However the same logic would appear to apply to threatened criminal proceedings.

The question as to the nature of regulatory investigations and enforcement action has not been directly considered by the Royal Court in Guernsey. However, in *Bordeaux Services (Guernsey) Limited et al v The GFSC* (18/2016) at para 28 the Deputy Bailiff made obiter comments in the context of a GFSC enforcement action that:

"The availability of discretionary financial penalties as one of the sanctions that can be imposed raises such cases to a level where the process is quasi-criminal."

The categorisation of regulatory investigations, in particular where powers to compel production of information are exercised and sanctions later applied, remains a difficult question and one which may be the subject of later legislative refinement or court challenge.

Issues for Interview Subjects

The glaring issue for subjects of GFSC interviews is that the right not to respond to questions available in civil, criminal or other proceedings is not available in responding to GFSC questioning under compulsion.

Given the considerable sanctions which the GFSC may impose upon individuals and firms, subjects are unlikely to draw much comfort from the fact that they are being compelled to answer questions in a regulatory investigation rather than a criminal one. The consequences for subjects in either action are potentially substantial.

Information Sharing

The regulatory laws provide that statements made under compulsion may not be used against the subject in criminal proceedings, except in exceptional circumstances. Those exceptional circumstances are principally where the subject puts the statement into issue in their own evidence in criminal proceedings, or in connection to offences of perjury, perverting the course of justice or similar. In general terms, statements given under compulsion in regulatory investigations cannot therefore be used against the subject in criminal proceedings.

But the trouble does not stop there. That the statement cannot be used against the subject as evidence in criminal proceedings against them does not put a stop to the potential repercussions of such a statement having been made.

- Once made, any recording or transcript of the statement is vulnerable to disclosure in civil, criminal or other proceedings.
- Statements made to the GFSC may be shared with prosecuting authorities in appropriate circumstances.
 - Such statements may be used as evidence against a person other than the subject / deponent.
 - The information in the statement may enable prosecuting authorities to assemble other evidence, of which they would otherwise have been unaware, to make a case against the subject.
- Statements made to the GFSC may be shared with prosecuting authorities and/ or regulators in other jurisdictions in appropriate circumstances.
 - It may be that the statements provide overseas prosecutors with information regarding the subject which would not otherwise have been obtainable (say by reason of domestic laws on self-incrimination preventing such statements from being taken). We would expect disclosure to such authorities to be done subject to undertakings regarding the use to which the disclosure may be put, but there are no guarantees that this will happen.
 - For authorities concerned with actions other than criminal actions (e.g. regulation, competition etc.) there is less of an argument to be made for undertakings restricting a statement's use.

Conclusions

Regulatory investigations open individuals to a minefield of risks, both in terms of regulatory enforcement and also in terms of how they interact with civil litigation and criminal prosecutions. While in non-regulatory matters, subjects may be advised to make full use of their right not to comment, the same luxury does not apply in regulatory investigations.

Unsurprisingly we recommend that subjects of GFSC interviews seek legal advice, and do so early in the process. Such advice can assist subjects in preparing for and responding to questioning as effectively as possible. Considered engagement with the GFSC can be highly beneficial in avoiding or limiting the application of regulatory sanctions, and managing collateral risks of civil and criminal enquiries. Co-operation with enquiries is a key mitigating factor noted in GFSC sanctions decisions. Where a person is compelled to respond to questions, the issue for them is not so much whether to engage, but how.

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