

# Handling a regulatory investigation: You received a letter from the insurance regulator – Now what?

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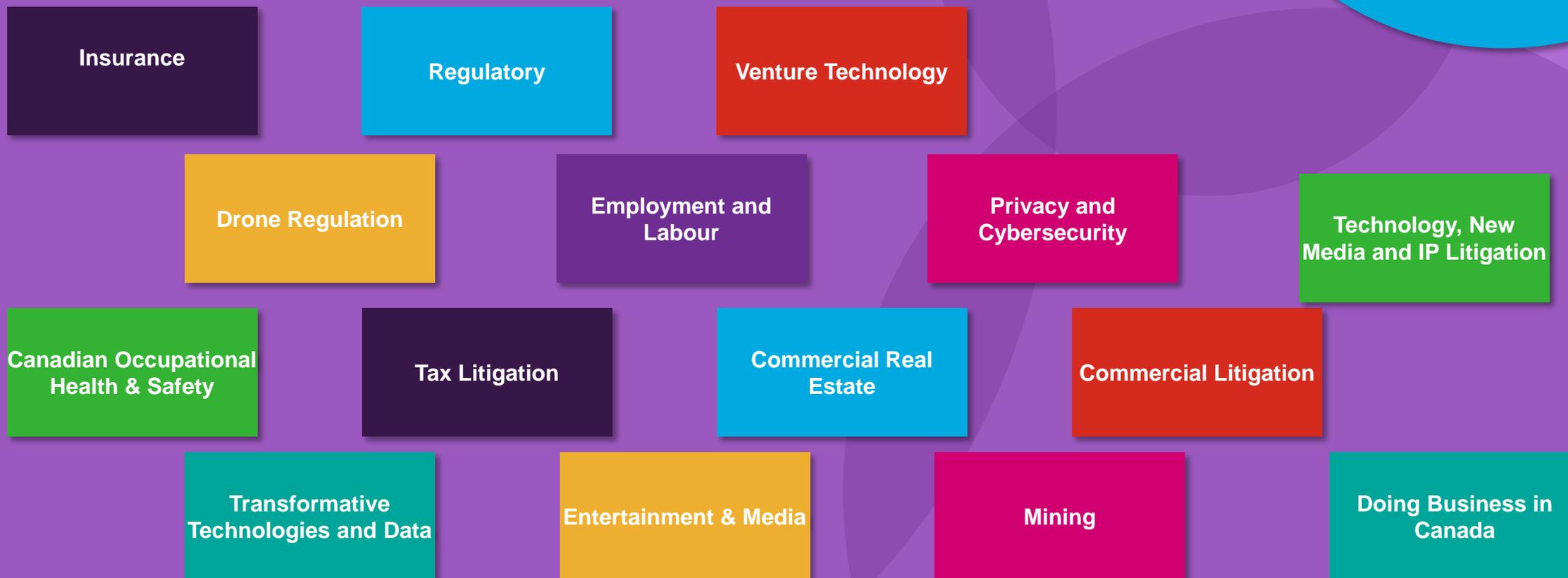


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# Handling a regulatory investigation:

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# Handling a regulatory investigation: You received a letter from the insurance regulator – Now what?

## Agenda

1. **What is an Investigation?**
2. **First Crucial Steps**
3. **Optimal Response to the Regulator**
4. **Managing Reputation Risks**
5. **Rights and Remedies**
6. **Final Thoughts**
7. **Questions**

# Regulators and how they investigate



**“Remember the hierarchy of competence – see one, do one, teach one, become a regulator.”**

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# What is an investigation?

*“The formal and systematic examination or search into an organization, its business and personnel”*

## Know how to recognize the start of an investigation:

- Any communication from a Regulator has to be reviewed with care, especially when the Regulator is seeking information, disclosure and materials from your organization or even access to your premises and employees.
- Could be in the form of a phone call, an email or a formal letter.

## What is the nature of the investigation?

- What information is a Regulator seeking and for what purpose?
  - How is that information relevant to an investigation?
- What is the scope of the investigation?
  - Is this an institutional question?
  - Is this an investigation of an individual?
  - Is this an investigation of a market practice?
- Is there a consumer protection element?
- Does it involve any other regulatory authorities?



# Your first steps are crucial



## 1. Assemble your team.

- Define roles and responsibilities immediately.
- Contact outside counsel and advisors.
- Access technology support (eDiscovery).
- Be cautious to ensure that the team is effective without unnecessarily increasing its members to an unmanageable size.

## 2. Compliance and management must be alerted.

- All corporate protocols regarding formal notifications should be followed.

## 3. Develop early measures to respond to an investigation.

- Develop a strategy for document preservation (both hardcopy and digital, including phones, social media, email).
- Preserve all potentially relevant documents and identify sources of documents.
- Suspend routine document destruction procedures.
- Identify any material parties, whether or not related to your organization.
- Implement immediate human resources actions, if required.
- Develop potential remediation strategies.

# Your first steps are crucial - continued

## 4. Messaging and communication.

- Consider what communication needs to be made INTERNALLY regarding the investigation.
- Consider what messaging to the public is required (in many instances – immediate public communication is not necessary).
- Determine who has authority to act as the point person to answer all questions internally, externally and with the regulators.
- Maintain proper protocols to keep management and board up to date on the investigation.

## 5. Work with outside advisors.

- Maintain audit logs and a central repository of all relevant information, including all correspondence between the Regulator and all involved parties.
- Maintain a record of people involved in the investigation including contact information.
- Create a data time line and data map.
- Create a reference list, including all relevant legislation, guidance, industry precedents.
- Create a response timeline and a method to track deliverables and reporting for each work stream.
- Coordinate meetings to ensure effective communication.



**DEVELOP YOUR THEORY OF THE OPTIMAL RESPONSE and WORK IN SUPPORT OF THAT THEORY.  
FRAME EVERY RESPONSE WITH THAT THEORY IN MIND.**

# Document collection & preservation of information

- Understand all of the sources and custodians of documents where relevant information may be found.
  - Sources and custodians extend beyond primary personnel, and can include documents held by secondary sources like compliance, legal, finance, management, external consultants.
  
- Develop a protocol to secure all documents in a fast and efficient manner, whereby the meta data is not corrupted or modified.
- Secure documentation while identifying all privileges and confidentiality.
- Always work with the general counsel's office (outside counsel) when assembling the documentation.
  
- Sources can include:
  - Emails, phone records, financial records, SMS, texts or social media posts
  - Hard copy notes and documentation
  - Electronic recordings in customer management programs
  - File documents held on document management system (in all media formats)
  - Personal computers, phones and other devices



# How NOT to respond.



*“You regulators are never satisfied. You wanted more transparency, so we put more windows in the building.”*

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# Responding to the regulator – Top three considerations

## 1. Does the Regulator have jurisdiction?

- Does the Regulator have the ability (legally and practically) to compel the production of information and documents.
- Is the jurisdiction or the investigation limited geographically?
- Does the investigation encroach upon other existing investigations?
- What is the regulatory process (legislative or otherwise) and what flexibility exists to deviate or modify?

## 2. What is the form of the request from the investigator?

- Who is the lead investigator – what department is charged with the investigation?
- Does the Regulator or another division of the regulatory authority already have the information being sought?
- Will the information be shared amongst other Regulators?
- Are there privacy and confidentiality concerns?
- What prompted the investigation – is it a consumer complaint or is it initiated by the Regulator?

## 3. When do you have to respond?

- Timelines can be tight in regulatory investigations.
- Do the timelines match the volume of work required to adequately respond. Is an extension is required?

# Responding to the regulator – What options are available?

## **What is the best method to respond to the regulator:**

1. Informal meetings with investigating Regulator (in person or by phone).
2. Informal response in writing to the investigator (letters and/or email correspondence).
3. Formal written response.
4. Formal oral submissions.
5. Challenge jurisdiction or information requests to stop or narrow scope of investigation.
6. Any combination of the above.

## **Consider parallel responses or proceedings:**

- Informal communications with other Regulators.
- Judicial or other regulatory determinations.
- Escalation meetings within the regulatory authority.
- Government relations response.

# Know the facts of the case

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**"Can we, just for a moment, Your Honor,  
ignore the facts?"**

# Submissions to the regulator: Top 10 tips

1. Be as factual as possible, with relevant and accurate data.
2. All responses should be prepared with the understanding that those submissions and the information provided may be produced and used in a hearing. Do NOT respond in piece meal fashion or in a rushed manner.
3. Format the responses such that the information is conveyed in the most succinct and clear manner.
4. Always request context from the Regulator as to the nature of the investigation so that your response is tailored to address regulatory concerns.
5. Be responsive to the questions being asked.
6. Cite documents which support the organization's submissions.
7. Employ litigation strategies where required.
8. Be specific in your explanation - Do not assume the Regulator understands your business and your terminology.
9. Rely on past rulings or precedents when making submissions (including enforcement actions, guidance, advisories, white papers).
10. Confirm protection of confidential information prior to delivery.

**REMEMBER THE THEORY OF THE OPTIMAL RESPONSE**

# The importance of evidence



**No one has better information than the Organization in the context of an Investigation.**

**Identify the documents and the information that will either support your response or refute any incorrect premises being advanced in the investigation.**

- Often an investigation is initiated and is based on (1) imperfect information; (2) an incorrect interpretation of a statute, regulation or guidance; or (3) an assertion that misstates one or more material facts.
- Whether through the documents produced, through the investigation, or by facts obtained from personnel within the organization (or third party suppliers), information can be used to qualify, correct or refute various tenets of the investigation.
- Information regarding compliance standards and the monitoring of compliance within the organization (internal audits) can be used to demonstrate the organization's commitment to a culture of compliance.
- Information can demonstrate the due diligence efforts of the organization and its personnel.
- Information regarding written policies, protocols and other procedural safeguards can assist when responding to an investigation (particularly where the assertion in the investigation alleges intentional wrongdoing or bad faith).
- Use industry experts to establish commercial practices or industry norms.
- Understand the information that provides the competing or alternate narrative to that which is being presented by the investigation.

# Communication and reputation risk



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# Managing reputation risk

## Orders and Sanctions are generally made public

- Any intervention by a Regulator in respect of your organization carries the potential for SIGNIFICANT reputational risk with both the public and the Regulator.
- Several Regulators (whether by statute or practice) implement “*credit for cooperation*” on the part of the regulated entity.
- If there is a problem or a violation – can it be contained to a single act or single actor – such that the organization’s integrity is not undermined.
- The form and content of the response can also assist to manage reputation risk – an early concession in the event of an unintentional error can mitigate the effects of a prolonged investigation that could continually impair the organization’s reputation.
- Context is important – if your organization is facing a single complaint from a single consumer, consider highlighting the breadth and scope of its operations, its customer base and its transaction volume.
- Highlight the record and history of the organization and its contributions to the economy, the industry, the province, the community and its residents.
- Use extreme caution before taking any strategy that attacks a complainant or the Regulator – in the court of public opinion Regulators and the individuals they seek to protect are generally viewed as “*honest brokers*”.
- Emphasize the organization’s level of cooperation and transparency in the investigation.

# Messaging responses to an investigation and potential risks

- If the investigation is the subject of a press release, post any preliminary or interim Order on their public website or is otherwise known to the public, some form of communication may be necessary, particularly if the Regulator's public statement makes assertions of intentional wrongdoing or consumer prejudice.
- Any public statement should be determined by the Team charged with responding to the investigation, and a process or protocol should be set to ensure public statements are approved, consistent, and aligned with the response to the investigation the organization is pursuing.
- Public Statement required -- caution must be exercised before any type of negative communication is chosen (i.e. attacking the methodology or *bona fides* of the Regulator, undermining a complainant, invoking "common industry practice" to justify the organization's compliance shortcomings or alleging some form of bias).
- Consider other external sources that can provide a complementary statement or support, (i.e. an industry association, community group or political/ interest group, as the intervention of other voices not directly associated to the organization can lend credibility to the organization's response).
- A public statement can also build goodwill with the Regulator, by indicating where the organization is cooperating with the investigation, which aligns with the strategy of achieving "credit for cooperation" from the Regulator.

# Rights & remedies in a regulatory hearing



- Pay close attention to the statute or the regulation under which the investigation is being conducted so that the organization knows and understands what review or appeal rights are available in the event of an adverse finding or determination, and before whom and under what conditions these review and appeal rights can be exercised.
- In many regulatory settings, formal rules of evidence or procedures can sometimes be relaxed, but that does not remove the organization's ability to object to processes or information gathering which are unfair or which threaten to prejudice the organization – e.g. to the extent there are review or appeal rights from a determination in an investigation, it is important that the organization register its objection or opposition in a timely manner.
- The organization may have the ability to participate in the formulation of the rules or processes of the investigation and any hearing resulting from it.
- Most investigations present multiple opportunities for the organization to propose to the Regulator partial or full resolution of the matters being raised by the Regulator.

# What does success look like?

**What is Success for the organization and the individuals involved? What are the keys to a successful outcome?**

- It is always preferable to succeed at first instance in any investigation, meaning the Regulator either:
  - (1) discontinues the investigation; or
  - (2) makes findings following the investigation favourable to the organization.
- In many circumstances, securing a discontinuance of an investigation or favourable findings to the organization is not possible for a variety of reasons – in such circumstances creating the best record within the investigation for the organization will enhance the chances of obtaining a better determination from a review panel within the regulatory structure or from the courts.



# Managing litigation risks arising from a regulatory investigation

**A regulatory investigation never exists in a vacuum.**

Where a Regulator initiates an investigation, you need to understand that other market participants, including consumers, distributors, suppliers or competitors as well as other Regulators, will be monitoring the progress and outcome of the Regulator's investigation.

The organization's response to the investigation should include the following considerations:

- Even if the investigation results in a penalty, that penalty does not preclude other Regulators from initiating similar investigations in their jurisdictions, nor does it preclude one or multiple plaintiffs initiating civil actions.
- Disclosure being made in the course of the investigation can create new, unforeseen exposure for additional regulatory inquiries or civil actions – the scope and content of what is being disclosed must be closely scrutinized to avoid the circumstance where new liabilities are divulged.
- If personnel of the organization are to be interviewed, do they need to invoke the various protections of the provincial *Evidence Act* provisions, and potentially section 13 of the *Charter of Rights and Freedoms*. Ensure that the organization understands the limits of those protections.
- Has the organization looked at the maximum penalties that could result, and considered whether an early resolution, including acceptance of a maximum sanction being imposed is still preferable to making fulsome disclosure about the organization that could potentially be available for others to review.
- If the Regulator is seeking acceptance of an agreed statement of facts or findings by the organization, to what extent is such an agreed statement available to the public, and to what extent is the organization permitted to negotiate the form and content of the statement?

# Final thoughts ...

- Regulatory investigations are becoming more formalized and complex.
- Regulators are dedicating the resources and subject-matter expertise required to conduct fulsome investigations they initiate.
- The risks associated with these investigations extend beyond the scope of the investigation itself.
- The days of *ad hoc* or informal responses to a regulatory investigation are past – if the organization is the target of an investigation, you need to carefully prepare the response, taking into account all the risks both the investigation and the content of the organization's response can pose.



**"This will help us stay one step ahead of the bank regulators."**

# Thank you



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