

DECISION MAKING MANUAL INSTRUMENT 2001

- A. The Financial Services Authority issues the statement of procedure and gives the guidance in the Annex to this instrument (“DEC) in the exercise of the powers listed in Schedule 4 to DEC.
- B. This instrument shall come into force at the beginning of the first day on which section 40 of the Financial Services and Markets Act 2000 (Application for permission) comes into force for any purpose.
- C. This instrument may be cited as the Decision Making Manual Instrument 2001.
- D. The Annex to this instrument (including its Schedules) may be cited as the Decision making manual (or DEC).

By order of the Board
21 June 2001

ANNEX



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Transitional provisions

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- 1 There are no transitional provisions in DEC. The transitional provisions in GEN are not applicable to DEC.

Chapter 1

Application, Purpose and Introduction

1.1 Application and Purpose

Application

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This manual gives *guidance* on the FSA's decision making and other procedures for giving *statutory notices* listed in DEC 2 Ann 1G and DEC 3 Ann 1G. This manual also gives *guidance* on the FSA's procedure for using its powers under Part XXIV of the *Act* (Insolvency), Part XXV of the *Act* (Injunctions and restitution) and Part XXVII of the *Act* (Criminal Offences). It is relevant to *firms*, *approved persons*, applicants for *Part IV permission*, *persons* for whom an application for approval under section 59 of the *Act* has been made, and other *persons*, whether or not they are regulated by the FSA. The UKLA's procedure for giving *statutory notices* under Part VI of the *Act* (Official listing) is set out in the *listing rules* and related *guidance*.

Purpose

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Section 395 of the *Act* (The FSA's procedures) requires the FSA to publish a statement of its procedure for the giving of *statutory notices*. The purpose of the Decision making manual (*DEC*) is to fulfil this obligation. The following constitute the required statement of procedure:

- (1) *DEC*; and
- (2) the UKLA's procedure for giving *statutory notices* under Part VI of the *Act* (Official Listing) arising out of the FSA's exercise of its regulatory powers as the competent authority for official listing (see the *listing rules* and related *guidance*).

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DEC 4.6 sets out the FSA's policy on the procedure to be followed:

- (1) if the FSA decides to use its:
 - (a) powers to apply to the civil courts for insolvency orders, injunctions, restitution orders and *collective investment scheme* related orders; or
 - (b) powers to prosecute criminal offences; and
- (2) if the FSA decides to discontinue any proceedings begun by the use of these powers.



1.2 Introduction

DEC and the other manuals

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The Authorisation manual (*AUTH*), the Supervision manual (*SUP*), the Enforcement manual (*ENF*) and the Decision making manual (*DEC*) form the regulatory processes part of the *Handbook*:

- (1) *AUTH* sets out the relationships between the FSA and applicants for *Part IV permission* and *persons* wishing to exercise *EEA rights*, *Treaty rights* or *UCITS directive* rights;
- (2) *SUP* sets out the relationship between the FSA and *authorised persons* (referred to in the *Handbook* as *firms*). As a general rule, material that is of a continuing relevance after *authorisation* is in *SUP*;
- (3) *ENF* describes the FSA’s enforcement powers under the *Act* and sets out its policies for using those powers; and
- (4) *DEC* is principally concerned with, and sets out, the FSA’s decision making procedures for decisions that involve the giving of *statutory notices*.

Statutory notices

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The *Act* designates certain notices as *warning notices*, *decision notices* or *supervisory notices* (“*statutory notices*”) for which there are certain specified procedures, actions and protections. *DEC* 1.2.3G summarises the *statutory notices* and related notices and provides references to where they are described in the *Act*.

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Table Summary of statutory and related notices

Reference to the Act	Notice	Description	Further information
Section 387	<i>Warning notice</i>	A <i>warning notice</i> gives the recipient details about action that the <i>FSA</i> proposes to take and about the right to make representations.	DEC 2.2
Section 388	<i>Decision notice</i>	A <i>decision notice</i> gives the recipient details about action that the <i>FSA</i> has decided to take.	DEC 2.3.1G to DEC 2.3.5G
Section 388	Further <i>decision notice</i>	A further <i>decision notice</i> gives the recipient details about different action from that set out in a <i>decision notice</i> and which the <i>FSA</i> has decided to take concerning the same matter covered by the <i>decision notice</i> . The <i>FSA</i> may give a further <i>decision notice</i> only if the person to whom the original <i>decision notice</i> was given consents.	DEC 2.3.6G to DEC 2.3.7G
Section 389	<i>Notice of discontinuance</i>	A <i>notice of discontinuance</i> identifies proceedings set out in a <i>warning notice</i> or <i>decision notice</i> and which are not being taken or are being discontinued.	DEC 2.3.8G to DEC 2.3.10G
Section 390	<i>Final notice</i>	A <i>final notice</i> sets out the terms of the action that the <i>FSA</i> has decided on and the date it takes effect.	DEC 2.3.11G to DEC 2.3.12G
Section 395(13)	<i>Supervisory notices</i>	A <i>supervisory notice</i> gives the recipient details about action that the <i>FSA</i> has taken or proposes to take.	DEC 3

Decision making on giving statutory notices

- 1.2.4 G_{/1} The *FSA* has different decision making procedures depending on whether or not a *statutory notice* is given.
- 1.2.5 G_{/1} Events leading to the giving of a *statutory notice* are covered in *AUTH*, *SUP*, *ENF* and *CIS*. *DEC 2* Ann 1G and *DEC 3* Ann 1G list the relevant references.
- 1.2.6 G_{/1} Decisions whether to give a *statutory notice* and decisions associated with the *statutory notice* once it has been given (a "*statutory notice associated decision*", see *DEC 4.1.2G*) will be taken by a "decision maker". References to the "decision maker" concerning *statutory notice decisions* refer to decisions taken by:
 - (1) the *Regulatory Decisions Committee (RDC)*; or
 - (2) *FSA* staff under *executive procedures*.
- 1.2.7 G_{/1} *DEC 4.1* describes the allocation of decisions between the *RDC* and *executive procedures*. *DEC 4.2* provides further information on the *RDC*. *DEC 4.3* provides further information on *executive procedures*.

Other decisions

- 1.2.8 G_{/1} The *FSA* will make regulatory decisions falling outside section 395 of the *Act*. These will include exercise of statutory powers which do not require *statutory notices* to be given, for example: when the *FSA* grants an application for a *Part IV permission* on the terms applied for (such decisions are made by internal staff procedures as described in *AUTH 8.2.5G* to *AUTH 8.2.8G*); when the *FSA* grants other applications; decisions on applications for *waivers*; decisions to give individual *guidance*; and decisions generally in the course of the *FSA's* oversight of regulated institutions. They also include decisions on recommendations by *FSA* staff to the *RDC*.
- 1.2.9 G_{/1} The *FSA's* general policy is that regulatory decisions should be taken at a level of seniority which is appropriate to the decision having regard to such factors as:
 - (1) the significance of the decision to those who would be affected by it;
 - (2) its novelty in the light of stated policy and established practice;
 - (3) the complexity of the relevant considerations;
 - (4) the range of alternative options; and
 - (5) the extent to which the facts relating to the decision are or may be disputed.
- 1.2.10 G_{/1} The *FSA* expects that most decisions will be made by individuals accountable through line management to the Board within the management structure of the *FSA*. Where appropriate, decisions will be made collectively by a group of staff. Decisions will be made within the stated policies of the *FSA* and in accordance with the *Act* and other legal requirements.




Chapter 2.

2.

Statutory notice procedure: Warning notice and decision notice procedure



2.1 Warning notice and decision notice procedure: Introduction

- 2.1.1**  The *Act* requires the *FSA*, when proposing to exercise its powers in certain circumstances, to use the *warning notice* and *decision notice* procedure. /1
- 2.1.2**  The circumstances to which the *warning notice* and *decision notice* procedure in *DEC* apply are set out in *DEC* 2 Ann 1G. Three flowcharts are provided in *DEC* 2 Ann 2G to *DEC* 2 Ann 4G. These illustrate:
- (1) the procedure for giving *warning notices* and *decision notices* in the case of applications for *Part IV permission*, applications for approval under section 59 of the *Act* (Approval for particular arrangements), applications for variation of *permission*, and for certain other applications (see *DEC* 2 Ann 2G);
 - (2) the procedure for giving *warning notices* and *decision notices* in non-application cases (see *DEC* 2 Ann 3G); and
 - (3) the procedure for giving *warning notices* and *decision notices* in the case of notifications of a change in *control* (see *DEC* 2 Ann 4G).
- 2.1.3**  *DEC* 1.2.3G includes a summary of the purpose of *warning notices* and *decision notices*. /1



2.2 Warning notice procedure

- 2.2.1** G_{/1} Under the circumstances listed in *DEC 2 Ann 1G*, if *FSA* staff consider that action is appropriate, they will recommend to the relevant decision maker that a *warning notice* be given. A specimen *warning notice* for enforcement cases is at *DEC 2 Ann 5G*.
- 2.2.2** G_{/1} After considering the staff recommendation, the decision maker may:
- (1) decide not to take further action (with or without a private warning (see *ENF 11.3* (Private warnings)); or
 - (2) decide to give a *warning notice* to the *person* concerned.
- 2.2.3** G_{/1} In the case of a proposed refusal of an application for approval under section 59 of the *Act*, the *FSA* must send a *warning notice* to all *interested parties*. Under section 62(5) of the *Act* (Applications for approval: procedure and right to refer to Tribunal), the *interested parties* in relation to an application for approval, are:
- (1) the applicant;
 - (2) the *person* in respect of whom the application is made ("A");
 - (3) the *person* by whom A's services are to be retained, if not the applicant.
- 2.2.4** G_{/1} Under regulation 22 of the *OEIC Regulations*, in the case of a *warning notice* concerning a proposed change in respect of an *ICVC*, the notice must be given to the *depository* as well as the *ICVC*. The only exception is if the proposal is to replace the *depository* or any *director*.
- 2.2.5** G_{/1} If the *FSA* decides to give a *warning notice* to a *person*, in accordance with section 387 of the *Act* (Warning notices), the *warning notice* must:
- (1) state the action which the *FSA* proposes to take;
 - (2) be in writing;
 - (3) give the *FSA's* reasons for the proposed action;
 - (4) state whether section 394 of the *Act* (Access to *FSA* material) applies (see *DEC 2.4*); and
 - (5) if that section applies, describe its effect and state whether any *secondary material* exists to which the *person* concerned must be allowed access under it.
- 2.2.6** G_{/1} If the *FSA* decides to take no further action and the *FSA* had previously informed the *person* concerned that it intended to recommend action, the *FSA* will communicate this decision promptly to the *person* concerned.

- 2.2.7 G_{/1} The *warning notice* will contain a statement that the *person* concerned is entitled to make representations to the *FSA*. The notice must specify a reasonable period, of at least 28 days from receiving (see *DEC 5.3*) the *warning notice*, within which the *person* to whom it is given may make representations.
- 2.2.8 G The procedures for making representations are set out in *DEC 4.4*.
- 2.2.9 G_{/1} The *warning notice* will contain (where appropriate) a statement that the mediation scheme is available. The applicability of the *FSA*'s mediation scheme is described in *DEC App 1*.



2.3 Decision notice procedure

2.3.1 G_{/1} The decision maker will consider any representations made in accordance with DEC 4.4 in relation to a *warning notice* which has already been given. A decision will be stated in a *decision notice* or (where appropriate) a *notice of discontinuance* or other written notice. The *decision notice* sets out the terms of the decision. A specimen *decision notice* for enforcement cases is at DEC 2 Ann 6G.

2.3.2 G_{/1} In accordance with section 388 of the *Act* (Decision notices), the *decision notice* must:

- (1) be in writing;
- (2) give the *FSA*'s reasons for its decision to take the action to which the *decision notice* relates;
- (3) state whether section 394 of the *Act* (Access to FSA material) applies (see DEC 2.4);
- (4) if that section applies, describe its effect and state whether any *secondary material* exists to which the *person* concerned must be allowed access under it; and
- (5) give an indication of:
 - (a) any right given by the *Act* to have the matter referred to the *Tribunal*; and
 - (b) the procedure on referring a case to the *Tribunal*.

2.3.3 G_{/1} In the case of a proposed refusal of an application for approval under section 59 of the *Act*, the *FSA* must give a *decision notice* to all *interested parties* (see DEC 2.2.3G).

2.3.4 G_{/1} In the case of a *decision notice* concerning a notification of a proposed change in respect of an *ICVC*, the *FSA* must give a *decision notice* to the *depository* as well as to the *ICVC*, if the *depository* received the *warning notice* (see DEC 2.2.4G).

2.3.5 G_{/1} The decision maker may decide to take action different from that proposed in the *warning notice*. However, under section 388(2) of the *Act*, that action must be made under the same Part of the *Act* as the action proposed in the *warning notice*.

Further decision notice

2.3.6 G_{/1} Under section 388(3) of the *Act*, following the giving of a *decision notice* but before the *FSA* takes action to which the *decision notice* relates, the *FSA* may give the *person* concerned a further *decision notice* relating to different action

concerning the same matter. Under section 388(4) of the *Act*, the *FSA* can only do this if the *person* receiving the further *decision notice* gives his consent. In these circumstances the following procedure will apply:

- (1) *FSA* staff will recommend to the decision maker that a further *decision notice* be given, either before or after obtaining the *person's* consent;
- (2) the decision maker will consider whether the action proposed in the further *decision notice* is appropriate in the circumstances;
- (3) if the decision maker decides that the action proposed is inappropriate, he will decide not to give the further *decision notice*. In this case, the original *decision notice* will stand and the *person's* rights in relation to that notice will be unaffected. If the *person's* consent has already been obtained, the *FSA* will notify him of the decision not to give the further *decision notice*;
- (4) if the decision maker decides that the action proposed is appropriate then, subject to the *person's* consent being (or having been) obtained, a further *decision notice* will be given;
- (5) a *person* who had the right to refer the matter to the *Tribunal* under the original *decision notice* will have that right under the further *decision notice*. The time period in which the reference to the *Tribunal* may be made will begin from the date on which the further *decision notice* is given.

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For the purpose of establishing whether the *person* receiving the further *decision notice* gives his consent, the *FSA* will normally require consent in writing. If the *person* concerned is an individual, the *FSA* will normally require a letter or signed memorandum from him recording his consent. If the *person* concerned is a *body corporate* or *partnership*, the *FSA* will normally require a letter or signed memorandum on behalf of the *body corporate* or *partnership* stating its consent.

Notice of discontinuance

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If the *FSA* decides not to take action proposed in a *warning notice* or the action to which a *decision notice* relates, section 389 of the *Act* (Notices of discontinuance) requires the *FSA* to give a *notice of discontinuance* to the *person* to whom the *warning notice* or *decision notice* was given. (Section 389 of the *Act* does not apply if the discontinuance of the proceedings results in the granting of an application made by the *person* to whom the *warning notice* (or *decision notice*) was given.)

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A *notice of discontinuance*:

- (1) must identify what proceedings are being discontinued (section 389(3)); and
- (2) must state that the *FSA* may publish information about the matter if the *person* to whom the *notice of discontinuance* is given consents (section 391(2)).

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Where the *FSA* is required to give a *person* a copy of a *notice of discontinuance* (see DEC 2.4.10G), the copy must be accompanied by a statement that the *FSA* may publish information about the matter, so far as relevant to the *person* to whom the copy is given, if that *person* consents.

Final notice

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Under section 390 of the *Act* (Final notices), the *FSA* must give a *final notice* to the *person* to whom it has given a *decision notice*:

- (1) if the matter was not referred to the *Tribunal* within the period of 28 days of the date when the *decision notice* was given, or within any other period that may be prescribed in the *Tribunal* rules, in which case the *FSA* will give a *final notice* at the same time as it takes the action to which the *decision notice* relates;
- (2) if the matter was referred to the *Tribunal* within the period of 28 days of the date when the *decision notice* was given, or within any other period that may be prescribed in the *Tribunal* rules, in which case the *FSA* will give a *final notice* at the same time as it takes action in accordance with any directions given by the *Tribunal* or the Court under section 137 of the *Act* (Appeal on a point of law).

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A *final notice* sets out the terms of the statement, order, penalty or other action, and will give details of the date when the action takes effect.



2.4 Third party rights and access to FSA material

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Sections 393 (Third party rights) and 394 (Access to FSA material) of the *Act* confer additional procedural rights relating to third parties and to disclosure of *FSA* material. These rights apply in certain *warning notice* and *decision notice* cases referred to in section 392 of the *Act* (Application of sections 393 and 394). The cases in which these additional rights apply are identified in *DEC 2 Ann 1G* by asterisks; these are generally cases in which the *warning notice* or *decision notice* is given on the *FSA*'s own initiative rather than in response to an application or notification made to the *FSA*.

Access to FSA material

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If section 394 of the *Act* (Access to FSA material) applies and the *FSA* gives a *person* a *warning notice* or *decision notice*, it must under section 394(1) allow that *person* ("A") access to:

- (1) the material on which the *FSA* relied in taking the decision which gave rise to the obligation to give the *warning notice* (or the *decision notice*); and
- (2) any *secondary material*, which, in the opinion of the *FSA*, might undermine that decision.

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However, the duty under section 394(1) is qualified in the following ways:

- (1) under section 394(2), the *FSA* does not have to allow A access to material that is *excluded material*;
- (2) under section 394(2)(a) and (b), the *FSA* does not have to allow A access to material if this:
 - (a) relates to a case involving a *person* other than A; and
 - (b) was taken into account in A's case only for the purpose of comparison with other cases;
- (3) under section 394(3), the *FSA* may refuse A access to particular material to which it would otherwise have to allow him access if, in the *FSA*'s opinion, allowing him access to the material would not be in the public interest or would not be fair, having regard to:
 - (a) the likely significance of the material to the *person* concerned in relation to the matter about which he has been given a notice; and

(b) the potential prejudice to the commercial interests of a *person* (other than A) which would be caused by the material’s disclosure.

2.4.4 G_{/1} If under section 394(2) the *FSA* does not allow A access to material because it is *excluded material* consisting of a *protected item*, it must give A written notice of the existence of the *protected item* and of the *FSA*’s decision not to allow him access to it (section 394(4)).

2.4.5 G_{/1} If under section 394(3) the *FSA* refuses to allow A access to particular material, it must give him written notice of the refusal and the reasons for it (section 394(5)).

2.4.6 G_{/1} If the *FSA* receives a request for access to material, the *FSA* may within a reasonable period after the request was made:

- (1) provide facilities for the inspection and photocopying of the material that it considers it is required to disclose; or
- (2) provide a photocopy of the material.

The *FSA* will provide the first photocopy of the material free of charge, but will charge for subsequent copies it provides to the same *person*.

Third party rights

2.4.7 G_{/1} If section 393 (Third party rights) applies and any of the reasons given in the *warning notice* relate to a matter which:

- (1) identifies a *person* (“the third party”) other than the *person* to whom the *warning notice* is given; and
- (2) in the *FSA*’s opinion is prejudicial to the third party;

then the *FSA* must give the third party, in accordance with section 393 of the *Act*, a copy of the *warning notice*.

2.4.8 G_{/1} A copy of the *warning notice* will not be given if the *FSA* considers that this would be impracticable, or the *FSA* has already given the third party a separate *warning notice* about the same matter. Similarly, a copy of the *warning notice* will not be given if the *FSA* gives the third party such a notice at the same time as it gives the *warning notice* which identifies him.

2.4.9 G_{/1} DEC 2.4.7G and DEC 2.4.8G apply similarly in relation to a *decision notice*.

2.4.10 G_{/1} The *FSA* must give a copy of the *notice of discontinuance*, *decision notice* or *final notice* (as appropriate) to a third party who has been given a copy of the *warning notice* or *decision notice* (section 393(14), 393(5) and 390(1) of the *Act*).

2.4.11 G_{/1} If the *FSA* gives a copy of a *warning notice* or *decision notice* to a third party, the copy must be accompanied by an indication of the third party’s right under section 393(9) to refer the case to the *Tribunal* and the procedure on such a referral.

2.4.12 G_{/1} If the *FSA* gives a copy of a *warning notice* or *decision notice* to a third party, the provisions about access to *FSA* material also apply to the third party (DEC 2.4.2G to DEC 2.4.6G). Under section 393(12), the material that the *FSA* must disclose under section 394 is material that relates to the matter that identifies the third party.

Statutory notice procedure: Warning notice and decision notice procedure

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1 Table List of warning notices and decision notices under the Act (other than Part VI)

Note: Third party rights and access to *FSA* material apply to the powers listed in this table where indicated by an asterisk * (see *DEC* 2.4)

Section of the Act	Description	Handbook reference	Decision maker
52(6)(a)/ 52(9)(a)	when the <i>FSA</i> is proposing/deciding to grant an application for a <i>Part IV permission</i> with a <i>limitation</i> or a <i>requirement</i> which was not applied for, or with a narrower description of <i>regulated activity</i> than that applied for	<i>AUTH</i> 3	<i>RDC</i>
52(6)(b)/(9) (b)	when the <i>FSA</i> is proposing/deciding to grant an application to vary a <i>firm's Part IV permission</i> but, otherwise than as part of the application, to restrict the <i>Part IV permission</i> (either by imposing a <i>limitation</i> or <i>requirement</i> which was not applied for or by specifying a narrower description of <i>regulated activity</i> than that applied for)	<i>SUP</i> 6	<i>RDC</i> / <i>executive procedures</i> (Note 1)
52(7)/(9)(c)	when the <i>FSA</i> is proposing/deciding to refuse an application for a <i>Part IV permission</i>	<i>AUTH</i> 3	<i>RDC</i>
52(7)/(9)(c)	when the <i>FSA</i> is proposing/deciding to refuse an application to vary a <i>firm's Part IV permission</i>	<i>SUP</i> 6	<i>RDC</i> / <i>executive procedures</i> (Note 1)
52(7)/(9)(c)	when the <i>FSA</i> is proposing/deciding to refuse an application to cancel a <i>firm's Part IV permission</i>	<i>SUP</i> 6	<i>RDC</i>
54(1)/(2)	when the <i>FSA</i> is proposing/deciding to cancel a <i>firm's Part IV permission</i> otherwise than at its request*	<i>ENF</i> 5	<i>RDC</i>
57(1)/(3)	when the <i>FSA</i> is proposing/deciding to make a <i>prohibition</i> order against an individual*	<i>ENF</i> 8	<i>RDC</i>

58(3)/(4)	when the <i>FSA</i> is proposing/deciding to refuse an application for the variation or revocation of a <i>prohibition order</i>	<i>ENF</i> 8	<i>RDC</i>
62(2)/(3)	when the <i>FSA</i> is proposing/deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> under section 59 of the <i>Act</i> (in conjunction with an application for <i>Part IV permission</i>)	<i>AUTH</i> 6	<i>RDC</i>
62(2)/(3)	when the <i>FSA</i> is proposing/deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> (otherwise than in conjunction with an application for <i>Part IV permission</i>)	<i>SUP</i> 10	<i>RDC</i>
63(3)/(4)	when the <i>FSA</i> is proposing/deciding to withdraw approval from an <i>approved person</i> *	<i>ENF</i> 8	<i>RDC</i>
67(1)/(4)	when the <i>FSA</i> is proposing/deciding to take action against an <i>approved person</i> by exercising the disciplinary powers conferred by section 66*	<i>ENF</i> 11/12/13	<i>RDC</i>
126(1)/127(1)	when the <i>FSA</i> is proposing/deciding to impose a sanction for <i>market abuse</i> *	<i>ENF</i> 14	<i>RDC</i>
183(3)/186(1)	when the <i>FSA</i> is proposing/deciding to object to a change in <i>control</i> following receipt of a notice of control	<i>SUP</i> 11	<i>Executive procedures</i>
185(3)/(4)	when the <i>FSA</i> is proposing/deciding to approve a change in <i>control</i> following receipt of a notice of control but subject to conditions	<i>SUP</i> 11	<i>Executive procedures</i>
187(1)/(3) and 188(1)	when the <i>FSA</i> is proposing/deciding to object to a <i>person</i> who has failed to submit a notice of control or a notice on acquiring, or increasing, <i>control</i> , or to object to an existing <i>controller</i>	<i>SUP</i> 11	<i>Executive procedures</i>
200(4)/(5)	when the <i>FSA</i> is proposing/deciding to refuse an application for variation or rescission of a requirement imposed on an <i>incoming firm</i>	<i>ENF</i> 4	<i>RDC</i> / <i>executive procedures</i> (Note 1)
207(1)/208(1)	when the <i>FSA</i> is proposing/deciding to publish a statement in respect of an <i>authorised person</i> (under section 205) or impose a financial penalty on an <i>authorised persons</i> (under section 206)*	<i>ENF</i> 11/12	<i>RDC</i>

245(1)/(2)	when the <i>FSA</i> is proposing/deciding to refuse an application for an <i>authorisation order</i> declaring a <i>unit trust scheme</i> to be an <i>AUT</i>	<i>CIS 16</i>	<i>RDC / executive procedures (Note 2)</i>
252(1)/(4)	when the <i>FSA</i> is proposing/deciding to refuse approval of a proposal to replace the <i>trustee</i> or <i>manager</i> of an <i>AUT</i>	<i>CIS 16</i>	<i>Executive procedures</i>
255(1)/(2)	when the <i>FSA</i> is proposing/deciding to make an order under section 254 revoking the <i>authorisation order</i> of an <i>AUT</i> *	<i>ENF 16</i>	<i>RDC</i>
260(1)/(2)	when the <i>FSA</i> , on an application to revoke or vary a direction under section 257, proposes/decides to refuse to revoke or vary the direction or proposes/decides to vary the direction otherwise than in accordance with the application	<i>ENF 16</i>	<i>RDC</i>
264(2)/265(4) (Note 3)	when the <i>FSA</i> is notifying/deciding not to withdraw a notice, to the operator and relevant <i>EEA State</i> authorities, that the way in which a <i>collective investment scheme</i> constituted in another <i>EEA State</i> intends to invite <i>persons</i> in the <i>United Kingdom</i> to participate in the <i>scheme</i> does not comply with <i>UK law</i>	<i>CIS 16</i>	<i>Executive procedures</i>
269(1)/(2)	when the <i>FSA</i> , on an application under subsection (4) or (5) of section 267 by an <i>operator</i> of a section 264 <i>recognised scheme</i> to revoke or vary a direction that the promotion of the <i>scheme</i> be suspended, proposes/decides to refuse the application or to vary the direction otherwise than in accordance with the application	<i>ENF 16</i>	<i>RDC</i>
271(1)/(3)	when the <i>FSA</i> is proposing/deciding to refuse approval of a collective investment scheme as a recognised scheme under section 270	<i>CIS 16</i>	<i>Executive procedures</i>
276(1)/(2)	when the <i>FSA</i> is proposing/deciding to refuse an application for an order declaring a <i>collective investment scheme</i> to be a <i>recognised scheme</i> under section 272	<i>CIS 16</i>	<i>Executive procedures</i>

280(1)/(2)	when the <i>FSA</i> is proposing/deciding to direct that a section 270 <i>recognised scheme</i> is to cease to be recognised or to revoke a section 272 order in respect of a <i>recognised scheme</i> *	<i>ENF 16</i>	<i>RDC</i>
321(8)/(9)	when the <i>FSA</i> is proposing/deciding to refuse an application for variation or revocation of a direction or a requirement imposed on a former underwriting member of Lloyd's*	None	<i>RDC</i>
331(1)/(3)	when the <i>FSA</i> is proposing/deciding to make an order disapplying the exemption from the <i>general prohibition</i> under section 327*	<i>ENF 18</i>	<i>RDC</i>
331(7)/(8)	when the <i>FSA</i> is proposing/deciding to refuse an application for the variation or revocation of an order made under section 329*	<i>ENF 18</i>	<i>RDC</i>
345(2)/(3)	when the <i>FSA</i> is proposing/deciding to disqualify an auditor or actuary from being the auditor of, or acting as an actuary for, any <i>authorised person</i> or class of <i>authorised person</i> or from being the auditor of any <i>AUT</i> or <i>ICVC</i> *	<i>ENF 17</i>	<i>RDC</i>
385(1)/386 (1)	when the <i>FSA</i> is proposing/deciding to exercise the power under section 384(5) to require a <i>person</i> to pay restitution*	<i>ENF 9</i>	<i>RDC</i>
Paragraph 19(8)/(12) of schedule 3	when the <i>FSA</i> is proposing/deciding to refuse to give a <i>consent notice</i> to a <i>UK firm</i> wishing to establish a <i>branch</i> under an <i>EEA right</i>	<i>SUP 13</i>	<i>RDC</i>
OEIC Regulations reference	Description	Handbook reference	Decision maker
Regulation 16(1)/(2)	when the <i>FSA</i> is proposing/deciding to refuse an application for an <i>authorisation order</i> in respect of a proposed <i>ICVC</i>	<i>CIS 16</i>	<i>RDC / executive procedures (Note 2)</i>
Regulation 22(1)/(2)/(4)/(5)	when the <i>FSA</i> is proposing/deciding to refuse approval of (or, having given a <i>warning notice</i> , deciding to approve (Note 4)) a proposal to replace the <i>depository</i> or director of an <i>ICVC</i> , or any other proposal/decision falling within regulation 21	<i>CIS 16</i>	<i>Executive procedures</i>

Regulation 24(1)/(2)	when the <i>FSA</i> is proposing/deciding to revoke an <i>authorisation order</i> relating to an <i>ICVC</i> under regulation 23(1)*	<i>ENF 16</i>	<i>RDC</i>
Regulation 28(1)/(2)	when the <i>FSA</i> is proposing/deciding to refuse an application to revoke or vary a direction in accordance with a request under regulation 25(7) or to vary the direction in accordance with the application	<i>ENF 16</i>	<i>RDC</i>
Paragraph 20 of schedule 5	when the <i>FSA</i> is proposing/deciding to use the disqualification powers under section 249(1)*	<i>ENF 17</i>	<i>RDC</i>

Note 1: The decision will be made by the *RDC* if it involves a fundamental (see *DEC* 4.1.5G) change to the nature of a *permission*.

Note 2: The decision will be made by the *RDC* if it relates to an application for an *authorisation order* by an *authorised fund manager* who is not the *operator* of an existing *AUT* or *ICVC*.

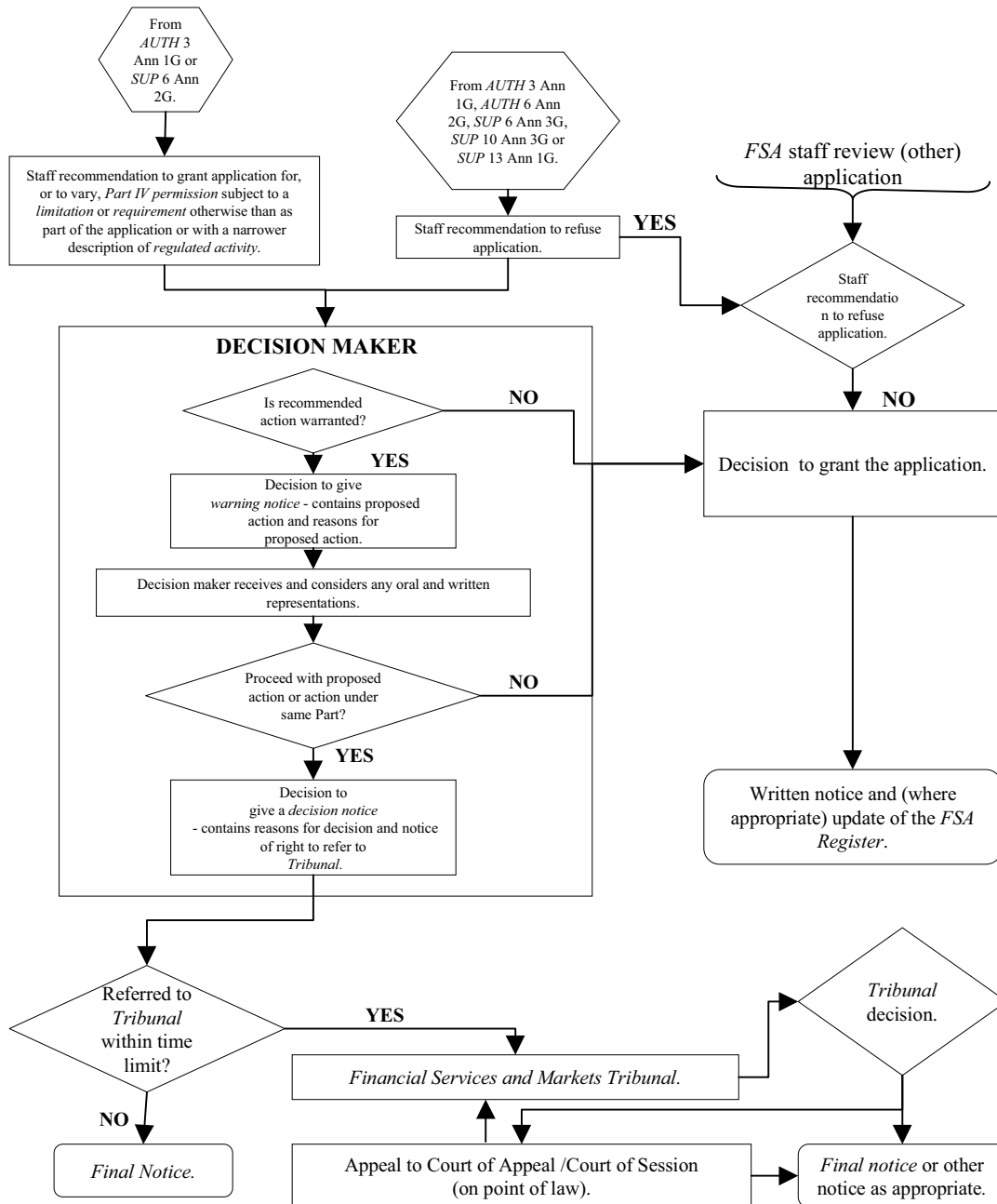
Note 3: Although the notice under section 265(4) is a *decision notice*, the notice under section 264(2) is not a *warning notice*. The *FSA* will operate a procedure compliant with section 264 for the section 264(2) notice, which will be similar to the procedure for a *warning notice*.

Note 4: The *FSA* must give a *decision notice* under regulation 22(5) of the *OEIC Regulations* when, having given a *warning notice*, it decides to approve a proposal. But this *decision notice* has the effect of a written notice giving the *FSA's* approval under regulation 21(3)(a) of the *OEIC Regulations*. Although the *FSA* will comply with the statutory requirements regarding the giving of *decision notices*, *DEC* should otherwise be read as if the *decision notice* was a written notice granting an application.

Statutory notice procedure: Warning notice and decision notice procedure

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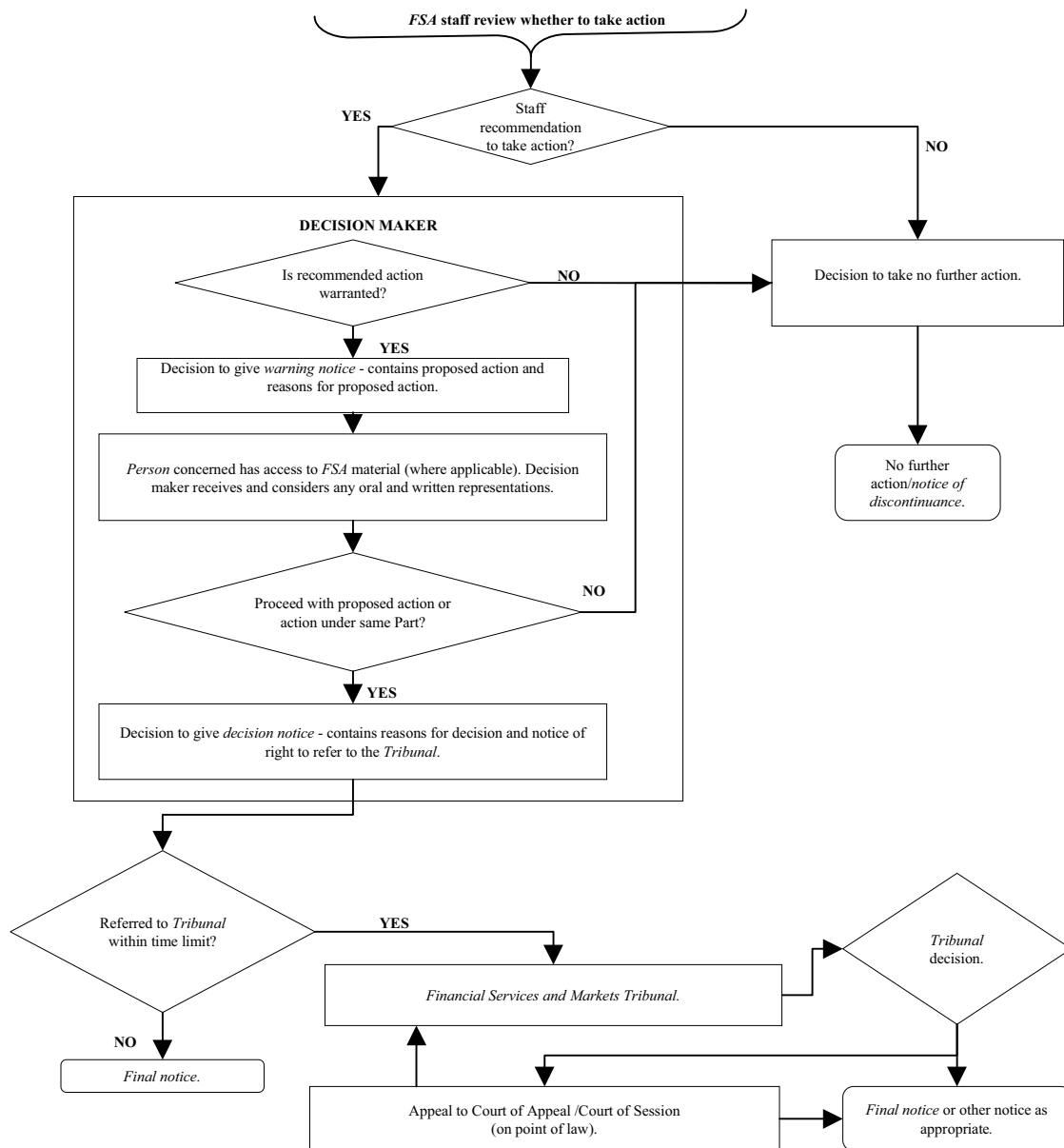
The FSA's decision making procedure for applications concerning Part IV permission, applications for approval under section 59 of the Act, and for certain other applications involving warning and decision notices



Statutory notice procedure: Warning notice and decision notice procedure

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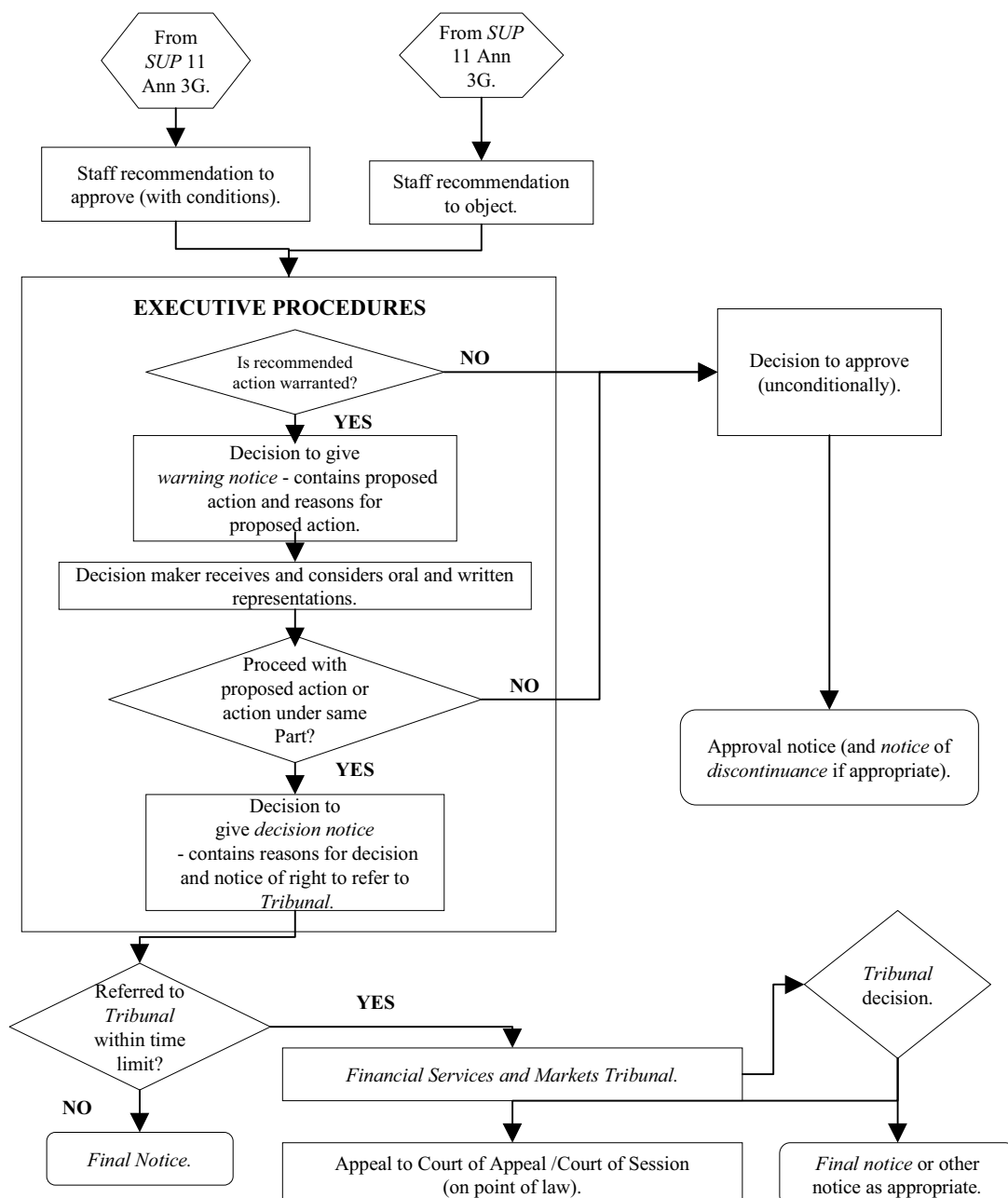
The FSA's decision making procedure in non-application cases involving warning and decision notices



Statutory notice procedure: Warning notice and decision notice procedure

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The FSA's decision making procedure on notification of a change in control involving warning and decision notices



Specimen warning notice

To: [firm or other person]

Of: [address]

[Date]

WARNING NOTICE

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) proposes to take the following action.

PROPOSED ACTION

[Details of proposed action including details of any financial penalty, the text of any public statement of misconduct, and the terms of any prohibition order]

REASONS

[Reasons for the proposed action]

DECISION MAKER

The decision to give this notice was made by [identity of relevant committee or individual] on behalf of the FSA

IMPORTANT

This warning notice is sent to you in accordance with section 387 of the Financial Services and Markets Act 2000 (“the Act”). (See DEC 2.2 of the Decision making manual.)

You may make written and oral representations to the FSA. If you wish to make representations you must do so within [28] days of receiving this warning notice or such longer period as may be permitted by the FSA. Written representations should be made to the Secretary, Regulatory Decisions Committee, at the above address. (See DEC 4.4 of the Decision making manual.)

[Section 394 of the Act applies to this warning notice. In accordance with section 394, you are entitled to have access to:

- (a) the material upon which the FSA has relied in deciding to give you this notice; and
- (b) any secondary material which, in the opinion of the FSA, might undermine that decision.

[The following secondary material exists]/[There is no such secondary material] to which you must be allowed access. (See DEC 2.4 of the Decision making manual.)]

[The FSA operates a mediation scheme for certain disciplinary and market abuse cases, where settlement discussions have taken place but broken down. You may use this scheme, but you are not obliged to do so. (See DEC App 1 of the Decision making manual.)]

Please contact [contact name and details] at the FSA for more information.

Specimen decision notice

To: [firm or other person]

Of: [address]

[Date]

DECISION NOTICE

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) has decided to take the following action.

ACTION

[Details of action (if any) including details of any financial penalty, or the text of any public statement of misconduct, or the terms of any prohibition order]

REASONS

[Reasons for the FSA’s decision to take the action]

DECISION MAKER

The decision to give this notice was made by [identity of relevant committee or individual] on behalf of the FSA

YOUR RIGHTS

This decision notice is sent to you in accordance with section 388 of the Financial Services and Markets Act 2000 (“the Act”). (See DEC 2.3 of the Decision making manual.)

[Section 394 of the Act applies to this decision notice. In accordance with section 394, you are entitled to have access to:

- (a) the material upon which the FSA has relied in deciding to give you this notice; and
- (b) any secondary material which, in the opinion of the FSA, might undermine that decision.

[The following secondary material exists]/[There is no such secondary material] to which you must be allowed access. (See DEC 2.4 of the Decision making manual.)]

Section [insert relevant section] of the Act entitles you, if you wish, to refer the FSA's decision to the Financial Services and Markets Tribunal ("the Tribunal"). Under section 133 of the Act, you have 28 days from the date of this decision notice to refer the matter to the Tribunal, although the Tribunal may permit you a longer period (see DEC 5.1 of the Decision making manual). The detailed procedures for making a reference to the Tribunal are contained in section 133 of the Act and the Tribunal rules. (See [insert where these can be found].)

Chapter 3.

Statutory notice procedure: Supervisory notice procedure

3.



3.1 Supervisory notice procedure

3.1.1 **G** _{/1} The *Act* requires the *FSA*, when proposing to exercise its powers in certain circumstances, to use the *supervisory notice* procedure. The relevant circumstances are set out in *DEC 3 Ann 1G*. *DEC 1.2.3G* includes a summary of the purpose of *supervisory notices*.

3.1.2 **G** _{/1} In *DEC 3.1.3G* to *DEC 3.1.10G*, the *supervisory notice* about a matter first given to the recipient is referred to as the "first *supervisory notice*" and the *supervisory notice* given after consideration of any representations is referred to as the "second *supervisory notice*". *DEC 3* sets out the procedure which applies when the *FSA* gives a *supervisory notice*. The flowchart in *DEC 3 Ann 2G* illustrates the procedure for the giving of *supervisory notices*. A specimen notice for enforcement cases is at *DEC 3 Ann 3G*.

First supervisory notice

3.1.3 **G** _{/1} In the circumstances listed in *DEC 3 Ann 1G*, if *FSA* staff consider that action is appropriate, they will recommend to the relevant decision maker that a *supervisory notice* be given. The recommendation will say whether the action should take effect immediately, on a specified date, or when the matter is no longer *open to review*.

3.1.4 **G** _{/1} After considering the staff recommendation, the *FSA* may:

- (1) decide to take no action; or
- (2) decide to give a first *supervisory notice* to the *person* concerned.

3.1.5 **G** _{/1} If the *FSA* decides to give a first *supervisory notice* to a *person*, in accordance with the sections of the *Act* listed in *DEC 3 Ann 1G*, the notice must:

- (1) give details of the action;
- (2) inform him when the action takes effect;
- (3) state the *FSA's* reasons for the action and for its decision as to when the action takes effect;
- (4) inform him of his right to refer the matter to the *Tribunal* and give an indication of the procedure on such a reference; and
- (5) inform him that he may make representations to the *FSA* within such a period as may be specified in the notice (whether or not the matter has been referred to the *Tribunal*).

3.1.6 G_{/1} If the *FSA* decides to take no further action and the *FSA* had previously informed the *person* concerned that it intended to recommend action, the *FSA* will communicate this decision promptly to the *person* concerned.

3.1.7 G_{/1} The procedures for making representations are set out in *DEC* 4.4.

Second supervisory notice

3.1.8 G_{/1} The *FSA* will consider any representations made in accordance with *DEC* 4.4 concerning a first *supervisory notice* which the *FSA* has already given.

3.1.9 G_{/1} If the *FSA* decides to take the proposed action, or to take action in a different way, or decides not to rescind action that is already effective, then in accordance with the sections of the *Act* listed in *DEC* 3 Ann 1G, a second *supervisory notice* must be given.

3.1.10 G_{/1} If the *FSA* decides to give a second *supervisory notice*, its content will depend on the action the *FSA* decides to take.

- (1) If the *FSA* decides to take the action proposed in the first *supervisory notice*, or if action has already been taken which the *FSA* decides not to rescind, in accordance with the sections of the *Act* listed in *DEC* 3 Ann 1G, the notice must inform the *person* concerned of his right to refer the matter to the *Tribunal*. If a notice informs a *person* of his right to refer the matter to the *Tribunal*, it must also describe the procedure on such a reference.
- (2) If the *FSA* decides to take different action from that proposed in the first *supervisory notice*, then in accordance with the sections of the *Act* listed in *DEC* 3 Ann 1G, the second *supervisory notice* must be in the same form as a first *supervisory notice* (see *DEC* 3.1.5G).

3.1.11 G_{/1} If the *FSA* decides not to take action, or decides to rescind action that is already effective, then in accordance with the sections of the *Act* listed in *DEC* 3 Ann 1G, the *person* concerned must be informed in writing.

Statutory notice procedure: Supervisory notice procedure

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1 Table List of supervisory notices under the Act (other than Part VI)

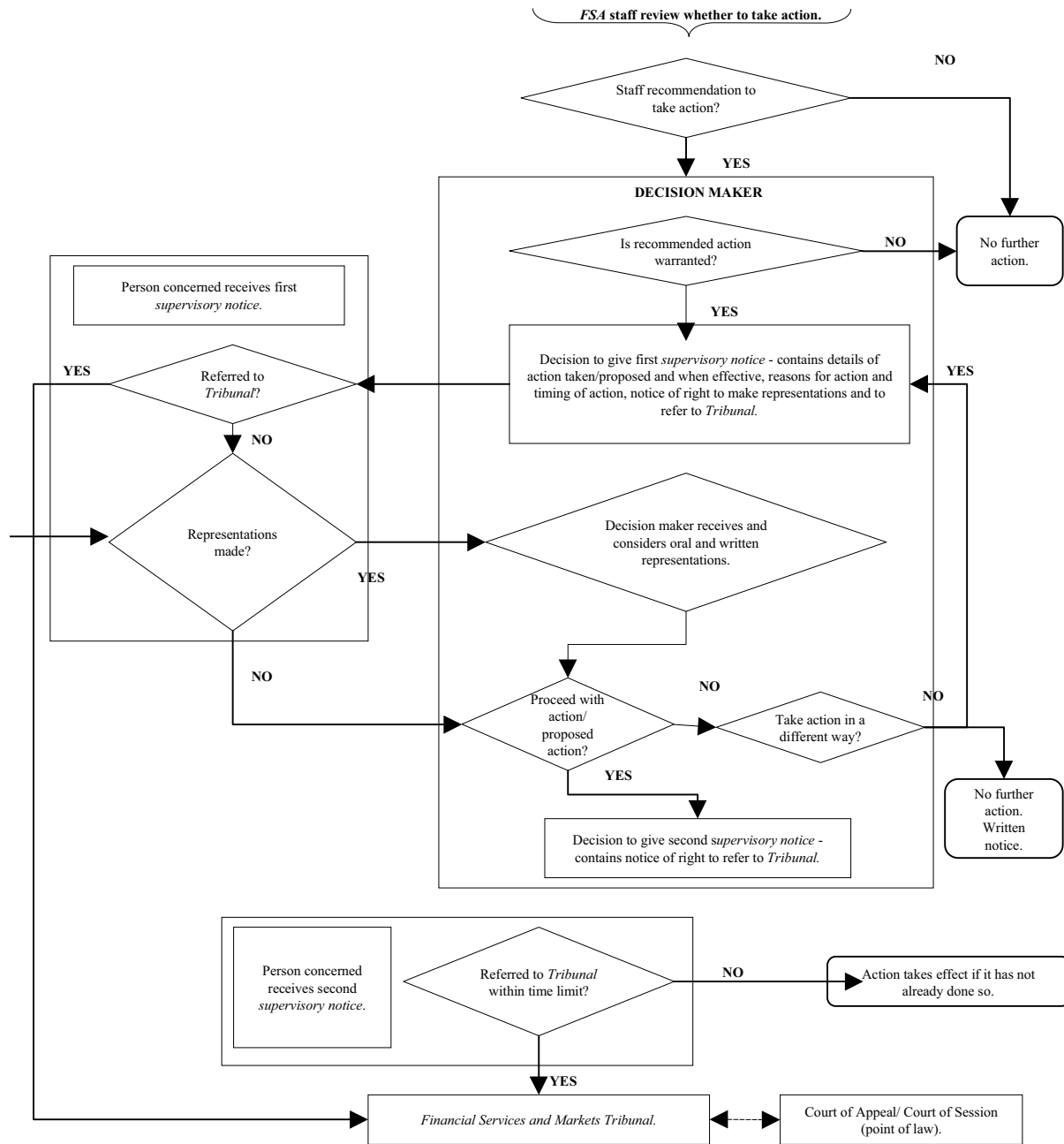
Section of the Act	Description	Handbook reference	Decision maker
53(4)/(7)/(8)(b)	when the <i>FSA</i> is exercising its <i>own-initiative power</i> to vary a <i>firm's Part IV permission</i>	<i>ENF 3</i> <i>SUP 7</i>	<i>RDC / executive procedures</i> (Note)
197(3)/(6)/(7)(b)	when the <i>FSA</i> is exercising its <i>power of intervention</i> in respect of an <i>incoming firm</i>	<i>ENF 4</i> <i>SUP 7</i>	<i>RDC / executive procedures</i> (Note)
259(3)/(8)/(9)(b)	when the <i>FSA</i> is exercising its power to give or, on its own initiative, to vary a direction to the <i>manager</i> and <i>trustee</i> of an <i>AUT</i>	<i>ENF 16</i>	<i>RDC</i>
268(3)/(7)(a) or (9)(a) (as a result of (8)(b))	when the <i>FSA</i> is exercising its power to give a direction to the <i>operator</i> of a <i>recognised scheme</i>	<i>ENF 16</i>	<i>RDC</i>
282(3)/(6)/(7)(b)	when the <i>FSA</i> is exercising its power to give a direction to an <i>operator, trustee</i> or <i>depository</i> of a <i>recognised scheme</i>	<i>ENF 16</i>	<i>RDC</i>
321(2)/(5)	when the <i>FSA</i> is exercising its power to impose a requirement on a former underwriting member of Lloyd's	None	<i>RDC</i>
OEIC Regulations reference	Description	Handbook reference	Decision maker
Regulation 27	when the <i>FSA</i> is exercising its power to give or, on its own initiative, to vary a direction to an <i>ICVC</i> and its <i>depository</i>	<i>ENF 16</i>	<i>RDC</i>

Note : The decision will be made by the *RDC* if it involves a fundamental change (see DEC 4.1.5G) to the nature of a *permission*.

Statutory notice procedure: Supervisory notice procedure

G

The FSA's decision making procedure for supervisory notices



Specimen first supervisory notice

To: [firm or other person]

Of: [address]

[Date]

SUPERVISORY NOTICE

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) [has decided/ proposes] to take the following action.

[PROPOSED] ACTION

[Details of [proposed] action including details of any own-initiative variation of permission, intervention or direction]

EFFECTIVE DATE

[The date on which any own-initiative variation of permission, intervention or direction is to take effect (if a direction imposes a requirement under section 257(2)(a), state that the requirement has effect until a specified date or a further direction)]

REASONS

[Reasons for the [proposed] action, including reasons for the determination as to when the action is to take effect]

DECISION MAKER

The decision to give this notice was made by [identity of relevant committee or individual] on behalf of the FSA

IMPORTANT

This supervisory notice is sent to you in accordance with [one of the following sections:

section 53(4);

section 197(3);

section 259(3);

section 268(3);

section 282(3);

[section 321(2)] of the Financial Services and Markets Act 2000 (“the Act”).

(See DEC 3 of the Decision making manual.)

You may refer this matter to the Financial Services and Markets Tribunal (“the Tribunal”). Under section 133 of the Act you have 28 days from the date of this supervisory notice to refer the matter to the Tribunal, although the Tribunal may permit you a longer period (see DEC 5.1 of the Decision making manual). The detailed procedures for making a reference to the Tribunal are contained in section 133 of the Act and the Tribunal rules. (See [insert where these can be found].)

You may also make written and oral representations to the FSA (whether or not you refer this matter to the Tribunal). If you wish to make representations you must do so within [28] days of receiving this supervisory notice or such longer period as may be permitted by the FSA. Written representations should be made to [] of the above address. (See DEC 4.4 of the Decision making manual.)

Please contact [contact name and details] at the FSA for more information.

Chapter 4.

The decision maker

4.

4.1 Allocation of decision making

4.1.1 **G** This section sets out the allocation of decision making between the RDC and *executive procedures* for decisions which:

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- (1) give rise to an obligation to give a *statutory notice*; or
- (2) are associated with *statutory notice decisions* ("statutory notice associated decisions").

4.1.2 **G** *Statutory notice associated decisions* include decisions:

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- (1) to set or extend the period for making representations (see DEC 4.4);
- (2) whether a copy of the *statutory notice* needs to be given to any third party and the period for the third party to make representations;
- (3) to refuse access to FSA material; and
- (4) as to the information it is appropriate to publish about the matter to which a *final notice*, or a *supervisory notice* which has already taken effect, relates.

4.1.3 **G** FSA staff responsible for preparing and recommending action in individual cases will allocate cases to the RDC (by full or modified procedures) or to *executive procedures* in accordance with DEC 4.1.4G and DEC 4.1.6G.

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Decisions to be taken by the RDC

4.1.4 **G** The RDC has responsibility for *statutory notice decisions* and *statutory notice associated decisions* if the FSA proposes or takes any of the following actions:

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- (1) to 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 IV permission*;
- (2) to restrict a *Part IV permission* on the FSA's own initiative (by removing a *regulated activity*, by imposing a *limitation* or *requirement* or by specifying a narrower description of *regulated activity*) in a way that would make a fundamental change (see DEC 4.1.5G) to the nature of the *Part IV permission* held (whether indefinitely, or for a limited period);
- (3) to refuse an application to vary a *Part IV permission*, or to restrict a *Part IV permission* on the grant of a variation (by imposing a *limitation* or *requirement* which was not applied for or by specifying a narrower description of *regulated activity* than that applied for), in a way that would make a fundamental change (see DEC 4.1.5G) to the nature of the *Part IV permission* that would

- have been held had the application been granted in full (whether indefinitely, or for a limited period);
- (4) to refuse an application for a *Part IV permission*, to refuse an application to cancel a *Part IV permission* or to cancel a *Part IV permission* on the FSA's own initiative;
 - (5) to refuse *approved person* status, or withdraw it under section 63 of the *Act* (Withdrawal of approval);
 - (6) to make a *prohibition order* in relation to any *person*, or refuse an application to vary or revoke such an order;
 - (7) to impose a requirement on an *incoming firm* with an effect equivalent to making a fundamental change (see DEC 4.1.5G) to the nature of a *permission*, or to refuse an application to vary or rescind such a requirement;
 - (8) to exercise the FSA's powers to impose a financial penalty or public censure on any *person*, or to make a restitution order against any *person*;
 - (9) to exercise any power of the FSA relating to a *regulated collective investment scheme*, other than to:
 - (a) refuse an application for an *authorisation order* (but see (10)); or
 - (b) refuse an application for recognition of a *collective investment scheme* under section 270 (Schemes authorised in designated countries or territories) or 272 (Individually recognised overseas schemes) of the *Act*; or
 - (c) object to a notice of intention to invite *persons* to participate in a *collective investment scheme* constituted in another *EEA State*; or
 - (d) refuse approval of changes to an *AUT* or *ICVC*;
 - (10) to refuse an application for an *authorisation order*, if the applicant is not the operator of an existing *AUT* or *ICVC*;
 - (11) to impose a requirement on a *former underwriting member* of Lloyd's or refuse an application to vary or rescind such a requirement;
 - (12) to make an order disapplying the exemption in section 327(1) of the *Act* (Exemption from the general prohibition) in relation to a professional firm to the extent specified in the order, or refuse an application to vary or revoke such an order;
 - (13) to disqualify an auditor or actuary;
 - (14) to refuse to give a *consent notice* to a *UK firm* wishing to establish a *branch* under an *EEA right*.

4.1.5

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In DEC 4.1.4G(2), (3) and (7), making a fundamental change to the nature of a *permission* 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) restricting a *firm* from taking on new business, dealing with a particular category of *client* or handling *client money* by imposing a *limitation* or *requirement*, or refusing an application to vary or cancel such a *limitation* or *requirement*; or
- (4) imposing or varying an assets requirement (as defined in section 48(3) of the *Act* (Prohibitions and restrictions)), or refusing an application to vary or cancel such a requirement.

Decisions to be taken by executive procedures

4.1.6

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Statutory notice decisions and *statutory notice associated decisions* which are not taken by the RDC, will be taken under *executive procedures*.

Examples of allocation of decision making

4.1.7

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Examples of matters decided by the RDC include:

- (1) refusing an application to vary a *Part IV permission* to carry on *insurance business* or to *accept deposits* for the first time; in these cases, the *firm* will normally have been required to complete parts of the application pack (*SUP* 6.4.14G);
- (2) refusing an application to vary a *Part IV permission* to carry on *regulated activities* with *private customers* for the first time;
- (3) refusing an application to vary a *Part IV permission* to remove a *requirement* to enable the *firm* to hold or control *client money* for the first time; and
- (4) varying a *Part IV permission* on the FSA's own initiative by removing a *regulated activity* from a *firm's permission*.

4.1.8

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Examples of matters decided by *executive procedures* (where the FSA decides or is required to use the statutory powers in question rather than to achieve the action required in other ways, for example through individual *guidance* or securing the agreement of a *firm* to take action on a voluntary basis) include:

- (1) imposing a *requirement* that a *firm* submit regular reports covering, for example, trading results, management accounts, *customer* complaints, connected party transactions (*SUP* 7.4.2G(1)), or varying such a *requirement*, on the FSA's own initiative, or refusing an application by the *firm* to vary such a *requirement*;
- (2) imposing a *requirement* that a *firm* submit a business plan (*SUP* 7.3.3G(3)), or varying such a *requirement*, on the FSA's own initiative, or refusing an application by the *firm* to vary such a *requirement*;
- (3) setting prudential limits through a *requirement*, for example on large *exposures*, foreign currency *exposures* or liquidity gaps (*SUP* 7.3.3G(2)), or varying such a *requirement*, on the FSA's own initiative, or refusing an application by the *firm* to vary such a *requirement*;
- (4) imposing a *requirement* that a *firm* maintain a particular amount or type of financial resources (*SUP* 7.3.3G(5)), or varying such a *requirement*, on the

FSA's own initiative, or refusing an application by the firm to vary such a requirement;

- (5) refusing an application to vary a *Part IV permission*, or to restrict a *Part IV permission* on the grant of a variation (by imposing a *limitation* or *requirement* which was not applied for, or by specifying a narrower description of *regulated activity* than that applied for), in a way that would not make a fundamental change (see *DEC 4.1.5G*) to the nature of the *Part IV permission* that would have been held had the application been granted in full (indefinitely, or for a limited period);
- (6) objecting to the acquisition or increase of *control* under section 186 of the *Act* (Objection to acquisition of control), objecting to existing *control* under section 187 of the *Act* (Objecting to existing control), or attaching conditions to an approval to a change in *control* under section 185 of the *Act* (Conditions attached to approval); and
- (7) refusing a request for an *authorisation order* for an operator's proposed *AUT* or *ICVC* (if the operator is an operator of an existing *AUT* or *ICVC*), refusing approval of a *scheme* becoming a *recognised scheme* authorised in a designated territory under section 270 of the *Act* or refusing an application in respect of a proposed individually recognised overseas *scheme* under section 272 of the *Act*.

4.2 The Regulatory Decisions Committee

- 4.2.1** **G** _{/1} The *Regulatory Decisions Committee (RDC)* is appointed by the *FSA Board* to exercise certain regulatory powers on behalf of the *FSA Board*. The *RDC* is accountable to the *FSA Board* for its decisions.
- 4.2.2** **G** _{/1} The *RDC* comprises a Chairman, one or more Deputy Chairmen, and other members.
- 4.2.3** **G** _{/1} The *RDC* is a body outside the *FSA's* management structure. Apart from the Chairman, none of the members of the *RDC* is an *FSA* employee. The members comprise:
- (1) current and recently retired practitioners with financial services industry skills and knowledge; and
 - (2) other suitable individuals representing the public interest.
- 4.2.4** **G** _{/1} The *RDC* is supported by the *RDC Secretariat*. The *RDC Secretariat* is separate from *FSA* staff involved in making recommendations to the *RDC*.

Appointment and removal of members of the RDC

- 4.2.5** **G** _{/1} The Chairman of the *RDC* is appointed by the *FSA Board* on the recommendation of an independent group established by the Board for that purpose. A non-executive member of the *FSA Board* chairs the independent group. The *FSA Board* also appoints all other members of the *RDC*, including its Deputy Chairman or Deputy Chairmen, on the recommendation of the Chairman of the *RDC*.
- 4.2.6** **G** _{/1} All members of the *RDC* are appointed for fixed periods.
- 4.2.7** **G** _{/1} The *FSA Board* may remove a member of the *RDC* but only in the event of that member's misconduct or incapacity.

Constitution and procedure of the RDC

- 4.2.8** **G** _{/1} The *RDC* will meet as a full committee or in panels. Except in an urgent *supervisory notice* case, where the Chairman or a Deputy Chairman and, where possible, any one other member of the *RDC* will make a decision (see *DEC 4.5.7G(2)*), each meeting of the *RDC* will include:
- (1) its Chairman or a Deputy Chairman (who will chair the meeting); and
 - (2) at least two other members.

- 4.2.9** G_{/1} However, the composition and size of panels of the *RDC*, and the frequency of their meetings, may vary depending on the nature of the particular matter under consideration.
- 4.2.10** G_{/1}
- (1) If a member of the *RDC* has a potential conflict of interest in any matter before the *RDC* he will disclose the conflict to the Chairman of the *RDC* (or if he is the Chairman of the *RDC*, to the Chairman or Deputy Chairman of the *FSA*). He will also disclose the conflict to the *RDC* Secretariat.
 - (2) If the Chairman of the *RDC* (or where appropriate the Chairman or Deputy Chairman of the *FSA*) considers it reasonable and appropriate, he will require the member of the *RDC* to stand down from consideration of that particular matter. The Chairman of the *RDC* (or Chairman or Deputy Chairman of the *FSA*) may ask another member of the *RDC* to assist him in considering the potential conflict.
- 4.2.11** G_{/1} The *RDC* Secretariat will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.
- 4.2.12** G_{/1} The meetings of the *RDC* will be in private, and will be conducted in the manner the *RDC* considers suitable in order to enable it to determine fairly the matters which it is required to consider.
- 4.2.13** G_{/1} Each member of the *RDC* present is entitled to vote on the matter under consideration. The Chairman of the meeting of the *RDC* will have a vote as a member of the *RDC* and will have the casting vote in a tie.
- 4.2.14** G_{/1} The *RDC* may require *FSA* staff to attend its meetings.

Consideration of previous breaches

- 4.2.15** G_{/1} *FSA* staff are entitled to put to the *RDC* the previous disciplinary record of a *person*, including any previous breach of the *Act*, the *Principles*, or other *rules* (including the record prior to the *Act*). *FSA* staff may also draw to the *RDC*'s attention the compliance history of a *person*, including that under previous legislation.
- 4.2.16** G_{/1} The *RDC* may not consider any of the matters in *DEC* 4.2.15G for the purpose of proving a later breach. The matters in *DEC* 4.2.15G may be considered when determining whether to take action or, where appropriate, as one of the factors described in *ENF* 13.3.3G, in determining the level of the financial penalty.

Administrative procedure for representations

- 4.2.17** G_{/1} Representations to the *RDC* are received in accordance with *DEC* 4.4.
- 4.2.18** G_{/1} The *FSA* will fix a date or dates for a meeting to consider the representations and to decide:
- (1) whether to take the action proposed;
 - (2) if the action has been taken, whether to rescind the action; and
 - (3) in either case, whether to take the action in a different way.

4.2.19

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The *RDC* Secretariat will ensure that a record is kept of:

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- (1) who took the decision;
- (2) the representations made to the *RDC*;
- (3) the material considered by the *RDC*;
- (4) the nature of the decision;
- (5) the reasons for the decision; and
- (6) the dates on which the decision was taken and then communicated by the *FSA* to the *person* concerned.

4.3 Executive procedure for statutory notice decisions and statutory notice associated decisions

Who makes the decision?

4.3.1

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All *statutory notice decisions* (and *statutory notice associated decisions*) under *executive procedures* are made under authority delegated by the FSA Board. The FSA Chairman's Committee may from time to time determine that particular categories of *statutory notice decision* (and *statutory notice associated decisions*) which may be made by *executive procedures* will be made by a *senior staff committee*. Alternatively, a *senior staff committee* may take such decisions if referred to it by FSA staff (see DEC 4.3.7G(2)). Otherwise, such decisions will be made by an individual FSA staff member.

Separation of functions

4.3.2

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Section 395(2) of the *Act* (The FSA's procedures) requires that the FSA's procedure for the giving of *statutory notices* must be designed to secure that "the decision which gives rise to the obligation to give any such notice is taken by a person not directly involved in establishing the evidence on which that decision is based".

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In accordance with section 395(2) of the *Act*, *statutory notice decisions* taken under *executive procedures* will not be taken by staff directly involved in establishing the evidence on which that decision is based, except in accordance with section 395(3) of the *Act* (see DEC 4.3.17G to DEC 4.3.19G).

Decision making by an individual FSA staff member

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If an individual FSA staff member makes a *statutory notice decision* (or *statutory notice associated decision*) the decision will be:

- (1) made by an executive director of the FSA Board, or his delegate (who will be of at least the level of associate);
- (2) on the recommendation of an FSA staff member of at least the level of associate; and
- (3) with the benefit of legal advice from an FSA staff member of at least the level of associate.

- 4.3.5 **G**_{/1} The individual who takes a decision under *executive procedures* is accountable to the FSA Board directly (if an executive director) or otherwise through line management responsible for the decision concerned.
- 4.3.6 **G**_{/1} An FSA staff member who considers that a *statutory notice decision* (or *statutory notice associated decision*) should be taken above his own level is free to refer that decision to a more senior level. If an FSA staff member consults another staff member about a decision, the decision remains the independent decision of the FSA staff member who consults his colleague, unless it is agreed that the decision should instead be taken by the colleague, and the colleague has the delegated authority to do so.
- 4.3.7 **G**_{/1} If an individual responsible for a decision by *executive procedures* (or a more senior FSA staff member with responsibilities in relation to the decision concerned) considers that it warrants collective consideration, the individual may:
- (1) take the decision himself, following consultation with other FSA staff members, as above; or
 - (2) refer it to a *senior staff committee*, which will take the decision itself.

Decision making by a senior staff committee

- 4.3.8 **G**_{/1} A *senior staff committee* will consist of such FSA staff members as the FSA Chairman's Committee may from time to time determine.
- 4.3.9 **G**_{/1} A *senior staff committee* is accountable for its decisions to the FSA Chairman's Committee, and through it, to the FSA Board.
- 4.3.10 **G**_{/1} A *senior staff committee* may operate through standing or specific sub-committees to consider particular decisions or classes of decision, for which accountability will lie through the committee. Each meeting of a *senior staff committee*, or sub-committee, will include:
- (1) an individual with authority to act as its chairman; and
 - (2) at least two other members.
- 4.3.11 **G**_{/1} A *senior staff committee* will operate on the basis of a recommendation from an FSA staff member of at least the level of associate, and with the benefit of legal advice from an FSA staff member of at least the level of associate.
- 4.3.12 **G**_{/1} If FSA staff recommend action be taken and they consider that the decision falls within the responsibility of a *senior staff committee* (or sub-committee):
- (1) in general, but subject to the need to act swiftly in urgent cases, the FSA staff's recommendation will go before the *senior staff committee* (or sub-committee);
 - (2) in an urgent case, if, in FSA staff's opinion, the action proposed should occur before it is practicable to convene a meeting of the *senior staff committee* (or sub-committee), the FSA staff's recommendation may be considered by the *senior staff committee's* chairman or a deputy chairman and, where possible, but subject to the need to act swiftly, one other member of the *senior staff committee*;
 - (3) in an exceptionally urgent case, if in the FSA staff's opinion:

- (a) the action should be taken before a recommendation to the chairman or a deputy chairman of the *senior staff committee* could be made; and
- (b) an urgent decision on the proposed action is necessary to protect the interests of consumers;

the *FSA* staff's recommendation will be considered and the decision made by a member of the *FSA*'s executive of at least director of division level.

General

4.3.13

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A *statutory notice* given under *executive procedures* will identify the decision maker. A decision to give a *decision notice* or second *supervisory notice* will normally be made by the same decision maker (that is, the individual or committee) who made the decision to give the *warning notice* or first *supervisory notice*.

4.3.14

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If a firm wishes to make representations in response to a *warning notice* or first *supervisory notice*, those representations will be received in accordance with *DEC* 4.4.

4.3.15

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The decision maker will ensure that a record is kept of:

- (1) who took the decision;
- (2) any representations to the decision maker;
- (3) the material considered by the decision maker;
- (4) the nature of the decision;
- (5) the reasons for the decision; and
- (6) the dates on which the decision was taken and then communicated to the *person* or *persons* concerned.

4.3.16

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FSA staff are required by their contract of employment to comply with a code of conduct which imposes strict rules to cover the handling of conflicts of interest which may arise from personal interests or associations. *FSA* staff who are subject to a conflict of interest must declare that interest to the person to whom they are immediately responsible for the decision. In the case of decisions by a *senior staff committee*, any conflict of interest must be declared to the chairman of the committee (or, if the person with the conflict is the chairman, to the *FSA* Chairman's Committee). The individual to whom the conflict of interest is declared will decide whether that conflict precludes the involvement of the *FSA* staff member in making a decision.

Section 395(3) decisions

4.3.17

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Under section 395(3) of the *Act*, the *FSA*'s procedure may permit a decision which gives rise to an obligation to give a *supervisory notice* to be taken by a person involved in establishing the evidence on which the decision is based if:

- (1) the *FSA* considers that, in a particular case, it is necessary in order to protect the interests of consumers; and
- (2) the person taking the decision is of a level of seniority laid down by the procedure.

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The *FSA* expects to exercise the power provided by section 395(3) only in exceptional cases. This means cases in which the *FSA* believes action is needed to protect the interests of consumers in the face of a material threat to those interests, but in which the requirements for separation cannot be met: for example where the notice needs to take immediate effect in order to protect the interests of consumers.

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The level of individual who may make such a decision is a member of the *FSA*'s executive of at least director of division level or a member of a committee which reports directly to the *FSA* Chairman's Committee.

4.4 Representations

- 4.4.1** G_{/1} (1) Any *warning notice* or first *supervisory notice* will contain a statement that the *person* concerned will have a certain amount of time in which to make representations to the decision maker. In the case of a first *supervisory notice* the *person* concerned may make representations whether or not the matter to which the notice relates has been referred to the *Tribunal*.
- (2) If a second *supervisory notice* is given where the decision maker has decided to take action different from that which was proposed in the first *supervisory notice*, the second *supervisory notice* will provide a similar statement about the right to make representations.

4.4.2 G_{/1} In the case of a *warning notice*, section 387(2) of the *Act* requires that the *warning notice* must specify a reasonable period for the making of representations. This must be at least 28 days. The *Act* does not specify a minimum period that the *FSA* must give for making representations for *supervisory notices*.

4.4.3 G_{/1} In deciding on the period to make representations, the decision maker will have regard to the circumstances of each case, including the nature of the proposed action and its likely effect on the *person* concerned. The decision maker will have particular regard to the risk to the *FSA's regulatory objectives* of any delay in imposing proposed action. The period for representations will normally be 28 days from the date when the *person* receives the notice, subject to his right to seek an extension of time.

Request for an extension of time

- 4.4.4** G_{/1} (1) After receiving the *warning notice* or first *supervisory notice*, if the *person* concerned considers that its stated period for representations is too short, then he may, within 14 days of receiving the notice, request the *FSA* in writing for more time. In the case of a *warning notice*, this may be appropriate, for example, if a *person* has entered or wishes to enter into settlement discussions with *FSA* staff.
- (2) In accordance with section 387(3) of the *Act* and other relevant sections of the *Act*, the decision maker may extend the period of time for representations specified in the *warning notice* or *supervisory notice*.

4.4.5 G_{/1} Requests for an extension of time will be considered by the decision maker who will notify the recipient of the notice promptly whether the request has been accepted or not.

Written representations

- 4.4.6 **G**_{/1} Any written representations should be sent to the *FSA* at the address stated in the *warning notice* or *supervisory notice*.

Oral representations

- 4.4.7 **G**_{/1} If he so chooses, a *person* who receives a *warning notice* or first *supervisory notice* may make oral representations to the decision maker and attend a meeting for that purpose.

- 4.4.8 **G**_{/1} If the *person* wishes to make oral representations he should send a written notification of this to the *FSA* at the address stated in the *warning notice* or *supervisory notice*. The notification should be made at least five *business days* before the end of the period for representations specified in the notice. The notification should specify the matters on which the *person* wishes to make oral representations, include an estimate of how much time the *person* expects the representations to take, and provide the names of any legal representatives appointed to attend the meeting at which the representations will be made. If after notifying the *FSA* of his intention to make oral representations, the *person* chooses not to make those representations, the decision maker will nevertheless decide the matter.

- 4.4.9 **G**_{/1} A *person* may appoint a representative of his choice (who may be legally qualified) to attend the meeting at which oral representations will be made. The representative may make or assist in making the representations.

- 4.4.10 **G**_{/1} The decision maker will specify a time as soon as is reasonably possible after receiving the notification for receiving the oral representations. The decision maker may specify the place where he will receive the representations and may specify that the representations will be received in private. The decision maker may limit the type, length and content of any representations. The decision maker may ask the *person* or his representative at the meeting to clarify any issue arising out of the representations and may require the *person*, and any representatives, to leave the meeting after they have made their representations.

- 4.4.11 **G**_{/1} *DEC 4.4.13G* and *DEC 4.4.14G* explain the procedure where no representations are received or made.

Third parties

- 4.4.12 **G**_{/1} *DEC 4.4* applies also to a third party who has received a copy of a *warning notice*, in relation to those matters affecting the third party.

Default procedures

- 4.4.13 **G**_{/1} If the *FSA* receives no response or representations by the time a decision is to be made about the giving of the *decision notice* or second *supervisory notice*, the decision maker may regard as undisputed the allegations or matters in the *warning notice* or first *supervisory notice*. In such cases, a *decision notice* or second *supervisory notice* will be given accordingly. A *person* who has received a *decision notice* or second *supervisory notice* and has not previously made any response or

representations to the *FSA*, may, nevertheless, refer the *FSA*'s decision to the *Tribunal* as described in *DEC 5.1*.

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In exceptional cases, the decision maker may permit representations from a *person* who has received a *decision notice* (or a second *supervisory notice*) given in accordance with *DEC 2.3* (or *DEC 3.1.8G* to *DEC 3.1.10G*), and shows on reasonable grounds that he did not receive the *warning notice* (or first *supervisory notice*), or that he had reasonable grounds for not responding within the specified period. In these circumstances, the decision maker may decide to give a *notice of discontinuance* (*DEC 2.3.8G* to *DEC 2.3.9G*) or a further *decision notice* (or a written notice or a *supervisory notice*).

4.5 Delegation of RDC decisions and modified RDC procedures

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The making of the following types of *statutory notice decisions* and *statutory notice associated decisions* falling within DEC 4.1.4G (Decisions to be taken by the RDC) will be discharged, on behalf of the RDC, by the Chairman of the RDC or FSA staff, so that they will be made by modified rather than full RDC procedure:

- (1) in relation to *warning notices* and *decision notices*:
 - (a) those relating to financial penalties for late submission of reports (see DEC 4.5.2G to DEC 4.5.6G);
 - (b) those relating to the revocation of recognition of section 270 or 272 *recognised schemes*, where there is a common understanding between the scheme management and the FSA about the need for revocation (see DEC 4.5.14G to DEC 4.5.15G);
- (2) in relation to *supervisory notices*:
 - (a) those involved in taking urgent action by *supervisory notice* (see DEC 4.5.7G and DEC 4.5.8G);
 - (b) those relating to the use of the FSA's *own-initiative power* and other cases involving the imposition of *requirements*, where there is a common understanding between the FSA and the *person* concerned about the need for the action (see DEC 4.5.9G to DEC 4.5.13G).

Financial penalties for late submission of reports

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When the FSA decides whether to impose a financial penalty on a *firm* for the late submission of a report (regardless of the period of delay), FSA staff will report on the late submission to at least one other member of staff who is:

- (1) at a level senior to that of the member of staff who reports on the late submission and on the reasons for it; and
- (2) not directly involved in the day-to-day supervision of the *firm* concerned.

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FSA staff at the appropriate level of seniority will consider the report about the late submission. They will then decide whether a financial penalty is appropriate and, if so, its amount. If they decide a penalty is appropriate, the FSA will give a *warning notice*.

4.5.4 G_{/1} If the *firm* makes representations in relation to the penalty stated in the *warning notice*, the matter will be referred to the Chairman or Deputy Chairman of the RDC. The Chairman or Deputy Chairman of the RDC will decide whether to confirm the penalty stated in the *warning notice* or that the penalty should be of a different amount and, if so, give a *decision notice*.

4.5.5 G_{/1} If the *firm* makes no representations, FSA staff at the appropriate level of seniority will decide whether to confirm their original decision and, if so, will then give a *decision notice*.

4.5.6 G_{/1} If the *firm* objects to the *decision notice*, it may refer the matter to the *Tribunal*. The right to refer a matter to the *Tribunal* is outlined in DEC 5.1.

Supervisory notices: urgent cases

4.5.7 G_{/1} If FSA staff recommend action be taken and they consider that the decision is the RDC's responsibility:

- (1) in general, but subject to the need to act swiftly in urgent cases, the FSA staff's recommendation will go before an RDC panel;
- (2) in an urgent case, if, in FSA staff's opinion, the action proposed should occur before it is practicable to convene an RDC panel, the FSA staff's recommendation will be considered by the RDC's Chairman or a Deputy Chairman of the RDC and, where possible, but subject to the need to act swiftly, one other RDC member;
- (3) in an exceptionally urgent case, where in the FSA's opinion:
 - (a) the action should be taken before a recommendation to the Chairman of the RDC can be made; and
 - (b) an urgent decision on the proposed action is necessary to protect the interests of consumers;

the FSA staff's recommendation will be considered by a member of the FSA's executive of at least director of division level. In these circumstances, the FSA will ensure as far as possible that the executive making the decision was not involved in establishing the evidence on which the decision is based.

4.5.8 G_{/1} If the executive making the decision has been involved in establishing the evidence on which the decision is based, and a notice is given on the grounds of urgency, this will be in accordance with DEC 4.3.17G to DEC 4.3.19G.

Supervisory notices: non-urgent cases

4.5.9 G_{/1} In certain other cases, including cases relating to *collective investment schemes* (see DEC 4.5.14G to DEC 4.5.15G), FSA staff may be in a position to inform the *person* concerned of their concerns, and of the action they are considering, before they begin to exercise *supervisory notice* procedures. If the *person* concerned consents to the action at that stage, FSA staff may decide to use the modified decision making procedure in DEC 4.5.10G to DEC 4.5.13G.

- 4.5.10** G_{/1} FSA staff will make recommendations for action to at least one other member of staff who is:
- (1) at an appropriate level of seniority; and
 - (2) not directly involved in the supervision of the *person* concerned, or in establishing the evidence on which the decision is based.
- 4.5.11** G_{/1} FSA staff at the appropriate level of seniority will consider the recommendations. If they are satisfied that the *person* concerned agrees to the recommended action, they will consider whether the FSA should give a first *supervisory notice* (see DEC 3.1.3G to DEC 3.1.7G).
- 4.5.12** G_{/1} If FSA staff decide to give the first *supervisory notice* and the *person* concerned accepts its terms, the FSA will then consider whether to give a second *supervisory notice* (see DEC 3.1.8G to DEC 3.1.10G) confirming the decision.
- 4.5.13** G_{/1} The FSA will only give the second *supervisory notice* when it is satisfied that the *person* concerned accepts the terms of the first *supervisory notice*, and the circumstances of the case have not materially changed since that notice was given. If FSA staff are not satisfied, or circumstances of the case have changed, they will refer the possible giving of a second *supervisory notice* to the RDC. In such cases the RDC will follow the process in DEC 3.1.8G to DEC 3.1.10G.

Modified procedures in collective investment scheme cases

- 4.5.14** G_{/1} In DEC 4.5.15G, the term "scheme management" refers:
- (1) in relation to an AUT, to the *manager* and *trustee*;
 - (2) in relation to an ICVC, to the *directors* and the *depository*;
 - (3) in relation to a *recognised scheme*, to the operator, and (if any) the *trustee* or *depository*.
- 4.5.15** G_{/1} In certain cases where it is proposing to exercise its powers under section 257 (Directions), 279 (Revocation of recognition) or 281 (Directions) of the *Act* or under regulation 23 or 25 of the *OEIC Regulations*, the FSA may be in a position to inform the scheme management of its concerns, and of the action it is considering, before it exercises those powers. Alternatively, the scheme management may request the FSA to exercise one of the powers. For example, the *manager* and the *trustee* of an AUT may ask the FSA to give a direction under section 257(2)(a) for the suspension of the *issue* and *redemption* of *units* because of a temporary problem in valuing the property subject to the *scheme*. If there is a common understanding between the FSA and all the members of the scheme management about the need for the exercise of the power in question at that stage (that is, before the FSA begins to exercise the statutory procedures), the FSA may:
- (1) in the case of the exercise of its powers under sections 257 or 281 or under regulation 25, decide to use the modified decision making procedure for non-urgent *supervisory notices* in DEC 4.5.9G to DEC 4.5.13G; or
 - (2) in the case of the exercise of its powers under section 279 or regulation 23, decide to use a modified decision making procedure under which the matter will be delegated to FSA staff of an appropriate level of seniority. The

procedure will be as set out in *DEC 4.5.9G* to *DEC 4.5.13G* but adapted to be appropriate for a case involving a *warning notice* and *decision notice*.

4.6 Decisions to apply to the civil courts and powers to prosecute criminal offences

4.6.1 **G**_{/1} A decision to begin, or discontinue, proceedings using the powers listed in *DEC* 1.1.3G will be made by the *RDC* Chairman or, in an urgent case and if the Chairman is not available, by an *RDC* Deputy Chairman and where possible, but subject to the need to act swiftly, one other *RDC* member.

4.6.2 **G**_{/1} In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his absence, another member of the *FSA*'s executive of at least director of division level. An exceptionally urgent case in these circumstances is one where *FSA* staff believe that a decision to begin proceedings using the powers in *DEC* 1.1.3G:

- (1) should be taken before it is possible to follow the procedure described in *DEC* 4.6.1G; and
- (2) is necessary to protect the interests of consumers or potential consumers.

4.6.3 **G**_{/1} Decisions to bring proceedings using the powers in *DEC* 1.1.3G do not involve any of the procedures relating to the giving of *statutory notices* including the procedures described in *DEC* 4.4 relating to representations. Further details about the *FSA*'s policy and procedures in the use of the powers to apply to the civil courts for *injunctions*, restitution orders, *insolvency orders*, *collective investment scheme* related orders and the powers to prosecute criminal offences are contained in *ENF* 6 (*Injunctions*), *ENF* 9 (*Restitution and redress*), *ENF* 10 (*Insolvency proceedings and orders against debt avoidance*), *ENF* 16 (*Collective investment schemes*) and *ENF* 15 (*Prosecution of criminal offences*) respectively.

Chapter 5.

References to the Tribunal, publication and service of notices

5.



5.1 The Tribunal

- 5.1.1** G_{/1} (1) A *person* who receives a *decision notice* or *supervisory notice* (including a third party who has been given a copy of a *decision notice*) has the right to refer the *FSA's* decision to the *Tribunal*.
- (2) The *Tribunal* is established under Part IX of the *Act* (Hearings and Appeals) and is governed by Part IX and Schedule 13 to the *Act* (The Financial Services and Markets Tribunal). The *Tribunal* is independent of the *FSA* and appointed by the Lord Chancellor's Department in accordance with the Financial Services and Markets Tribunal Rules 2001 ("the Tribunal rules").
- 5.1.2** G_{/1} Under section 133(1) of the *Act* (Proceedings: general provisions), any reference to the *Tribunal* must be made within 28 days of the date on which the *decision notice* or *supervisory notice* is given, or within any period prescribed by the *Tribunal* rules. Under section 133(2) of the *Act*, the *Tribunal* rules may allow a reference to be made after the end of the 28 day period.
- 5.1.3** G_{/1} A reference to the *Tribunal* will be a full rehearing of the matter that gave rise to the decision referred to the *Tribunal*. On a reference the *Tribunal*:
- (1) must determine what (if any) is the appropriate action for the *FSA* to take in relation to the matter referred (section 133(4)); and
- (2) may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the *FSA* at the time the *FSA* took its decision.
- 5.1.4** G_{/1} In determining a reference:
- (1) made as a result of a *decision notice*, the *Tribunal* may not (section 133(6)) direct the *FSA* to take action which the *FSA* would not, as a result of section 388(2) of the *Act* (Decision notices), have had the power to take when giving the *decision notice*;
- (2) made as a result of a *supervisory notice*, the *Tribunal* may not (section 133(7)) direct the *FSA* to take action which would otherwise have required the giving of a *decision notice*.
- 5.1.5** G_{/1} On determining a reference, the *Tribunal*:
- (1) must (section 133(5)) remit the matter to the *FSA* with such directions (if any) as the *Tribunal* considers appropriate for giving effect to its determination; and
- (2) may make recommendations as to the *FSA's* regulating provisions or its procedures.

5.1.6

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Under section 133(9) of the *Act*, the *FSA* must not take any action specified in a *decision notice* during the period within which a reference may be made to the *Tribunal*. Nor may it take such action, if the matter is referred, until the reference, and any appeal against the *Tribunal's* decision, has been finally disposed of.

5.1.7

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The *FSA* is required to act in accordance with the determination of, and any direction given by, the *Tribunal* and an order of the *Tribunal* will be enforceable as if it were an order of the county court or, in Scotland, as if it were an order of the Court of Session.

5.2 Publication

Publication of final notices and effective supervisory notices

- 5.2.1 **G**_{/1} Section 391(4) and (5) of the *Act* (Publication) provides that the *FSA* must publish such information about the matter to which a *final notice*, or *supervisory notice* that has taken effect, relates, as it considers appropriate. See also *DEC 5.2.3G*.

Publication of notices of discontinuance

- 5.2.2 **G**_{/1} If the *FSA* has given a *notice of discontinuance*, the *FSA* may, if the *person* to whom the notice is given consents, publish such information as it considers appropriate about the matter to which the discontinued proceedings related (section 391(2) of the *Act*). Similarly, section 391(3) of the *Act* indicates that where a *notice of discontinuance* has been copied to a *person*, the *FSA* may, if the *person* to whom the notice is copied consents, publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that *person*. See also *DEC 5.2.3G*.

No publication if unfair or prejudicial

- 5.2.3 **G**_{/1} Section 391(6) of the *Act* provides that the *FSA* may not publish information relating to a *final notice*, *supervisory notice* that has taken effect or *notice of discontinuance* if publication would, in the *FSA*'s opinion, be unfair to the *person* with respect to whom the action was taken or prejudicial to the interests of consumers.

Warning and decision notices: no publication

- 5.2.4 **G**_{/1} Section 391(1) of the *Act* provides that neither the *FSA* nor any other *person* to whom a *warning notice* or *decision notice* is given or copied may publish the notice or any details concerning it.

Manner of publication

- 5.2.5 **G**_{/1} Section 391(7) of the *Act* provides that information which is published may be published in such a manner as the *FSA* considers appropriate. The *FSA* will

consider the particular circumstances of each case in deciding what manner of publication will be appropriate.



5.3 Service of notices by the FSA

Service of Notices Regulations

- 5.3.1 **G**_{/1} The Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001 (SI 2001/1420) govern service of *statutory notices* and other notices and *documents* which must be served by the FSA under the *Act*.

Methods of service by the FSA and deemed receipt

- 5.3.2 **G**_{/1} The methods by which the FSA may give a notice under the Regulations and the day on which it is deemed to be received, are set out in DEC 5.3.3G.

- 5.3.3 **G**_{/1} Table Methods of service of notices by the FSA

Method	Deemed day of receipt
(1) delivery of the notice to the recipient	not applicable: it is received when delivered
(2) leaving the notice at the recipient's proper address (as defined in the Regulations)	the business day after it is left at that address
(3) <i>posting</i> the notice to that address	if the notice is <i>posted</i> to an address in the <i>United Kingdom</i> , the second business day after <i>posting</i> if the notice is <i>posted</i> to an address in any <i>EEA State</i> (other than the <i>United Kingdom</i>), the fifth business day after <i>posting</i>
(4) transmitting the notice by fax if the recipient has indicated in writing that he is willing to receive the notice by such means and a follow-up copy is sent by another method by the end of the following business day	the business day after the day on which the document is transmitted
(5) transmitting the notice by any other electronic means of communication, if the recipient has indicated in writing that he is willing to receive the notice by such means	the business day after the day on which the document is transmitted

- 5.3.4 **G**_{/1} The Regulations also make provision for the service of notices on:

- (1) the recipient's nominee;
- (2) if the recipient is an *appointed representative*, on his *principal*; and

(3) if the recipient is not an individual, to particular *persons* on its behalf.

Meaning of "business day"

5.3.5

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In the Regulations and DEC 5.3.3G, "business day" means any day except Saturday, Sunday or a bank holiday, where "bank holiday" includes Christmas Day and Good Friday.

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Appendix 1

Settlement procedure and mediation scheme for FSA disciplinary cases

1.1 Introduction

- 1.1.1** G_{/1} A *person* who is or may be subject to enforcement action may discuss the proposed action with *FSA* staff through settlement discussions. Settlement discussions take place on an informal basis after the *FSA* has given a *warning notice*. Where *FSA* staff have recommended that disciplinary action be taken against a *person*, the mediation scheme will be available to those *persons* against whom action is proposed after settlement discussions have broken down. This appendix sets out the procedure for settlement and the framework of the mediation scheme.

1.2 Settlement

- 1.2.1** G_{/1} If a *person* who is or may be subject to enforcement action wishes to discuss the proposed action with *FSA* staff on an informal basis, he may do so after the *FSA* has given the *warning notice*. The *warning notice* will contain details of the person to contact for these purposes. (There is no bar on discussions at an earlier stage, but they are likely to be less productive until the *FSA* has given the *warning notice* to the *person* concerned.) The *FSA* and the *person* concerned should agree that discussions will take place on a "without prejudice" basis, and that neither party may subsequently rely on admissions or statements made in the context of the discussions, or *documents* recording the discussions.

- 1.2.2** G_{/1} The terms of any proposed settlement will:
- (1) be put in writing and be agreed by *FSA* staff and the *person* concerned;
 - (2) include a statement of the facts and any breaches admitted by the *person* concerned and the proposed action to be taken; and
 - (3) be considered by the *RDC*.

- 1.2.3** G_{/1} Having considered the terms of the proposed settlement, the *RDC* may ask to meet the relevant *FSA* staff or the *person* concerned in order to assist in its consideration of the proposed settlement. The *RDC* may:

- (1) accept the proposed settlement by issuing a *decision notice* or (where appropriate) *notice of discontinuance* based on the terms of the settlement; or
- (2) decline the proposed settlement;

whether or not the *RDC* has met with the relevant *FSA* staff or the *person* concerned.

1.2.4

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Where the *RDC* declines the proposed settlement, it may invite *FSA* staff and the person concerned to enter into further discussions to try to achieve a settlement. The *RDC* may extend the period for representations (if they have not already done so), or, if representations have already been made, the *RDC* will proceed to give a decisions notice.

1.2.5

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If it is not possible to reach an agreed proposed settlement of the case by informal discussions, the *person* concerned may elect to submit the case to mediation.

1.3

Mediation

1.3.1

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Mediation is a confidential without prejudice dispute resolution process in which a neutral mediator assists the parties in trying to settle their differences. The mediator is not a judge or arbitrator and has no power to bind the parties, but rather operates as a facilitator of the discussions.

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As mediation will be on a "without prejudice" basis, admissions made by the parties in the course of the mediation and documents prepared for the purposes of the mediation may not be referred to in subsequent proceedings relating to the dispute if the mediation is unsuccessful. However, if the mediation results in a proposed settlement of the dispute which is approved by the *RDC*, the terms of the proposed settlement will form the basis of a *decision notice*, and subsequent *final notice*, or (where appropriate) *notice of discontinuance*, given by the *FSA*.

1.3.3

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Following the issue of a *warning notice* the *person* will have access to certain material on which the *FSA* has relied in deciding to commence disciplinary proceedings (see *DEC 2.4.2G*). The period following the issue of the *warning notice* is therefore a natural point for informal settlement discussions to take place in an attempt to resolve the matter. Mediation is intended to supplement those discussions where the parties consider that the involvement of a neutral mediator is required to facilitate further progress.

1.4

Scope of mediation scheme

1.4.1

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Mediation will be available in enforcement cases involving disciplinary matters and *market abuse*, subject to the exceptions set out in *DEC App 1.4.2G*.

- 1.4.2** G /1 Mediation will not be available in:
- (1) cases involving allegations of a criminal offence or offences; or
 - (2) cases involving allegations of unfitness or impropriety based on judgements about dishonesty or lack of integrity; or
 - (3) cases involving the exercise of the *FSA's own-initiative powers* on a variation of *permission*.

- 1.4.3** G /1 In each appropriate enforcement case (see *DEC App 1.4.1G* and *1.4.2G*), the mediation scheme will be available to the *person* against whom a *warning notice* is issued. The mediation scheme will be available after the *warning notice* has been issued and before the *RDC* issues a *final notice*. The relevant *warning notice* will state the circumstances in which mediation is available for that matter under the terms of the scheme.

- 1.4.4** G /1 The *person* is not obliged to submit his case for mediation.

1.5 Mediation provider

- 1.5.1** G /1 The scheme will be administered by a body (the mediation provider) which:
- (1) is independent of the *FSA*;
 - (2) provides a panel of experienced mediators who are independent of the *FSA*; and
 - (3) has suitable expertise of and experience in the administration of mediation schemes.

1.6 Starting the mediation

- 1.6.1** G /1 The *FSA* will offer the mediation facility in all appropriate enforcement cases (see *DEC App 1.4.1G*). If the *person* agrees to submit the case to mediation, the parties will send a joint mediation notice in an agreed form to:
- (1) the mediation provider; and
 - (2) the secretary to the *RDC*.

- 1.6.2** G /1 The mediation notice will commit each party to use their best endeavours to progress the mediation process in a timely manner.

1.6.3 G_{/1} The *person* may request in the mediation notice that the time period specified in the *warning notice* for making oral or written representations (or both) to the *RDC* be extended by a maximum of 14 days, to allow time for the mediation to be completed. On receipt of a mediation notice requesting such an extension, the *RDC* will notify the parties and the mediation provider of its agreement to the requested extension or of any other extension that it sees fit.

1.6.4 G_{/1} If required, the *person* may apply to the *RDC* for a further extension in order to complete the mediation (see *DEC App 1.7.5G*). The total of all extensions to the 28 day time period for making written or oral representations may not exceed 28 days, other than in exceptional circumstances.

1.7 **Setting up the mediation**

1.7.1 G_{/1} Once the parties have agreed to mediate, and a mediation notice has been sent to the mediation provider, the mediation provider will liaise with the parties in order to deal with the matters set out in *DEC App 1.7.2* to *1.7.11*.

Appointment of mediator

- 1.7.2** G_{/1}
- (1) The mediation provider will maintain a panel of suitable mediators, and recommend in each case a mediator to the parties. The parties are free to accept or decline the recommendation. If either party declines the recommendation, the mediation provider will seek to obtain agreement on another mediator from the panel.
 - (2) If the parties cannot agree a mediator within 7 days of the mediation notice being received by the mediation provider, the mediation provider will appoint a mediator.
 - (3) The mediators on the panel will all be:
 - (a) experienced commercial mediators; and
 - (b) accredited by or registered with a recognised mediation organisation.
 - (4) Experience of and expertise in the financial services sector will not be compulsory for panel mediators, but may be desirable.
 - (5) Mediators will, in accepting appointments, be required to confirm to the parties that they have no conflicts of interest in doing so.

Date for mediation

- 1.7.3** G_{/1}
- (1) a suitable date for the mediation; and

- (2) a timetable for the mediation process as a whole, including the date for submission of case summaries and exchange of *documents* referred to in the case summaries.

Duration of mediation

1.7.4

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- (1) Most mediations should last no longer than one full day, but in complex cases more time may be necessary. The mediator will assist the parties in deciding how much time to set aside. If the mediation requires more time than allotted to it, the parties may ask the mediation provider to set up a further day or days.
- (2) The parties and the mediator will use their best endeavours to complete the mediation as soon as practicable.

Mediation timetable

1.7.5

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- (1) In complex cases, the agreed timetable may extend beyond the initial extension agreed by the *RDC*, in which case the parties may request a further extension from the *RDC* (see *DEC* App 1.6.4G).
- (2) If the mediation has not started within the allotted timetable, the *FSA* may decline to mediate, and the matter will be referred to the *decision notice* stage.

Venue

1.7.6

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The mediation may take place at any venue acceptable to the parties and the mediator. This may be at the offices of the mediation provider, the mediator (if different), the *FSA* or elsewhere.

Mediation agreement

1.7.7

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- (1) Each mediation will take place in accordance with the terms of a mediation agreement. The agreement will set out the terms on which the mediation will take place, in particular, the agreement will provide that:
- (a) the mediation will be on a “without prejudice” basis and confidential; and
 - (b) the parties who attend the mediation will have authority to agree proposed settlement terms (subject, in relation to the *FSA* staff, to App 1.7.9G).
- (2) The mediation agreement will be signed by the parties, the mediator and the mediation provider.

Confidentiality

1.7.8

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- (1) Confidentiality is a key element of the mediation process. It means that:

- (a) matters disclosed in, and documents created for the purposes of, the mediation cannot be referred to in the public domain; and
 - (b) matters disclosed by one party to the mediator in confidence will not be disclosed to the other party without consent.
- (2) Under the mediation scheme, however, confidentiality will be limited in that:
- (a) if any information indicating potentially criminal conduct is disclosed to the mediator, the mediator will not be required to keep that matter confidential (and may choose to terminate the mediation);
 - (b) the terms of any settlement reached will, if approved by the RDC, be incorporated in a *decision notice*, and subsequent *final notice*, or (where appropriate) *notice of discontinuance* which may be made public;
 - (c) the FSA may publish information regarding the operation of the scheme on an anonymous basis in the FSA's annual report; such information may include, for example, the number of mediations conducted under the scheme and the number of those mediations which have resulted in agreed settlements.
- (3) In all other respects, documents prepared for the purposes of, and discussions taking place in the course of, the mediation will retain the confidential status they had during the mediation itself.

Authority to settle

1.7.9

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- (1) A key feature of mediation is the requirement that those who attend the mediation on behalf of each party have full authority to agree proposed settlement terms. In general, the FSA's decision making procedure for regulatory enforcement cases requires that the RDC approve any decision to take or refrain from taking disciplinary action. (The exception is some cases involving late submission of reports, see DEC 4.5.2G to DEC 4.5.6G) Therefore, the RDC must approve any proposed settlement terms agreed at the mediation.
- (2) The FSA will be represented during the mediation proceedings and at the mediation itself by the FSA staff who initially recommended that disciplinary action be taken. In order to minimise the risk that the proposed settlement terms agreed at the mediation will not be approved, the FSA will endeavour to ensure that the relevant members of the RDC, or as many of its relevant members as possible, are available for consultation by telephone during the mediation. This is to enable a clear indication to be given to the parties and the mediator whether the RDC will find the proposed settlement terms acceptable.
- (3) However, no involvement of the RDC in the mediation will in any way compromise its right subsequently to decline to approve the settlement terms.
- (4) If the RDC decides to decline to approve the settlement terms agreed at the mediation, the parties may, with the consent of the RDC, return to the mediation process if they wish to explore further settlement options. If they do, the RDC will ensure that its views are clearly stated as to why the terms previously agreed were not acceptable.

Paperwork for the mediation

1.7.10

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- (1) Mediation requires the parties to be able to discuss the dispute in an informed way. Therefore, each party attending the mediation will be required to produce:
 - (a) a short case summary setting out the issues in dispute; and
 - (b) any documents referred to in the case summary.
- (2) These documents must be submitted to the mediation provider in triplicate at least one week before the mediation. The mediation provider will be responsible for the exchange of documents.
- (3) The parties and the mediator may agree to dispense with the requirement to produce documentation before the mediation.

Costs

1.7.11

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- (1) The costs of the mediation provider in administering and conducting the mediation process (including the fee payable to the mediator) will be agreed between the *FSA* and the mediation provider when the mediation provider is appointed.
- (2) For each mediation, the mediation provider will invoice the parties for the anticipated costs of administering and conducting the mediation in advance. The *FSA* and the *person* will bear half of these costs each. Any additional costs incurred by the mediation provider will be invoiced after the mediation. These costs will also be shared. The costs referred to in (1) and (2) do not include legal or other costs that the *FSA* or *person* may incur in relation to the mediation, which will be the responsibility of the parties.

1.8

Preliminary meeting

1.8.1

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Once appointed, the mediator may (in his discretion) call a preliminary meeting with the parties and their advisers (if any). This may be used to ensure that the parties are properly prepared for the mediation, agree the issues for discussion and understand how the process will operate.

1.9

Termination of the mediation

1.9.1

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The mediation will take place at the agreed time and place.

- 1.9.2** G_{/1} If the *person* withdraws from the mediation process after it has agreed to mediate, it will be responsible for its share of any costs incurred by, or owing to, the mediation provider (see *DEC App 1.7.11G (1)*).
- 1.9.3** G_{/1} The mediation agreement will set out the terms on which a party or the mediator, or both, may terminate the agreement. These will include terms providing that:
- (1) either party may withdraw from and terminate the mediation at any stage before or during the mediation (subject to the provisions on costs in *DEC App 1.9.2G*, for terminations before the mediation takes place);
 - (2) either party or the mediator may withdraw if the mediation has not taken place within the agreed timetable; and
 - (3) the mediator may withdraw from and terminate the mediation if, for example, a criminal *offence* by or involving a party to the mediation is disclosed to him (see *DEC App 1.7.8G (2)(a)*).

1.10 Result of the mediation

- 1.10.1** G_{/1} Mediation can only give rise to one of two outcomes:
- (1) a proposal for settlement agreed between the parties; or
 - (2) no agreed proposal.
- 1.10.2** G_{/1} If no agreed proposal is reached, the mediation will be terminated and the case will proceed to the *decision notice* stage.
- 1.10.3** G_{/1} If a settlement proposal is agreed, it will be considered by the *RDC*, which will decide whether to approve it. If it is approved, a *decision notice*, and subsequently a *final notice*, will be issued reflecting the terms of the agreement reached. If it is not approved, the parties may return to the mediation only with the *RDC's* consent. If the *RDC* does not consent, the case will continue towards the *decision notice* stage.

1.11 Advisers

- 1.11.1** G_{/1} The parties may bring legal or other advisers of their choice with them to the mediation, although it is important to preserve the informality of the mediation process.

1.12**Review of mediation procedures****1.12.1****G**

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The use of mediation in the disciplinary context is a novel approach in the area of financial regulation, but reflects current trends in civil litigation. The *FSA* proposes to operate the mediation scheme on a pilot basis for one year and monitor it and review its operation at the end of that period. The *FSA* proposes to publish core information relating to the operation of the scheme in the *FSA's* Annual Report.

Handbook Modules

Schedule1 Record keeping requirements

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- 1 There are no record-keeping requirements in DEC.

Handbook Modules

Schedule2 Notification requirements

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- 1 There are no notification or reporting requirements in DEC.

Handbook Modules

Schedule3 Fees and other required payments

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- 1 There are no requirements for fees or other payments in DEC.

Handbook Modules

Schedule4 Powers exercised

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1 The following powers in the Act have been exercised by the FSA to issue the statement of procedure and give the guidance in DEC:

(1) Section 157(1) (Guidance)

(1) Section 395(5) (The Authority's procedures)

Handbook Modules

Schedule5 Rights of action for damages

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- 1 There are no rules in DEC.

Handbook Modules

Schedule6 Rules that can be waived

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- 1 There are no rules in DEC.

Decision making manual

Derivations

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There is no table of derivations for *DEC*.

Decision making manual

Destinations

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There is no table of destinations for *DEC*.