

Chapter 6

Penalties

6.7 Discount for early settlement

6.7.1 **G** *Persons* subject to enforcement action may be prepared to agree the amount of any financial penalty, or the length of any period of suspension, restriction, condition, limitation or disciplinary prohibition (see ■ DEPP 6A), and other conditions which the *FCA* seeks to impose by way of such action. These conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The *FCA* recognises the benefits of such agreements, as they offer the potential for securing earlier redress or protection for consumers and a cost saving to the *person* concerned and to the *FCA* in contesting the financial penalty or other disciplinary action. The penalty that might otherwise be payable, or the length of the period of suspension, restriction, condition or disciplinary prohibition that might be imposed, for a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.

6.7.2 **G** **The settlement discount scheme applied to financial penalties**
 In appropriate cases the *FCA*'s approach will be to negotiate with the *person* concerned to agree in principle the amount of a financial penalty having regard to the *FCA*'s statement of policy as set out in ■ DEPP 6.5 to ■ DEPP 6.5D and ■ DEPP 6.6. (This starting figure will take no account of the existence of the *settlement discount scheme* described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the scheme set out in ■ DEPP 6.7.3G to ■ DEPP 6.7.3CG. The resulting figure ("B") will be the amount actually payable by the *person* concerned in respect of the *breach*. However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.

6.7.3 **G**

- (1) Subject to ■ DEPP 6.7.3G(4) a settlement discount is available only in cases where a *settlement agreement* (which may be a *focused resolution agreement*) is reached during the period from commencement of an investigation until the *FCA* has:
 - (a) a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty; and
 - (b) communicated that assessment to the *person* concerned and given them reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1").
- (2) The communication of the *FCA*'s assessment of the appropriate penalty for the purposes of ■ DEPP 6.7.3G(1)(b) need not be in a

prescribed form but will include an indication of the *breaches* alleged by the *FCA*. It may include the provision of a draft *warning notice*.

- (3) Subject to ■ DEPP 6.7.3.G(4), in relation to any *settlement agreement* other than a *focused resolution agreement* the reduction in penalty will be as follows:
 - (a) 30% if the agreement is concluded during stage 1; and
 - (b) 0% in any other case.
- (4) Where stage 1 has been started but no *settlement agreement* has been agreed before 1 March 2017:
 - (a) if any agreement is reached to settle the case between the period from the end of stage 1 until the expiry of the period for making representations, or, if sooner, the date on which the representations are sent in response to the giving of a warning notice, there will be a reduction of 20% in the penalty; and
 - (b) if any agreement is reached to settle the case between the expiry of the period of making representations, or, if sooner, the date on which representations are sent in response to the giving of a warning notice and the giving of a decision notice, there will be a reduction of 10% in the penalty.

6.7.3A

G The reductions in penalty in cases involving a *focused resolution agreement* will be as follows.

- (1) Where agreement is reached in relation to all relevant facts and all issues as to whether those facts constitute a *breach* (or more than one *breach*):
 - (a) 30% if the agreement is concluded during stage 1; and
 - (b) 0% in any other case.
- (2) Where agreement is reached in relation to all relevant facts:
 - (a) 15 to 30% if the agreement is concluded during stage 1; and
 - (b) 0% in any other case.
- (3) Where the agreement reached does not fall within either ■ DEPP 6.7.3AG(1) or ■ DEPP 6.7.3AG(2):
 - (a) 0 to 30% if the agreement is concluded during stage 1; and
 - (b) 0% in any other case.
- (4) Where a *focused resolution agreement* is followed:
 - (a) before the end of stage 1, by a complete *settlement agreement*, the reduction is determined under ■ DEPP 6.7.3G and not ■ DEPP 6.7.3AG.
 - (b) after the end of stage 1, by a complete *settlement agreement*, the reduction is determined under ■ DEPP 6.7.3AG and not ■ DEPP 6.7.3G.

- 6.7.3B** **G** The decision maker responsible for applying **DEPP 6.7.3AG** is:
- (1) The *settlement decision makers* in cases in which the *focused resolution agreement* is followed, after stage 1 has ended, by a complete *settlement agreement*.
 - (2) The *RDC* in all other cases.
- 6.7.3C** **G** Where **DEPP 6.7.3AG** specifies that the reduction will be within a range, the decision maker identified by **DEPP 6.7.3BG** will determine the appropriate figure within the range. Factors relevant to this determination may include:
- (1) the extent to which the position taken by the *person* subject to enforcement action on the disputed issues at the time the *focused resolution agreement* is entered into is reflected in the terms of the *decision notice*.
 - (2) any saving of time or public resources as a result of the *focused resolution agreement*.
- 6.7.4** **G**
- (1) Any *settlement agreement* between the *FCA* and the *person* concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.
 - (2) In certain circumstances the *person* concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by the table at **DEPP 6.7.3G** (3). It may be, for example, that the *FCA* no longer wishes to pursue its action in respect of all of the acts or omissions previously alleged to give rise to the *breach*. In such cases, the *person* concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, *FCA* staff may consider that greater openness from the *person* concerned could have resulted in an earlier settlement.
 - (3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.
 - (4) However, in exceptional cases the *FCA* may accept that there has been a substantial change in the nature or seriousness of the action being taken against the *person* concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the *FCA* and *person* concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible or, where the *settlement agreement* is a *focused resolution agreement*, the decision maker identified by **DEPP 6.7.3BG** may take this into account when determining the appropriate figure within the applicable range.

6.7.5 **G** In cases in which the *settlement discount scheme* is applied, the fact of settlement and the level of the discount to the financial penalty imposed by the *FCA* will be set out in the *final notice*.

The settlement discount scheme applied to suspensions, restrictions and conditions

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6.7.6 **G** The *settlement discount scheme* which applies to the amount of a financial penalty, described in ■ DEPP 6.7.2 G to ■ DEPP 6.7.5 G, also applies to the length of the period of a suspension, restriction, condition or disciplinary prohibition (other than a permanent disciplinary prohibition), having regard to the *FCA*'s statement of policy as set out in ■ DEPP 6A.3. No settlement discount is available with respect to a permanent disciplinary prohibition. The *settlement discount scheme* does not apply to the length of the period for which approvals under section 59 of the *Act* have effect as a result of a limitation, as different considerations apply to determining the appropriate length of this period: see ■ DEPP 6A.1.5G and ■ DEPP 6A.3AG. However, the *FCA* will take into account that the *approved person* is willing to enter into a settlement agreement when determining the appropriate period.