

Chapter 5

Settlement decision procedure

5.1 Settlement decision makers

Introduction

5.1.1

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(1) A *person* subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the FCA.

Alternatively, they may enter into a *focused resolution agreement* and in this way partly contest the proposed action (see ■ DEPP 5.1.8AG to ■ DEPP 5.1.8DG).

(1A) Further, even if the *person* subject to enforcement action wishes to fully contest the proposed enforcement action, they may choose to do so by (i) agreeing to the FCA issuing the required *statutory notices* and (ii) then making an expedited reference of the matter to the *Tribunal* (see ■ DEPP 5.1.8EG to ■ DEPP 5.1.8JG).

(2) The fact that a *person* does any of these things will not usually obviate the need for *statutory notices* recording the FCA's proposal and decision to take action. As set out in this chapter, senior FCA staff have a role to play in giving the requisite *statutory notices*:

(a) where a *person* enters into a *settlement agreement* (other than a *focused resolution agreement*), senior FCA staff will give both the *warning notice* and *decision notice*;

(b) where a *person* enters into a *focused resolution agreement*, senior FCA staff will give the *warning notice* and the RDC will decide whether to give a *decision notice* and the terms of any notice given; and

(c) where a *person* elects to make an expedited reference to the *Tribunal* before a *warning notice* has been issued, senior FCA staff will then give the *warning notice* and *decision notice*.

(3) These decisions by senior FCA staff will be taken jointly by two members of the FCA's senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level (the "*settlement decision makers*").

(4) At least one of the *settlement decision makers* will not be from the Enforcement and Financial Crime Division. The other *settlement decision maker* will usually be, but need not be, from the Enforcement and Financial Crime Division. A *settlement decision maker* will not have been directly involved in establishing the evidence on which the decision is based.

- (5) "Statutory notice" for these purposes:
 - (a) means any *statutory notice* the giving of which would otherwise require a decision by the *RDC*;
 - (b) includes a *statutory notice associated decision*.

Procedure: general

5.1.2 **G** A person who is or may be subject to enforcement action may wish to discuss the proposed action with *FCA* staff through settlement discussions.

5.1.3 **G** Settlement discussions may take place at any time during the enforcement process if both parties agree. This might be before the giving of a *warning notice*, before a *decision notice*, or even after referral of the matter to the *Tribunal*. But the *FCA* would not normally agree to detailed settlement discussions until 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. Settlement after a *decision notice* will be rare.

5.1.4 **G** *FCA* staff and the person concerned may agree that neither the *FCA* nor the person concerned would seek to rely against the other on any admissions or statements made in the course of their settlement discussions if the matter is considered subsequently by the *RDC* or the *Tribunal*.

Procedure: participation of decision makers in discussions

- 5.1.5 **G**
- (1) The *settlement decision makers* may, but need not, participate in the discussions exploring possible settlement.
 - (2) If the *settlement decision makers* have not been involved in the discussions, but an agreement has been reached, they may ask to meet the relevant *FCA* staff or the person concerned in order to assist in the consideration of the proposed settlement.

- 5.1.6 **G** The terms of any proposed settlement:
- (1) will be put in writing and be agreed by *FCA* staff and the person concerned;
 - (2) may refer to a draft of the proposed *statutory notices* setting out the facts of the matter and the *FCA*'s conclusions;
 - (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the person concerned to:
 - (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FCA* and any secondary material which might undermine the *FCA* decision to give the *statutory notice*;
 - (b) waive and not exercise any rights under section 387 of the *Act* or otherwise to make representations to the *RDC* in respect of a *warning notice* or first *supervisory notice*;

- (c) not object to the giving of a *decision notice* before the expiry of the 14 day period after the giving of a *warning notice* specified under section 387 of the *Act*;
- (d) not dispute with the *FCA* the facts and matters set out in a *warning notice, decision notice, supervisory notice or final notice* and to waive and not exercise any right under section 208 (Decision notice) of the *Act* to refer the matter to the *Tribunal*.

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The *settlement decision makers* may:

- (1) accept the proposed settlement by deciding to give a *statutory notice* based on the terms of the settlement; or
- (2) decline the proposed settlement;

whether or not the *settlement decision makers* have met with the relevant *FCA* staff or the *person* concerned.

5.1.8

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- (1) Where the *settlement decision makers* decline to issue a *statutory notice* despite the proposed settlement, they may invite *FCA* staff and the *person* concerned to enter into further discussions to try to achieve an outcome the *settlement decision makers* would be prepared to endorse.
- (2) However, if the proposed action by the *FCA* has been submitted to the *RDC* for consideration, it will be for the *RDC* to decide:
 - (a) whether to extend the period for representations in response to a *warning notice or first supervisory notice*; or
 - (b) if representations have been made in response to a *warning notice or first supervisory notice*, whether to proceed to give a *decision notice or second supervisory notice*.

Procedure: focused resolution agreements

5.1.8A

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The issues which may be agreed under a *focused resolution agreement* include, but are not limited to:

- (1) questions of fact;
- (2) whether specified facts amount to a *breach* (or more than one *breach*);
- (3) whether action for a financial penalty and/or *public censure* is warranted;
- (4) the appropriate level of a financial penalty;
- (5) whether action for a suspension, restriction, condition or limitation (as defined for the purposes of ■ DEPP 6A) is warranted;
- (6) the appropriate length of a suspension, restriction, condition or limitation (as defined for the purposes of ■ DEPP 6A);

- (7) whether a *prohibition order* is warranted; and/or
- (8) the appropriate scope of such a *prohibition order*.

5.1.8B **G** The terms of any proposed *focused resolution agreement*:

- (1) will be put in writing and be agreed by *FCA* staff and the *person* concerned;
- (2) may refer to a draft of the proposed *warning notice*; and
- (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the *person* concerned to:
 - (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FCA* and any secondary material which might undermine the *FCA* decision to give the *statutory notice*, except in relation to material that is relevant to issues which remain in dispute; and
 - (b) not dispute the issues agreed with the *FCA* when:
 - (i) making representations to the *RDC* in respect of a *warning notice* (whether in exercise of rights under section 387 of the *Act* or otherwise); or
 - (ii) on any subsequent reference of the matter to the *Tribunal* under (except where the *Tribunal* decides of its own motion to reopen an issue or issues).

5.1.8C **G** Where the proposed settlement is on the basis of a *focused resolution agreement*, the role of the *settlement decision makers* shall be as follows:

- (1) The *settlement decision makers* will decide whether or not to give a *warning notice*. (For the avoidance of doubt, the *settlement decision makers* may meet the relevant *FCA* staff or the *person* concerned in accordance with ■ DEPP 5.1.5G and any such meeting shall not affect the *settlement decision makers*' ability to decide whether or not to give a *warning notice*).
- (2) If the *settlement decision makers* decline to give a *warning notice* based on the proposed *focused resolution agreement*, they may invite *FCA* staff and the *person* concerned to enter into further discussions to try to achieve an outcome the *settlement decision makers* would be prepared to endorse.
- (3) If the *settlement decision makers* are satisfied with the proposed *focused resolution agreement*, they shall give a *warning notice* based on the proposed resolution agreement which records the agreed position on the agreed issues and the position of the *FCA* on those issues which remain in dispute.
- (4) Where the *settlement decision makers* give a *warning notice*, the notice will specify the time allowed for making representations. This will not be less than 14 days.

- (5) The *settlement decision makers* will promptly inform the *RDC* that a *warning notice* has been given. The *FCA* will then specify a time within which the *recipient* of the notice is required to indicate whether they wish to make oral representations.
- (6) It will then be for the *RDC* to decide whether to give a *decision notice* under the procedure set out in ■ DEPP 3.2.16G to ■ DEPP 3.2.25G.

5.1.8D G For the avoidance of doubt, the decision whether to agree a proposed *focused resolution agreement* is entirely within the discretion of the *settlement decision makers*.

Procedure: expedited references to the Tribunal

5.1.8E G (1) The purpose of this section is to define a procedure (the “expedited reference procedure”) enabling a *person* subject to enforcement action to challenge the proposed action before the *Tribunal* without engaging with the *FCA*’s internal decision-making process.

(2) ■ DEPP 5.1.8FG to ■ DEPP 5.1.8IG set out the circumstances in which the expedited reference procedure is available, the steps a *person* must take to make use of the procedure, and how the procedure operates, depending on whether it is invoked before or after the *warning notice* is given.

5.1.8F G The expedited reference procedure is available only if:

- (1) the proposed action requires the *FCA* to issue a *warning notice*;
- (2) the *FCA* considers that it has a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty or other outcome; and
- (3) the *FCA* has communicated that assessment to the *person* concerned.

5.1.8G G To use the expedited reference procedure, the *person* subject to enforcement action must notify the *FCA* that they:

- (1) wish to make an expedited reference to the *Tribunal*; and
- (2) waive and will not exercise any rights under section 387(2) of the *Act* in respect of the *warning notice* given (or to be given) in relation to the proposed action.

5.1.8H G To use the expedited reference procedure before a *warning notice* has been given:

- (1) the notification set out in ■ DEPP 5.1.8GG must be given to *FCA* staff;
- (2) the decision to issue a *warning notice* will then be taken by the *settlement decision makers*; and

(3) the decision to issue a *decision notice* will also be taken by the *settlement decision makers*, taking into consideration any representations by any third party under section 393 of the *Act* or any *interested party* under section 63 or 67 of the *Act*.

5.1.8I **G** To use the expedited reference procedure after a *warning notice* has been given:

(1) the notification set out in ■ DEPP 5.1.8GG must be given to the *RDC*; and

(2) the decision to issue a *decision notice* will then be taken by the *RDC* in light of any representations by any third party under section 393 of the *Act* and any *interested party* under section 63 or 67 of the *Act*.

5.1.8J **G** Once a *decision notice* has been given as part of the expedited reference procedure (whether by the *settlement decision makers* or the *RDC*), it is the responsibility of the *person* subject to enforcement action to seek to refer the matter to the *Tribunal* under the *Act* if they so wish. If the matter is not referred to the *Tribunal* within the time required under section 390(1) of the *Act*, the *FCA* will, on taking the action to which the *decision notice* relates, give a *final notice*.

Procedure: warning notice statements

5.1.8K **G** If *FCA* staff consider that it is appropriate to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates and is given by the *settlement decision makers*, they will make a recommendation to the *settlement decision makers* that such information should be published.

5.1.8L **G** The *settlement decision makers* will then consider whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* falling within section 391(1ZB) of the *Act* relates. The *FCA*'s policy on publishing such information is set out in ■ EG 6.

5.1.8M **G** If the *settlement decision makers* propose that the *FCA* should publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates:

(1) the *settlement decision makers* will settle the wording of the statement it proposes the *FCA* should publish (*warning notice statement*);

(2) the *FCA* staff will make appropriate arrangements for the *warning notice statement* that the *settlement decisions makers* propose the *FCA* should publish to be given to the *persons* to whom the *warning notice* was given or copied;

(3) the proposed *warning notice statement* will specify the time allowed for the *recipient* to respond in writing to the *settlement decision makers*. This will normally be 14 days;

- (4) the *recipient* of a proposed warning notice statement may request the *settlement decision makers* to grant an extension of the time allowed for its response. Such a request must normally be made within seven *days* of the proposed warning notice statement being given; and
- (5) the *settlement decision makers* will not normally grant a request by a *person* to whom the warning notice statement was given to make their response in person.

5.1.8N G If no response to the proposed warning notice statement is received, the *FCA* will make appropriate arrangements to publish the warning notice statement.

5.1.8O G If the *settlement decision makers* receive a response from the *person* to whom the proposed warning notice statement was given, the *settlement decision makers* will consider their response and decide whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* relates.

5.1.8P G If the *settlement decision makers* decide that the *FCA* should publish a warning notice statement:

- (1) the *settlement decision makers* will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision;
- (2) the *settlement decision makers* will settle the wording of the warning notice statement; and
- (3) the *FCA* will make appropriate arrangements for the warning notice statement to be published.

5.1.8Q G If the *settlement decision makers* decide that the *FCA* should not publish a warning notice statement they will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision.

Settlement by mediation
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5.1.9 G The *FCA* and other parties may agree to mediation as a way of facilitating settlement in appropriate cases.

Third party rights
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5.1.10 G

- (1) ■ DEPP 2.4 sets out the *FCA*'s approach to giving third parties copies of *statutory notices* pursuant to section 393 (Third party rights) of the *Act*.
- (2) The decision to give a *warning notice* or a *decision notice* to a third party is a *statutory notice associated decision*.
- (3) In cases therefore where the decision to give a *warning notice* or *decision notice* is taken by *settlement decision makers*, those decision makers will decide whether a copy of the notice should be given to a

third party in accordance with section 393 of the *Act*. Any representations made by the third party in response to a *warning notice* will be considered by the *settlement decision makers*

