

# THE SETTLEMENT FRAMEWORK

AN OVERVIEW OF ITS APPLICATION IN PRACTICE

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At an awareness session on the Settlement Procedure conducted by the Financial Services Commission (the “Commission”) on the 12 April 2022, the Chief Executive of the Commission stressed that the Settlement Committee is not a ‘whitewashing’ instance and that settlement discussions might take place in parallel with any investigation, inquiry or referral to the Enforcement Committee which have already started. This means that, if the Settlement Committee is not satisfied with the representations of a licensee, the normal enforcement process will be pursued potentially with harsher sanctions than what would have been settled for.

The awareness session was aimed at shedding light on the practical application by the Commission of its Settlement Framework published, on 11 December 2020. The Settlement Framework sets out a method and procedure under which timely and proportionate enforcement outcomes can be achieved in suitable cases by engaging with the settlement committee of the Commission (**Settlement Committee**).

## *The process under the Settlement Framework*

Any member of the board of licensee or duly authorised member of senior management together with the licensee’s legal adviser may attend settlement discussions.

The Commission has indicated that they recognise the benefit in differentiating between the licensees who acknowledge regulatory breaches at an early stage and those who avoid doing so. Settlement discussions can take place at any point provided it takes place before the issuance of a decision notice. Discussions to reach a settlement are made on a ‘without prejudice’ basis and early acknowledgement by a licensee of its potential regulatory breach are considered favourably. A graduated penalty reduction scheme is applied with a reduction up to an administrative penalty on a sliding scale depending on the timing as to when the settlement is reached.

Where the settlement is reached at any stage before the matter is referred to the enforcement committee of the Commission (**Enforcement Committee**), a discount of 30% can be obtained on the administrative penalty. The discount is reduced to 10% when settlement is reached after the referral to the Enforcement Committee but before the issue of a warning notice.<sup>1</sup> A discount of only 5% is available if the settlement is reached after a Warning Notice is issued.

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<sup>1</sup> A warning notice is a notice issued by the Enforcement Committee to a licensee stating the intention of the Enforcement Committee to impose an administrative sanction, the type and terms of the administrative sanction and the right of the licensee to make written representations (**Warning Notice**).



### ***Relevant factors in assessing the proposal for settlement***

In considering the substance of any proposal for settlement by a licensee, the Settlement Committee may take into account the following factors:

- the nature, seriousness and impact of the conduct or suspected contravention that is the subject of the proposed settlement and whether such contravention is ongoing;
- the role played by the licensee in the conduct and/or suspected contravention that is the subject of the proposed settlement;
- whether a potential settlement, if reached, will achieve an effective outcome for those (such as consumers or investors) who have been adversely affected by the conduct and/or suspected contravention;
- whether the licensee will comply with the terms of any settlement agreement reached;
- the disciplinary record and compliance history of the licensee;
- the prospects of a swift and appropriate resolution of the matter; and
- whether the proposed terms of settlement delivers credible deterrence.

In weighing the sanctions to be considered in the settlement discussions, the Commission is required to follow the paramount principles of its enforcement policy which are: effectiveness and efficiency, fairness, transparency, proportionality and consistency. In particular, licensees would be well advised to stress during the discussions and/or written submissions that the enforcement manual of the Commission (**Enforcement Manual**) provides that the powers (of the Commission) are to be exercised judiciously and proportionately and in a manner which does not disrupt or interfere in the business activities of licensees beyond what is reasonably necessary for the achievement of the Commission's regulatory objectives.

### ***Purpose of the settlement procedure***

The objective of the Commission is to ensure the settlement of enforcement disputes in a manner which is consistent, proportionate, effective and in the public interest. Licensees should seek to address a maximum number of deficiencies identified by the Commission before the settlement discussions are actually scheduled so that they can come to this discussion with a clean slate. Promoting compliance is the key regulatory objective behind the application of disciplinary sanctions and enforcement policies by the Commission. Licensees should be mindful that the Commission will be looking for formal high-level commitments, from the management team of the licensees, that they are fully dedicated to maintaining a compliance culture beyond fixing any breaches which have already been identified.

### ***Possible sanctions which could arise from the settlement procedure***

The possible sanctions which can come out of settlement discussions potentially include those within the powers of the Commission under the Financial Services Act 2007 which can be, public censures, disqualification of the licensee or an officer, revocation of a licence (unlikely but possible) and most likely, private warnings or an administrative penalty. However, given that settlement agreements remain confidential between the Commission and the relevant licensee,



there is typically no public record of the sanctions (unless the sanction includes a public censure) which the Commission will typically impose.

*Should you require legal advice on the matters mentioned above, please contact [chambers@blc.mu](mailto:chambers@blc.mu).*

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