

**Enforcement Guide**

# Chapter 5

# Settlement

## 5.1 Settlement and the FCA – an overview

- 5.1.1** The *FCA* resolves many enforcement cases by settlement. Early settlement has many potential advantages as it can result, for example, in *consumers* obtaining compensation earlier than would otherwise be the case, the saving of *FCA* and industry resources, messages getting out to the market sooner and a public perception of timely and effective action. The *FCA* therefore considers it is in the public interest for matters to settle, and settle early, if possible.
- 5.1.2** The possibility of settlement does not, however, change the fact that enforcement action is one of the tools available to the *FCA* to secure our *statutory objectives*. The *FCA* seeks to change the behaviour not only of those subject to the immediate action, but also of others who will be alerted to our concerns in a particular area. There is no distinction here between action taken following agreement with the subject of the enforcement action and action resisted by a firm before the *RDC* (including action taken following a *focused resolution agreement*). In each case, the *FCA* must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.
- 5.1.3** Settlements in the *FCA* context are not the same as ‘out of court’ settlements in the commercial context. An *FCA* settlement is a regulatory decision, taken by the *FCA*, the terms of which are accepted by the *firm* or individual concerned. So, when agreeing the terms of a settlement, the *FCA* will carefully consider its *statutory objectives* and other relevant matters such as the importance of sending clear, consistent messages through enforcement action, and will only settle in appropriate cases where the agreed terms of the decision result in acceptable regulatory outcomes. Redress to *consumers* who may have been disadvantaged by a *firm’s* misconduct may be particularly important in this respect. Other than in exceptional circumstances, *FCA* settlements that give rise to the issue of a *final notice* or *supervisory notice* will result in some degree of publicity (see ■ chapter 6), unlike commercial out of court settlements, which are often confidential.
- 5.1.4** In recognition of the value of early settlement, the *FCA* operates a scheme to award a discount for early settlement of cases involving financial penalties, suspensions, restrictions and disciplinary prohibitions. Details of the scheme, which applies only to settlement of cases where investigators were appointed on or after 20 October 2005, are set out in ■ DEPP 6.7. This chapter provides some commentary on certain practical aspects of the operation of the scheme.

## 5.1.5

Some decisions on settlements and *statutory notices* arising from them are taken by two members of the FCA's senior management, rather than by the RDC (DEPP refers to these individuals as the '*settlement decision makers*'). Full details of the special decision making *arrangements* for settlements are set out in ■ DEPP 5.

## 5.2 When settlement decisions may take place

- 5.2.1** Settlement discussions between *FCA* staff and the *person* concerned are possible at any stage of the enforcement process if both parties agree.
- 5.2.2** The *FCA* considers that in general, the earlier settlement discussions can take place the better this is likely to be from a public interest perspective. However, the *FCA* will only engage in such discussions once it has a sufficient understanding of the nature and gravity of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome. At the other end of the spectrum, the *FCA* expects that settlement discussions following a *decision notice* or *second supervisory notice* will be rare.
- 5.2.3** In the interests of efficiency and effectiveness, the *FCA* will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from progressing a case through the formal process. To this end, the *FCA* will aim to organise its resources so that the preparation for the formal process continues in parallel with any settlement discussions. The *FCA* will expect *firms* and others to give it all reasonable assistance in this regard.
- 5.2.4** The *FCA* will engage senior management in discussions (either heads of department or directors), liaising where appropriate with the *settlement decision makers*, attending a without prejudice meeting during discussions or arranging for the attendance of an appropriately senior *FCA* representative.

## 5.3 The basis of settlement discussions

### 5.3.1

As set out in ■ DEPP 5, special decision-making arrangements apply in relation to settlement. The *person* concerned may agree all relevant issues with the FCA (in which case the *settlement decision makers* will give all relevant *statutory notices*). Alternatively, a *focused resolution agreement* may be agreed (in which case the *settlement decision makers* are responsible for giving the *warning notice* and the RDC for giving any *decision notice*). The FCA would expect to hold any settlement discussions on the basis that neither FCA staff nor the *person* concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the RDC or the *Tribunal* unless those admissions or statements are recorded in a *focused resolution agreement*. This will not, however, prevent the FCA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions. The RDC may be made aware of the fact negotiations are taking place if this is relevant, for example, to an application for an extension of the period for making representations.

### 5.3.2

If the settlement negotiations result in a proposed settlement of the dispute, FCA staff will put the terms of the proposed settlement in writing and agree them with the *person* concerned. The *settlement decision makers* (and, as the case may be, the RDC) will then consider the matter under the procedures set out in ■ DEPP 5. A settlement is likely to result in the giving of *statutory notices* (see ■ EG 2.15.1 to ■ EG 2.15.3).

## 5.4 Multiple parties and third party rights in enforcement action involving warning and decision notices

- 5.4.1** Enforcement cases often involve multiple parties, for example a *firm* and individuals in the *firm*. Enforcement action may be appropriate against just the *firm*, just the individuals or both. In some cases, it will not be possible to reach an acceptable settlement unless all parties are able to reach agreement.
- 5.4.2** Even where action is not taken against connected parties, these parties may have what the *Act* calls ‘third party rights’. Broadly, if any of the reasons contained in a *warning notice* or *decision notice* identifies a *person* (the third party) other than the *person* to whom the notice is given, and in the opinion of the *FCA* is prejudicial to the third party, a copy of the notice must be given to the third party unless that *person* receives a separate *warning notice* or *decision notice* at the same time. The third party has the right to make representations and ultimately can refer the matter to the *Tribunal*. Any representations made by the third party in response to a *warning notice* or *decision notice* will be considered by the *settlement decision makers*, who will also decide whether to give the *decision notice* or *final notice*.
- 5.4.3** In practice, third party rights do not frequently cause undue difficulty for settlement, either because they do not arise at all or because the third party agrees not to exercise such rights.

## 5.5 The settlement discount scheme

- 5.5.1** The *settlement discount scheme* allows a reduction in a financial penalty or period of suspension, restriction or condition that would otherwise be imposed on a *person* according to the stage at which the agreement is reached. Full details of the scheme are set out in ■ DEPP 6.7.
- 5.5.2** Normally, where the outcome is potentially a financial penalty, suspension, restriction, condition or disciplinary prohibition, the *FCA* will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the *FCA* refers to as a stage 1 letter. The *FCA* will aim to give 28 *days'* notice of the beginning of stage 1 to allow the parties involved to make administrative arrangements, e.g. ensuring that key staff can be available to participate where necessary in any settlement discussions. Where appropriate, the *FCA* will offer a preliminary without prejudice meeting to explain the *FCA's* view of the misconduct (including the key factual and legal bases for our view), and to give the *firm* or individual an opportunity to identify where they believe there are errors in the factual basis and to indicate the extent to which they agree with the outline findings.
- [**Note:** stage 1 is the period from commencement of an investigation until the *FCA* has a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty (or suspension, restriction, condition or disciplinary prohibition, or combination thereof). The *FCA*, at stage 1, also needs to have communicated that assessment to the *person* concerned and allowed a reasonable opportunity to reach agreement as to the amount of penalty or the length of any suspension, restriction, condition or temporary disciplinary prohibition.]
- 5.5.3** The *settlement discount scheme* does not apply to civil or criminal proceedings brought in the courts, or to *public censures, prohibition orders, withdrawal of authorisation* or approval, limitations of the period for which any approval is to have effect, or the payment of compensation or redress.
- 5.5.4** There is no set form for a stage 1 letter though it will always explain the nature of the misconduct, the *FCA's* view on the sanction, and the period within which the *FCA* expects any settlement discussions to be concluded. In some cases, a draft *statutory notice* setting out the alleged *rule* breaches and the proposed sanction may form part of the letter, to convey the substance of the case team's concerns and reasons for arriving at a particular level of sanction. The *FCA* will identify the key evidence on which its case relies at the commencement of stage 1. While the *FCA* will identify the key evidence that underpins our outline findings, the *FCA* will not generally provide

evidence where that evidence is already in the possession of the *firm* or individual.

**5.5.5**

The timing of the stage 1 letter will vary from case to case. Sufficient investigative work must have taken place for the *FCA* to be able to satisfy itself that the settlement is the right regulatory outcome. In many cases, the *FCA* can send out the stage 1 letter substantially before the *person* concerned is provided with the *FCA*'s preliminary investigation report (see paragraphs ■ 4.13.1 to ■ 4.13.4). The latest point the *FCA* will send a stage 1 letter is when the *person* is provided with the preliminary investigation report.

**5.5.6**

The *FCA* considers that 28 days following a stage 1 letter will normally be the 'reasonable opportunity to reach agreement as to the amount of penalty' before the expiry of stage 1 contemplated by ■ DEPP 6.7.3G. Extensions to this period will be granted in exceptional circumstances only, and factors that will be taken into account in considering an application will include the extent to which factors outside the *firm's* or individual's control will have a material impact on their ability to engage in settlement negotiations within the period set out in the stage 1 letter.

**5.5.7**

The procedure for the *settlement discount scheme* where the outcome is potentially a financial penalty, described in paragraphs ■ 5.5.1 to ■ 5.5.6, will also apply where the outcome is potentially a suspension, restriction or condition.





## 5.6 Mediation

- 5.6.1** The *FCA* is committed to mediating appropriate cases; mediation and the involvement of a neutral mediator may help the *FCA* to reach an agreement with the *person* subject to enforcement action in circumstances where settlement might not otherwise be achieved or may not be achieved so efficiently and effectively.
- 5.6.2** Further information about the *FCA*'s approach to mediation and the mediation process are set out on our web site.

## 5.7 The relevance of settled cases to subsequent action

**5.7.1** Decisions recorded in *FCA final notices* or *supervisory notices* will be taken into account in any subsequent case if the later case raises the same or similar issues to those considered by the *FCA* when it reached its earlier decision. Not to do so would expose the *FCA* to accusations of arbitrary and inconsistent decision-making. The need to look at earlier cases applies irrespective of whether the decisions were reached following settlement or consideration by the *RDC* or the *Tribunal*. This reflects the fact that a person's agreement to the action proposed by the *FCA* in the earlier case would not have relieved the *FCA* of the obligation to ensure that the final decision was the right regulatory outcome, both for the person concerned and more generally.

**5.7.2** The *FCA* recognises the importance of consistency in its decision-making and that it must consider the approach previously taken to, say, the application of a particular *rule* or *Principle* in a given context. This applies equally to consideration by the *RDC* or by the *settlement decision makers* when they look at action taken by the *FCA* in earlier, similar, cases. This is not to say that the *FCA* cannot take a different view to that taken in the earlier case: the facts of two enforcement cases are very seldom identical, and it is also important that the *FCA* is able to respond to the demands of a changing and principles-based regulatory environment. But any decision to depart from the earlier approach will be made only after careful consideration of the reasons for doing so.