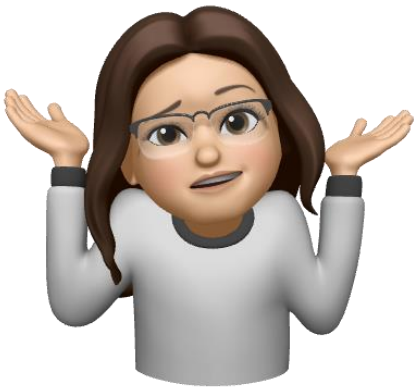
BABIN BESSNER SPRY

185 Frederick Street, Suite 101, Toronto ON, M5A 4L4
Tel: 416 637 3244 ■ Fax: 416 637 3243 ■ www.babinbessnerspry.com



Regulatory settlement? Inform yourself!

Understand how a settlement can unexpectedly affect you

By Ellen Bessner, Aaron Gold, BABIN BESSNER SPRY LLP

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This article was written by Ellen Bessner and Aaron Gold (student-at-law at Babin Bessner Spry LLP).

When an advisor retains us because they are the subject of a client complaint, they are usually so anxious that they just want us to make the matter go away. However, as defence lawyers, we know better than most that even a single client complaint causes prolonged pain, potentially leading to protracted regulatory, civil and occasionally criminal proceedings. Our job is to move the regulatory matter along toward its conclusion, many by settlement, but also to ensure advisors are informed of the implications on potential parallel proceedings.

The incidence of these parallel proceedings is due, in large part, to the increasingly united administrative and investigative efforts of regulatory bodies (e.g., provincial securities commissions), self-regulatory organizations (the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA), which are to be consolidated), and industry groups (e.g., FP Canada). Depending on the infraction, the advisor could attract attention from regulators or courts in other jurisdictions, too.

Settlement agreements and hearing orders are public, as they are published on regulators' websites and in press releases. These orders attract the attention of industry groups and lawyers trolling the internet for potential class actions. You may expect that industry groups would not have a significant impact on your career, as the only penalty they can usually impose is to suspend or revoke your ability to use any designation earned. However, they reference the results of their investigations in their publications and on their websites, and some of them insist on a separate interview process that duplicates the regulatory interview. That process can be grueling, as the interviews are exhausting and expensive if you don't have errors and omissions insurance to pay your legal fees for necessary preparation and representation.

For those advisors who have clearly committed infractions, a settlement can be an expeditious and cost-effective resolution to regulatory enforcement, in comparison to a contested hearing. However, advisors must be advised by legal counsel on how the settlement process can impact future proceedings. Here are a few of the implications, but each matter is different, so ask your lawyer what the implications of a settlement agreement are for you, before signing on the dotted line.

1. IIROC and the MFDA insist that settlement agreements contain clear admissions. In 2014 the OSC adopted a policy on no-contest settlement agreements, allowing for the resolution of enforcement matters without requiring the respondent to make any factual admissions or acknowledge that it breached Ontario securities laws. However, the OSC's no-contest settlements have typically been reserved for large institutional respondents, and are unavailable where the respondent has engaged in conduct that is considered by the regulator to be abusive, fraudulent or criminal.

2. The settlement agreement, if accepted by a regulatory panel, will be posted on the website and circulated in a press release, as mentioned. There is usually a clause in the agreement that admissions contained in the agreement are solely for the purposes of the regulatory proceeding. However, don't be fooled: these admissions can be used against you in other proceedings. So, if you are going to make an admission in the settlement agreement, know that it may be relied on in other proceedings, including civil or criminal matters involving the same infraction.

3. Many advisors choose to enter into a settlement agreement, as they understand that they committed an infraction and want to get it behind them. This is perceived as the quickest route to end the pain of a regulatory matter. However, with both the settlement agreement and an order of the panel approving the settlement published on the web and in press releases, other regulators and industry organizations will observe that one of their registrants/members has admitted to committing an infraction and each may commence their own investigation and proceedings. While a regulatory settlement may be the best route for many advisors, they need to understand the particular implications to them.

Before signing a settlement agreement with regulators, advisors and their counsel should carefully consider the admissions set out in the draft agreement. Even with clear language to the contrary, the agreement and admissions therein are likely to be admissible in subsequent civil or criminal proceedings. Publication of the order itself may attract further exposure, often in the form of class proceedings. While a settlement offers a cost-effective and expeditious resolution to enforcement proceedings, advisors shouldn't neglect to consider who may eventually read these admissions — including the judge presiding at a future trial.

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