

## Chapter 2

# Statutory notices and the allocation of decision making

## 2.5 Provision for certain categories of decision

### Purpose

- 2.5.1 G Some of the decisions referred to in ■ DEPP 2 Annex 1 and ■ DEPP 2 Annex 2 share similar characteristics. For convenience, ■ DEPP 2.5 sets out some of these and the particular features they have.

### Different decision makers

- 2.5.2 G The decision to give a *warning notice* and a *decision notice* in a particular matter will often not be taken by the same decision maker. Certain types of action require that the *warning notice* decision be taken by FCA staff under *executive procedures* and the *decision notice* decision be taken by the RDC. Similarly, in enforcement cases the RDC might take the decision to give a *warning notice*, but the decision to give a *decision notice* could be taken by the *settlement decision makers* on the basis that the *person* concerned does not contest the action proposed (see ■ DEPP 5).

### Decisions relating to applications for FCA authorisation or approval

- 2.5.3 G FCA staff under *executive procedures* will take the decision to give a *warning notice* if the FCA proposes to:
- (1) refuse an application for a *Part 4A permission* or to refuse an application to cancel a *Part 4A permission*;
  - (2) impose a limitation or a requirement which was not applied for, or specify a narrower description of regulated activity than that applied for, on the grant of a *Part 4A permission*;
  - (3) refuse an application to vary a *Part 4A permission*, or to restrict a *Part 4A permission* on the grant of a variation (by imposing a limitation or a requirement which was not applied for or by specifying a narrower description of regulated activity than that applied for);
  - (3A) refuse an application to vary a *requirement* imposed under section 55L of the *Act*, or to impose a new *requirement*;
  - (3B) exercise its power under section 55L(1) of the *Act* in connection with an application to the PRA for a *Part 4A permission* or the variation of a *Part 4A permission*;
  - (4) refuse *approved person* status;

- (4A) grant a *relevant senior manager application*, subject to any conditions or only for a limited period;
- (4B) refuse an application to vary an approval under section 59 of the Act that was granted subject to conditions;
- (5) refuse an application for a *small e-money issuer certificate* (see ■ ELM 8 (Small e-money issuers));
- (6) refuse an application for variation or rescission of a requirement imposed on an *incoming EEA firm*.

**2.5.4** G If no representations are made in response to a *warning notice* proposing the action set out at ■ DEPP 2.5.3 G within the period specified, a *decision notice* will be given accordingly: see ■ DEPP 2.3.2 G (Default procedures).

**2.5.5** G If representations are made in response to a *warning notice* proposing the action set out at ■ DEPP 2.5.3G (1), ■ DEPP 2.5.3G (4), ■ DEPP 2.5.3G(4A), ■ DEPP 2.5.3G(4B) or ■ DEPP 2.5.3G (5), then the RDC will take the decision to give a *decision notice*.

**2.5.5A** G If representations are made in response to a *warning notice* proposing the action set out at ■ DEPP 2.5.3G (3B), FCA staff under *executive procedures* will take the decision to give a *decision notice*.

**2.5.6** G If representations are made in response to a *warning notice* proposing the action set out at ■ DEPP 2.5.3G (2), ■ DEPP 2.5.3G (3), ■ DEPP 2.5.3G (3A), or ■ DEPP 2.5.3G (6), then the RDC will take the decision to give a *decision notice* if the action involves a fundamental variation or requirement (see ■ DEPP 2.5.8 G). Otherwise, the decision to give the *decision notice* will be taken by FCA staff under *executive procedures*.

**Decisions relating to applications for PRA authorisation or approval**

**2.5.6A** G FCA staff under *executive procedures* will take the decision where the FCA is proposing or deciding to:

- (1) refuse its consent to the granting by the PRA of an application for a *Part 4A permission*, or give its consent subject to conditions;
- (2) refuse its consent to the granting by the PRA of an application for the variation of a *Part 4A permission*, or give its consent subject to conditions; or
- (3) refuse its consent to the granting by the PRA of an application to perform a *controlled function*, or give its consent subject to conditions.

**FCA's own-initiative powers**

**2.5.7** G The RDC will take the decision to give a *supervisory notice* exercising the FCA's *own-initiative powers* (by removing a regulated activity, by imposing a

limitation or requirement or by specifying a narrower description of regulated activity) if the action involves a fundamental variation or requirement (see ■ DEPP 2.5.8 G). Otherwise, the decision to give the *supervisory notice* will be taken by *FCA staff under executive procedures*.

**2.5.7A** **G** Notwithstanding ■ DEPP 2.5.7 G, *FCA staff under executive procedures* will be the decision maker whenever a *firm* agrees not to contest the *FCA's* exercise of its *own-initiative powers*, including where the *FCA's* action involves a fundamental variation or requirement.

**2.5.8** **G** A fundamental variation or requirement means:

- (1) removing a type of activity or *investment* from the *firm's permission*; or
- (2) refusing an application to include a type of activity or *investment*; or
- (3) [deleted]
- (4) imposing or varying an assets requirement (as defined in section 55P of the *Act* (Prohibitions and restrictions)), or refusing an application to vary or cancel such a requirement.

**The FCA’s power to vary SMF manager’s approval on its own initiative**

**2.5.8A** **G** The *RDC* will take the decision under section 63ZB of the *Act* to vary an approval given to an *SMF manager* (by imposing a condition, varying a condition, removing a condition or limiting the period for which the approval is to have effect).

**2.5.8B** **G** Notwithstanding ■ DEPP 2.5.7G, *FCA staff under executive procedures* will be the decision maker whenever all of the interested parties (as defined by section 63ZC(6) of the *Act*) agree not to contest the *FCA's* exercise of its power under section 63ZB of the *Act*.

**2.5.8C** **G** The *FCA's* statement of policy on the use of the power to vary an *SMF manager's* approval on its own initiative is set out in ■ DEPP 8.

**Decisions relating to listing of securities**

**2.5.9** **G** *FCA staff under executive procedures* will take the following *statutory notice* decisions:

- (1) the refusal of an application for listing of securities;
- (2) the suspension of *listing* on the *FCA's* own initiative or at the request of the issuer;
- (3) [deleted]
- (4) the discontinuance of *listing* of securities at the issuer's request;

- (5) the exercise of any of the powers in sections 87K or 87L of the Act in respect of a breach of any applicable provision; and
- (6) [deleted]
- (7) the refusal of an application by an issuer for cancellation of a suspension of *listing* made under section 77 of the Act.

2.5.10 G The RDC will take *statutory notice decisions* relating to the discontinuance of listing of securities on the FCA's own initiative.

2.5.11 G If securities have matured or otherwise ceased to exist the FCA will remove any reference to them from the official list. This is a purely administrative process, and not a discontinuance of listing in the sense used in Part 6 of the Act.

Decisions relating to imposition of limitations or other restrictions of sponsors and primary information providers.

**Decisions relating to imposition of limitations or other restrictions of sponsors and primary information providers**.....

2.5.11A G Under section 88(4)(aa) of the Act, if the FCA proposes to impose limitations or other restrictions on the services to which a *sponsor's* approval relates, it must give him a *warning notice*. If, after considering any representations made in response to the *warning notice*, the FCA decides to impose limitations or other restrictions on the services to which a *sponsor's* approval relates, it must give him a *decision notice*. Where the *sponsor* has requested or otherwise agrees to the limitation or other restriction, FCA staff under *executive procedures* will take the decision to give the *warning notice* and *decision notice*. Otherwise, the RDC will take the decision to give the *warning notice* and *decision notice*.

2.5.11B G If the FCA is proposing or deciding to refuse a *sponsor's* application for the withdrawal or variation of a limitation or other restriction on the services to which a *sponsor's* approval relates under section 88(8)(d) of the Act, the decision maker will be FCA staff under executive procedures where FCA staff decided to impose the limitation or other restriction. Otherwise, the RDC will take the decision to give the *warning notice* and *decision notice*.

2.5.11C G Under section 89P(5)(b) of the Act, if the FCA proposes to impose limitations or other restrictions on the dissemination of *regulated information* to which a *primary information provider's* approval relates, it must give him a *warning notice*. If, after considering any representations made in response to the *warning notice*, the FCA decides to impose limitations or other restrictions on the dissemination of *regulated information* to which a *primary information provider's* approval relates, it must give him a *decision notice*. Where the *primary information provider* has requested or otherwise agrees to the limitation or other restriction, FCA staff under *executive procedures* will take the decision to give the *warning notice* and *decision notice*. Otherwise, the RDC will take the decision to give the *warning notice* and *decision notice*.

**2.5.11D** **G** Under section 89P(9)(d) of the *Act*, if the *FCA* is proposing or deciding to refuse a *primary information provider's* application for the withdrawal or variation of a limitation or other restriction on the dissemination of *regulated information* to which a *primary information provider's* approval relates, the decision maker will be *FCA* staff under *executive procedures* where *FCA* staff decided to impose the limitation or other restriction. Otherwise, the *RDC* will take the decision to give the *warning notice* and *decision notice*.

**Modified procedures in collective investment scheme and certain other cases**

**2.5.12** **G** *FCA* staff will usually inform or discuss with the *person* concerned any action they contemplate before they recommend to the *RDC* that the *FCA* takes formal action. The *FCA* may also be invited to exercise certain powers by the *persons* who would be affected by the exercise of those powers. In these circumstances if the *person* concerned has agreed to or accepted the action proposed then the decisions referred to in **■ DEPP 2.5.13 G** will be taken by *FCA* staff under *executive procedures* rather than by the *RDC*.

**2.5.13** **G** The decisions referred to in **■ DEPP 2.5.12 G** are:

- (1) the decision to give a *supervisory notice* pursuant to section 259(3), (8) or 9(b) (directions on authorised unit trust schemes); section 268(3), 7(a) or 9(a) (directions in respect of recognised overseas schemes); or section 282(3), (6) or (7)(b) (directions in respect of relevant recognised schemes) of the *Act*;
- (1A) the decision to give a *supervisory notice* pursuant to section 261Z1(3), (8) or (9)(b) (Procedure on giving directions under section 261X or 261Z and varying them on *FCA's* own initiative) of the *Act*;
- (2) the decision to give a *warning notice* or *decision notice* pursuant to section 280(1) or (2)(a) (revocation of recognised investment scheme) of the *Act*;
- (3) the decision to give a *supervisory notice* in accordance with regulation 27(3), (8) or 9(b) of the *OEIC Regulations*; and
- (4) the decision to give a *warning notice* or *decision notice* pursuant to regulation 24 or regulation 28 of the *OEIC Regulations*.
- (4A) the decision to give a *warning notice* or *decision notice* pursuant to section 255 or 260 of the *Act*;
- (4B) the decision to give a *warning notice* or *decision notice* pursuant to section 261V or 261Z2 of the *Act*;
- (5) [deleted]
- (6) [deleted]

**2.5.14** **G** In determining whether there is agreement to or acceptance of the action proposed, an indication by the following *persons* will be regarded as conclusive:

- (1) in relation to an *authorised unit trust scheme*, the *manager* and *trustee*;
- (1A) in relation to an *authorised contractual scheme*, the *authorised contractual scheme manager* and *depository*;
- (2) in relation to an *ICVC*, the *directors* and the *depository*;
- (3) in relation to a *recognised scheme*, the *operator* and, if any, the *trustee* or *depository*.

2.5.15 G A decision to give a *warning notice* or *decision notice* refusing an application for an *authorisation order* declaring a *scheme* to be an *AUT*, *ACS* or *ICVC* or an *AUT*, *ACS* or *ICVC* to be a money market fund will be taken by the *RDC* only if the application is by an *authorised fund manager* who is not the *operator* of an existing *AUT*, *ACS* or *ICVC*. Otherwise, the decision to give the *warning notice* or *decision notice* will be taken by *FCA* staff under *executive procedures*.

2.5.16 G A notice under paragraph 15A(4) of Schedule 3 to the *Act* relating to the application by an *EEA firm* for approval to manage a *UCITS scheme* is not a *warning notice*, but the *FCA* will operate a procedure for this notice which will be similar to the procedure for a *warning notice*.

**Notices under other enactments** .....

2.5.17 G The *FCA* expects to adopt a procedure in respect of notices under enactments other than the *Act* which is similar to that for *statutory notices* under the *Act*, but which recognises any differences in the legislative framework and requirements. ■ DEPP 2 Annex 1 and ■ DEPP 2 Annex 2 therefore identify notices to be given pursuant to other enactments and the relevant *FCA* decision maker.

2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:

- (1) [deleted]
- (2) [deleted]
- (3) Friendly Societies Act 1992, section 58A: The *warning notice* and *decision notice* must set out the terms of the direction which the *FCA* proposes or has decided to give and any specification of when the friendly society is to comply with it. A *decision notice* given under section 58A(3) must give an indication of the society's right, given by section 58A(5), to have the matter referred to the *Tribunal*. A *decision notice* under section 58A(3) may only relate to action under the same section of the Friendly Societies Act 1992 as the action proposed in the *warning notice*. A *final notice* under section 390 of the *Act* must set out the terms of the direction and state the date from which it takes effect. Section 392 of the *Act* is to be read as if it included references to a *warning notice* given under section 58A(1) and a *decision notice* given under section 58A(3).

- (4) The *FCA* is only required to give a single *supervisory notice* under Regulations 28 and 36 of the *MiFI Regulations*. No representations can be made to the *FCA* after the issuing of this notice, but the matter can be referred to the *Tribunal*.
- (5) The decision to give a written notice under section 55XA(1) of the *Act* will be taken by *FCA* staff under *executive procedures*. If the applicant decides to seek a review, by the *FCA*, of that decision, they can make representations to the *RDC*. If the *RDC* then decides under section 55XA(5) of the *Act* to confirm the first decision, or take a different decision of the type described by section 55XA(1) of the *Act*, it must give the applicant a written notice.