

GUIDING PRINCIPLES
FOR THE SETTLEMENT
OF ENFORCEMENT CASES

OFFICE OF FINANCIAL
AND INSURANCE REGULATION

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Introduction

A primary mission of OFIR is to protect the public from dishonest and untrustworthy persons and companies. Major sanctions the Commissioner may impose for unlawful conduct range from fines to license revocation. The purpose of setting forth these principles is to ensure that sanctions are used forcefully and fairly.

Misconduct under the various statutes we enforce is basically similar, although the particular way a violation occurs may vary. A person may commit fraud under the Insurance Code by selling an illusionary policy; a person may commit fraud under lending laws by falsifying records; and, a person may commit fraud under the Uniform Securities Act by using a false prospectus. But the misconduct is essentially the same: the knowing use of deception to take money from customers unlawfully.

Similarly, the statutes we administer typically set standards for continued licensure, reporting requirements, disclosures to consumers, business conduct, and the like, and this makes feasible a general discussion of how penalties should be applied across the board. Fraud is just as serious under the Insurance Code, the Banking Code, the Uniform Securities Act, and the several other laws OFIR enforces.

In the discussion that follows, “license” includes any authorization from OFIR, including registrations and exemptions; “fraud” includes all forms of intentional misrepresentation; and, “revocation” includes comparable sanctions, such as orders of prohibition, and lesser license consequences, such as suspensions and limitations.

Guiding Principles for Settlements

Where a case can be settled favorably from a public protection standpoint, it is efficient to do so. This leaves more time to work on other, often more challenging, matters. Also, where fraud by an individual is involved, the key to protecting the public is revoking the license swiftly, and this can often be achieved by stipulation and consent order.

Thus, enforcement staff should explore good settlements. Note that an admission of violation, while useful, is not necessary to a good settlement. The certainty of result may outweigh this element.

The menu of major sanctions and remedies includes the following:

- Revocation
- Restitution [including refunds]
- Fines
- Cease and desist orders
- Remedial plans

The chart below contains common violations that arise under one or more of the statutes we enforce. Authorized remedies that typically should be included in a settlement are indicated. However, each case is unique and a good settlement should take the following seven factors into account as to a violation [the “seven-factor analysis”].

- Whether it was intentional
- The number of violations
- The harm caused
- The future risk to the public
- Whether it was a knowing violation of the law
- Strength of the case
- Mitigating circumstances

For example, fraud is intentional and poses a great future risk to the public. Since fraud is rooted in character and is highly damaging to consumers, the license of an individual should be revoked where there is good evidence. No simple surrender of the license is allowed. Where a dishonest person offers to make restitution if only his or his license will be left in place, the answer is no. Dishonest persons will just create a new list of victims in the future.

Whether a company should lose its license is more complicated. One should factor in, among other things, how widespread the fraud was, whether management or ownership took an active role in it, and whether a remedial business plan would solve the problem.

Revocation is the ultimate tool to protect the public where it is warranted. This may be the sole and satisfactory result in some negotiated settlements, particularly where there are no resources for restitution.

Where losses have occurred, restitution brings relief directly to the affected consumers. In choosing between restitution and fines, restitution is more important. Practicality must be brought to bear, of course, as there is no point in ordering restitution where the party lacks the resources to make restitution.

Fines are an important deterrent to future misconduct in a particular case. Also, since fines and other penalties are published on the OFIR website, they deter others from the proscribed misconduct.

Fines are typically set forth in a range. Thus, for a violation of the Mortgage Brokers, Lenders, and Servicers Licensing Act, the Commissioner may assess a civil fine against a registrant of not more than \$1,000. Thus, the fine could range from \$1 to \$1,000.

In the memorandum to the Chief Deputy Commissioner recommending a fine, the staff shall indicate if the fine falls into the low, middle, or high end of the range. The choice of the particular fine shall be justified in light of the seven-factor analysis. By way of brief example, and looking at only some of the seven factors, a few harmless, unintentional acts might warrant a low fine, while several harmful, intentional acts would warrant a high fine.

Cease and desist orders are in some cases mandated by statute and, where they are discretionary, they should be brought to bear where they are needed to protect the public. The main question is whether the perpetrator is likely to strike again in the absence of an order.

Remedial plans may be specified in statute, but may result from negotiations in any event and may often be the most effective, long-term protection to consumers with respect to future company activity.

The Chart

The chart below gives guidance as to settlements. In general, it reflects that, where applicable, revocation and cease and desist orders, which protect the public in the future, are more important than restitution and fines. As discussed above, fines are subordinate to restitution where restitution is an option. Remedial plans may be important, but in many cases are not options, such as where a license is revoked.

Some or all of the remedies in the chart may be authorized by statute for particular violations. For purposes of the chart, they are an assumed option that needs to be verified in an individual case. Where they are mandated, they must be included in a settlement.

The chart is oriented to ordinary violations involving harm, intentionality, some frequency, and a good case. In a particular matter, the seven-factor analysis listed above needs to be performed. In cases where there are multiple violations, the most serious sanction based upon the most serious violation should be part of the settlement.

Overall, there is no simple formula to attain the right settlement in any given case. The right settlement will be driven by good judgment as what is needed to protect the public. Where that settlement cannot be attained, the staff, where it has a good case, should proceed to a formal hearing.

To make the right use of the chart, one must have in mind the discussion and definitions above. The following is a key to the comments in the boxes:

- Highest priority. Virtually always a part of the settlement. With a company, mitigating circumstances might apply, such as one bad actor in an otherwise good company.
- High priority. Ordinarily part of the settlement, but of lesser importance where there is a revocation.
- Important. Worthwhile in most settlements, but not so significant as to abandon an otherwise good settlement.
- Case-by-case analysis. A careful application of the seven-factor analysis is warranted before applying the sanction.
- Not applicable. In most cases, some other remedy would apply.

CONDUCT	REVOCATION	CEASE AND DESIST	RESTITUTION	FINES	REMIDIAL PLAN
FRAUD	Highest priority	High priority	High priority	Important	Not applicable
WRONGFULLY TAKING MONEY	Highest priority	High priority	High priority	Important	Not applicable
BREACH OF FIDUCIARY DUTY	Highest priority	High priority	High priority	Important	Not applicable
UNLICENSED ACTIVITY	Not applicable	Highest priority	High priority	Important	Not applicable
DIFFICIENT DISCLOSURES	Case-by-case analysis	High priority	Highest priority	Important	High priority
UNSUITABILITY OF PRODUCTS	Case-by-case analysis	High priority	Highest priority	Important	High priority
BREACH OF TRUST	Case-by-case analysis	High priority	Highest priority	Important	High priority
FAILURE TO MAKE REPORTS	Not applicable	Not applicable	Not applicable	Highest priory	Not applicable
DISREGARDING INQUIRIES	Not applicable	Not applicable	Not applicable	Highest priority	Not applicable
NOT KEEPING RECORDS	Not applicable	Not applicable	Not applicable	Highest priority	Not applicable
EXCESSIVE FEES	Case by case analysis	Highest priority	Highest priority	Important	Not applicable
REBATING OF INSURANCE PREMIUM	Case by case analysis	Highest priority	Not applicable	Important	Not applicable
UNFAIR TRADE PRACTICES IN INSURANCE	Case by case analysis	Highest priority	Highest priority	Important	Not applicable

Procedures

Only the Chief Deputy Commissioner or the Commissioner may enter into a settlement agreement. After the staff has negotiated an agreement in conformity with the chart above, the staff shall prepare a memorandum explaining why the settlement should be offered in light of the chart and the seven-factor analysis. If fines are recommended, they shall be characterized as low, middle, or high in the range of applicable fines and be justified in light of the seven-factor analysis.