ENFORCEMENT (SETTLEMENT AND OTHER PROCEDURES) INSTRUMENT 2005

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the following powers in or under the Financial Services and Markets Act 2000:

(1) section 69(1) (Statement of Policy);
(2) section 93(1) (Statement of Policy);
(3) section 157(1) (Guidance);
(4) section 210(1) (Statement of Policy); and
(5) section 395(5) (The Authority's procedures).

Commencement

B. This instrument comes into force on 20 October 2005.

Amendments to the Handbook

C. The modules of the FSA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes listed in column (2).

<table>
<thead>
<tr>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Glossary of definitions</td>
<td>Annex A</td>
</tr>
<tr>
<td>Authorisation manual</td>
<td>Annex B</td>
</tr>
<tr>
<td>Supervision manual</td>
<td>Annex C</td>
</tr>
<tr>
<td>Enforcement manual</td>
<td>Annex D</td>
</tr>
<tr>
<td>Decision Making manual</td>
<td>Annex E</td>
</tr>
<tr>
<td>Credit Unions sourcebook</td>
<td>Annex F</td>
</tr>
<tr>
<td>Electronic Money sourcebook</td>
<td>Annex G</td>
</tr>
</tbody>
</table>

Citation

D. This instrument may be cited as the Enforcement (Settlement and Other Procedures) Instrument 2005.

By order of the Board
19 October 2005
Annex A

Amendments to the Glossary of definitions

In this Annex, entire sections of text are being inserted, the place where the changes will be made is indicated and the text is not underlined.

Insert the following new definitions in the appropriate alphabetical positions:

<table>
<thead>
<tr>
<th>Definition</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>settlement decision makers</td>
<td>(in DEC) two members of the FSA's executive of at least director of division level with responsibility for deciding whether to give statutory notices in the circumstances described in DEC Appendix 1.2.2AG.</td>
</tr>
<tr>
<td>settlement decision procedure</td>
<td>(in DEC) the procedure for the making of statutory notice decisions in the circumstances described in DEC Appendix 1.2.2AG.</td>
</tr>
<tr>
<td>settlement discount scheme</td>
<td>(in ENF) the scheme described in ENF 13.7 by which the financial penalty that might otherwise be payable in respect of a person's misconduct or contravention may be reduced to reflect the timing of any settlement agreement.</td>
</tr>
</tbody>
</table>
Annex B

Amendments to the Authorisation manual

In this Annex, underlining indicates new text and striking through indicates deleted text. Where an entire section of text is being deleted, the place where the change will be made is indicated and the text is not shown struck through.

1.1.1 G …

(4) a candidate for approval under Part V of the Act, but only in respect of AUTH 6 (Approved persons), which is of general relevance, and AUTH 8 (Determining applications); and

…

1.1.3 G …

(4) the FSA’s powers in relation to authorisation and how it will use them (see AUTH 3 and AUTH 5), including a summary of how applications will be determined; see AUTH 8 (Determining applications).

…

1.3.9 G Summary of AUTH and parts of PERG

This table belongs to AUTH 1.3.7G.

<table>
<thead>
<tr>
<th>Chapter:</th>
<th>Applicable to:</th>
<th>On:</th>
</tr>
</thead>
<tbody>
<tr>
<td>…</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AUTH 8: Determining applications</td>
<td>1. applicants for Part IV permission generally;</td>
<td>1. the procedures which the FSA will follow when granting an application; and</td>
</tr>
<tr>
<td></td>
<td>2. an EEA firm or a Treaty firm that has submitted an application for approval of a person under the approved persons regime;</td>
<td>2. a summary of the FSA’s decision making procedures for:</td>
</tr>
<tr>
<td></td>
<td>(a) refusing, or proposing to refuse, an application for Part IV permission or an application for approval under the approved persons regime; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. a candidate.</td>
<td>(b) granting, or proposing to grant, an application for Part IV permission subject to limitations or requirements not applied for or with a narrower description of regulated activity than that to which the application relates.</td>
</tr>
<tr>
<td>…</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The flowchart in AUTH 1 Annex 1 is replaced in its entirety by the following flowchart. This change removes references to AUTH 8 and changes AUTH 2 and AUTH 7 to PERG 2 and PERG 7 respectively.

AUTH 1 Annex 1G  Introduction to the Authorisation Manual
3.6.5 G If, after reviewing an application, the FSA proposes to impose a *limitation*, the applicant will be advised formally (that is, the applicant will be sent a *warning notice*) and given an opportunity to make representations before the FSA reaches a final decision. For an overview of how the FSA determines applications and a summary of the FSA's decision making procedures, see *AUTH 8* (Determining applications).

3.7.7 G If, after reviewing an application, the FSA proposes to impose a *requirement*, the applicant will be advised formally (that is, the applicant will be sent a *warning notice*) and given an opportunity to make representations before the FSA reaches a final decision. For an overview of how the FSA determines applications and a summary of the FSA's decision making procedures, see *AUTH 8*.

3.9.31 G *AUTH 8* (Determining applications) gives an overview of how the FSA will determine an application. The FSA's decision making procedures are in *DEC* and include the procedures the FSA will follow if it proposes to refuse an application for Part IV permission or grant an application subject to limitations or requirements not applied for.
The FSA receives an application for *Part IV permission*

FSA staff determine whether the applicant can satisfy the *threshold conditions*, including whether the applicant is ready, willing and organised to comply with the relevant prudential, COB and other regulatory requirements (the “test”, see AUTH 3.9.26G)

**Applicant satisfies the test and the permission applied for is appropriate.**

- **Grant of application.**
  - *Authorisation* is the direct consequence of the FSA giving *Part IV permission*.
  - Written notice and update the FSA register.

**Applicant satisfies the test but the permission applied for needs modification.**

- Staff recommendation to grant application for *Part IV permission* subject to *limitations* or *requirements* or with a narrower description of *regulated activity*.

**Applicant does not satisfy the test.**

- Staff recommendation to refuse application for *Part IV permission*.
  - See AUTH 8 & DEC 2 Ann 2G.
Before making a decision either to approve or to give a warning notice (see AUTH 8.3 (Statutory notices and other matters)), the FSA may request further information about the candidate from the applicant for Part IV permission. If it does this, the three month approval period:

...

Decisions on applications

See AUTH 8 (Determining applications) for an overview of how applications for Part IV permission and for approval of a candidate under section 59 of the Act (Approval for particular arrangements) will be determined. AUTH 8 also includes a summary of the decision making procedures which apply-[deleted]
The FSA receives an application to perform controlled functions under the approved persons regime.

If incomplete forms are received the process will stop until all information is received, that is, it will almost certainly take longer to process than the published response times.

Do FSA staff consider the application is properly completed and correctly signed?

YES

Do FSA staff consider that the person is fit and proper to perform the controlled function specified?

YES

Application is granted.

Written notification to each of the interested parties and update of FSA Records.

NO

Further vetting checks and consideration.

NO

Staff recommendation to refuse application.

Staff recommendation to grant application.

AUTH 6 & DEC 2
Ann 2G.
AUTH Chapter 8 is deleted in its entirety. The deleted text is not shown struck through.

AUTH 8 [deleted]
Annex C

Amendments to the Supervision manual

In this Annex, underlining indicates new text and striking through indicates deleted text.

... 6.4.28 G A decision to grant an application for cancellation of permission will be taken by appropriately experienced FSA staff. Where, however, the FSA staff dealing with the application recommend that a firm's application for cancellation of Part IV permission be refused, the decision will be taken by the RDC; if the applicant makes representations to the FSA. If there are no representations, the decision will be made under executive procedures.

...
Annex D

Amendments to the Enforcement manual

In this Annex, underlining indicates new text and striking through indicates deleted text. Where an entire section of text is being inserted, the place where the change will be made is indicated and the text is not underlined.

13.3.3 G The factors which may be relevant when the FSA determines the amount of financial penalty for a firm or approved person include the following.

…

(9) The timing of any agreement as to the amount of the disciplinary penalty. The FSA and the person subject to disciplinary action may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, ENF 13.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the person concerned reach an agreement.

…

13.5.9 G The settlement discount scheme set out in ENF 13.7 does not apply to financial penalties for late submission of reports.

…

After ENF 13.6 insert the following new section:

13.7 Discount for early settlement

13.7.1 G Persons subject to disciplinary action may be prepared to agree the amount of any financial penalty and other conditions which the FSA seeks to impose by way of disciplinary action. Such conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The FSA recognises the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for consumers and the saving of cost to the person concerned and the FSA itself in contesting the financial penalty. The penalty that might otherwise be payable in respect of misconduct or contravention by the person concerned will therefore be reduced to reflect the timing of any settlement agreement.

13.7.2 G In appropriate cases the FSA's approach will be to negotiate with the person concerned to agree in principle the amount of a financial penalty having regard to the factors set out in ENF 13.3. (This starting figure will take no account of the existence of the settlement discount scheme described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the stage in the process at which agreement is reached. The resulting figure ("B") will be the amount actually payable by the person concerned in respect of the misconduct or contravention.
However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.

13.7.3 G (1) FSA has identified four stages of a disciplinary action for these purposes:

(a) the period from commencement of an investigation until the FSA has
   (i) a sufficient understanding of the nature and gravity of the misconduct or contravention to make a reasonable assessment of the appropriate penalty; and
   (ii) communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1");

(b) the period from the end of stage 1 until the expiry of the period for making written representations or, if sooner, the date on which the written representations are sent in response to the giving of a warning notice ("stage 2");

(c) the period from the end of stage 2 until the giving of a decision notice ("stage 3");

(d) the period after the end of stage 3, including proceedings before the Tribunal and any subsequent appeals ("stage 4").

(2) The communication of the FSA’s assessment of the appropriate penalty for the purposes of ENF 13.7.3G(1)(a) need not be in a prescribed form but will include an indication of the breaches alleged by the FSA. It may include the provision of a draft warning notice.

(3) The reductions in penalty will be as follows:

<table>
<thead>
<tr>
<th>Stage at which agreement reached</th>
<th>Percentage reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage 1</td>
<td>30</td>
</tr>
<tr>
<td>Stage 2</td>
<td>20</td>
</tr>
<tr>
<td>Stage 3</td>
<td>10</td>
</tr>
<tr>
<td>Stage 4</td>
<td>0</td>
</tr>
</tbody>
</table>

13.7.4 G (1) Any settlement agreement between the FSA and the person concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.
(2) In certain circumstances the person concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by the table at ENF 13.7.3G(3). It may be, for example, that the FSA no longer wishes to pursue disciplinary action in respect of all of the acts or omissions previously alleged to give rise to the contravention of a requirement. In such cases, the person concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, FSA staff may consider that greater openness from the person concerned could have resulted in an earlier settlement.

(3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.

(4) However, in exceptional cases FSA may accept that there has been a substantial change in the nature or seriousness of the disciplinary action being taken against the person concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the FSA and person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.

14.7.4 G The FSA considers that the factors which may be relevant when it sets the amount of a penalty in market abuse cases include, the following.

(9) The timing of any agreement as to the amount of the penalty for market abuse. The FSA and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements in disciplinary actions, ENF 13.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the person concerned reach an agreement. The same regime is to apply to agreements as to the amount of the penalty in market abuse cases.
21.7.6 G The FSA will consider any of the following factors …

…

(11) (The timing of any agreement as to the amount of the penalty for the particular breach) The FSA and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements in disciplinary actions, ENF 13.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the person concerned reach an agreement. The same regime is to apply to agreements as to the amount of the penalty in Part VI cases.

…

ENF TP 1.1 Transitional provisions applying to the Enforcement manual

<table>
<thead>
<tr>
<th>(1)</th>
<th>(2) Material to which the transitional provision applies</th>
<th>(3)</th>
<th>(4) Transitional provision</th>
<th>(5) Transitional provision: Dates in force</th>
<th>(6) Handbook provision coming into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>…</td>
<td></td>
<td></td>
<td>G</td>
<td>G</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>ENF 13.3.3G(9), ENF 13.5.9G, ENF 13.7 (Discount for early settlement), ENF 14.7.4G(9), and ENF 21.7.6G(11)</td>
<td></td>
<td>These provisions (in summary, relating to the discount scheme) apply only to cases where investigators are appointed on or after 20 October 2005.</td>
<td>From 20 October 2005</td>
<td>20 October 2005</td>
</tr>
</tbody>
</table>

…

14
Annex E

Amendments to the Decision Making manual

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.2.6 G 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; or

(3) FSA staff under the settlement decision procedure.

1.2.7 G 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. DEC Appendix 1 explains settlement procedures and the mediation scheme for FSA enforcement cases. It includes a description of the circumstances in which decisions that would normally be made by the RDC will be made by FSA staff under settlement decision procedure.

1.2.8 G 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 8.2.5 G to AUTH 8.2.8 G); 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.
List of warning notices and decision notices under the Act and certain other enactments

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)

<table>
<thead>
<tr>
<th>Section of the Act</th>
<th>Description</th>
<th>Handbook reference</th>
<th>Decision maker</th>
</tr>
</thead>
<tbody>
<tr>
<td>52(6)(a)/52(9)(a)</td>
<td>when the FSA is proposing/deciding to grant an application for a Part IV permission with a limitation or a requirement which was not applied for, or with a narrower description of regulated activity than that applied for</td>
<td>AUTH 3</td>
<td>RDC / Executive procedures</td>
</tr>
<tr>
<td>52(6)(b)/(9)(b)</td>
<td>when the FSA is proposing/deciding to grant an application to vary a firm's Part IV permission but, otherwise than as part of the application, to restrict the Part IV permission (either by imposing a limitation or requirement which was not applied for or by specifying a narrower description of regulated activity than that applied for)</td>
<td>SUP 6</td>
<td>RDC / Executive procedures (Note 1)</td>
</tr>
<tr>
<td>52(7)(9)(c)</td>
<td>when the FSA is proposing/deciding to refuse an application for a Part IV permission</td>
<td>AUTH 3</td>
<td>RDC / Executive procedures</td>
</tr>
<tr>
<td>52(9)(a)</td>
<td>when the FSA is deciding to grant an application for a Part IV permission with a limitation or a requirement which was not applied for, or with a narrower description of regulated activity than that applied for</td>
<td>AUTH 3</td>
<td>RDC / executive procedures (Note 1)</td>
</tr>
<tr>
<td>52(9)(b)</td>
<td>when the FSA is deciding to grant an application to vary a firm's Part IV permission but, otherwise than as part of the application, to restrict the Part IV permission (either by imposing a limitation or requirement which was not applied for or by specifying a narrower description of regulated activity than that applied for)</td>
<td>SUP 6</td>
<td>RDC / executive procedures (Note 1)</td>
</tr>
<tr>
<td>52(9)(c)</td>
<td>when the FSA is deciding to refuse an application for a Part IV permission</td>
<td>AUTH 3</td>
<td>RDC / executive procedures (Note 1A)</td>
</tr>
<tr>
<td>52(7)(9)(c)</td>
<td>when the FSA is proposing/deciding to refuse an application to vary a firm's Part IV permission</td>
<td>SUP 6</td>
<td>RDC / Executive procedures (Note 4)</td>
</tr>
<tr>
<td>52(9)(c)</td>
<td>when the FSA is deciding to refuse an application to vary a firm’s Part IV permission</td>
<td>SUP 6</td>
<td>RDC / executive procedures (Note 1)</td>
</tr>
<tr>
<td>52(7)(9)(c)</td>
<td>when the FSA is proposing/deciding to refuse an application to cancel a firm's Part IV permission</td>
<td>SUP 6</td>
<td>RDC / Executive procedures</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Reference</td>
<td>Procedures</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
<td>-----------</td>
<td>------------</td>
</tr>
<tr>
<td>52(9)(c)</td>
<td>When the FSA is deciding to refuse an application to cancel a firm's Part IV permission</td>
<td>SUP 6</td>
<td>RDC/Executive procedures (Note 1A)</td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>62(2)/(3)</td>
<td>When the FSA is proposing/deciding to refuse an application for approval of a person performing a controlled function under section 59 of the Act (in conjunction with an application for Part IV permission)</td>
<td>AUTH 6</td>
<td>RDC/Executive procedures</td>
</tr>
<tr>
<td>62(3)</td>
<td>When the FSA is deciding to refuse an application for approval of a person performing a controlled function under section 59 of the Act (in conjunction with an application for Part IV permission)</td>
<td>AUTH 6</td>
<td>RDC/Executive procedures (Note 1A)</td>
</tr>
<tr>
<td>62(2)/(3)</td>
<td>When the FSA is proposing/deciding to refuse an application for approval of a person performing a controlled function (otherwise than in conjunction with an application for Part IV permission)</td>
<td>SUP 10</td>
<td>RDC/Executive procedures</td>
</tr>
<tr>
<td>62(3)</td>
<td>When the FSA is deciding to refuse an application for approval of a person performing a controlled function (otherwise than in conjunction with an application for Part IV permission)</td>
<td>SUP 10</td>
<td>RDC/Executive procedures (Note 1A)</td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>183(3)/186(1)</td>
<td>When the FSA is proposing/deciding to object to a change in control following receipt of a notice of control</td>
<td>SUP 11</td>
<td>RDC/Executive procedures (Note 13)</td>
</tr>
<tr>
<td>185(3)/(4)</td>
<td>When the FSA is proposing/deciding to approve a change in control following receipt of a notice of control but subject to conditions</td>
<td>SUP 11</td>
<td>RDC/Executive procedures (Note 13)</td>
</tr>
<tr>
<td>187(1)/(3) and 188(1)</td>
<td>When the FSA is proposing/deciding to object to a person who has failed to submit a notice of control or a notice on acquiring, or increasing, control, or to object to an existing controller</td>
<td>SUP 11</td>
<td>RDC/Executive procedures (Note 13)</td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and the applicant makes representations to the FSA.

Note 1A: The decision will be made by the RDC if the applicant makes representations to the FSA. If there are no representations, the decision will be made under executive procedures.

Note 13: The decision will be made under executive procedures unless the RDC is already considering or is shortly to consider a closely related matter and it seems appropriate to those making...
the decision under *executive procedures* for the RDC to have responsibility for the decision, having regard to such factors as those listed in *DEC 1.2.9G*.

...

4.1.4 G Decisions to be taken by the RDC

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

(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; — [deleted]

...

(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); — [deleted]

(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;

(4A) to refuse an application for, or to revoke, a *small e-money issuer certificate* (see *ELM 8* (Small e-money issuers));

(5) to refuse approved person status, or withdraw it approved person status under section 63 of the Act (Withdrawal of approval);

...

(25) to publish a statement censuring a sponsor; and

(26) to impose a financial penalty or to issue a statement censuring a person for breach of any requirement set out in *LR*; and

(27) to object to the acquisition or increase of *control* under section 186 of the Act (Objection to acquisition of control), to object to existing *control* under section 187 of the Act (Objecting to existing control) or to attach conditions to an approval to a change in control under section 185 of the Act (Conditions attached to approval) in circumstances where the RDC is already considering or is shortly to consider a closely related matter and it seems appropriate to those making the decision under *executive procedures* for the RDC to have responsibility for the decision, having regard to such factors as those
listed in DEC 1.2.9G.

4.1.4A G The RDC has responsibility for statutory notice decisions and statutory notice associated decisions if the FSA takes any of the following actions, but only if the action involves a fundamental (see DEC 4.1.5G) change to the nature of a permission and the applicant makes representations to the FSA:

(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; and

(2) 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).

4.1.4B G The RDC has responsibility for statutory notice decisions and statutory notice associated decisions if the FSA takes any of the following actions but only if the applicant makes representations to the FSA:

(1) to refuse an application for a Part IV permission or to refuse an application to cancel a Part IV permission;

(2) to refuse an application for a small e-money issuer certificate (see ELM 8 (Small e-money issuers); and

(3) to refuse approved person status.

4.1.5 G In DEC 2 Annex 1G, DEC 4.1.4G(2), (3) and (7), DEC 4.1.4AG and DEC 4.1.8G(5), making a fundamental change to the nature of a permission means:

... 

... 

4.1.7 G Examples of matters decided by the RDC include:

(1) deciding to give a decision notice, refusing an application to vary a Part IV permission to carry on insurance business or to accept deposits for the first time in circumstances where the applicant makes representations to the FSA; in these cases, the firm will normally have been required to complete parts of the application pack (SUP 6.4.14G);

(2) deciding to give a decision notice, refusing an application to vary a Part IV permission to carry on regulated activities with private...
customers for the first time in circumstances where the applicant makes representations to the FSA:

(3) deciding to give a decision notice, 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 in circumstances where the applicant makes representations to the FSA; 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 G 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:

…

(5) refusing an application to vary a Part IV permission, or to restrict restricting 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) or in a way that would make such a fundamental change in circumstances where the applicant makes no representations to the FSA;

(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) unless the RDC is already considering or is shortly to consider a closely related matter and it seems appropriate to those making the decision under executive procedures for the RDC to have responsibility for the decision, having regard to such factors as those listed in DEC 1.2.9G, in which case the decision will be made by the RDC;

(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;

…
The Regulatory Decisions Committee

The RDC is supported by the RDC Secretariat Office. The RDC Secretariat Office is separate from FSA staff involved in making recommendations to the RDC.

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 Office.

The RDC Secretariat Office will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

The FSA RDC Office, in conjunction with the Chairman or a Deputy Chairman of the RDC, 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.

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

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.

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.
Modified procedures in straightforward cases

4.5.16 G The making of statutory notice decisions and statutory notice associated decisions falling within DEC 4.1.4G (Decisions to be taken by the RDC) which, in the opinion of the Chairman or a Deputy Chairman of the RDC, are straightforward (see DEC 4.5.17G), may be discharged, on behalf of the RDC, by the Chairman or a Deputy Chairman alone or together with one other member of the RDC if, in the opinion of the Chairman or Deputy Chairman, this is appropriate, so that they will be made by modified rather than full RDC procedure.

4.5.17 G The Chairman or a Deputy Chairman of the RDC may decide, whether or not following a recommendation from FSA staff, that a decision falling within DEC 4.5.16G is a straightforward decision, having regard to all the circumstances of the case, including those factors listed in DEC 1.2.9G. However, a statutory notice decision falling within DEC 4.5.16G is not a straightforward decision if the person concerned makes representations to the RDC and, in such a case, the decision will be made by full RDC procedure.

DECE Appendix 1
Settlement procedure and mediation scheme for FSA enforcement cases

1.1.1 G A person who is or may be subject to enforcement action may discuss the proposed action with FSA staff through settlement discussions. Settlement discussions may take place on an informal basis at any time during the enforcement process. Where FSA staff have recommended that enforcement action be taken against a person, the mediation scheme will be available to those persons against whom action is proposed where settlement discussions are, in the opinion of either party, unlikely to lead to an agreed settlement. This appendix sets out the procedure for settlement and the framework of the mediation scheme, and explains the special procedure for making statutory notice decisions where a settlement is reached.

1.2 Settlement

1.2.1 G 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 at any time during the enforcement process. This might be before the giving of a warning notice, before a decision notice, or even after referral of the matter to the Tribunal. 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. Neither FSA staff nor the person concerned may disclose to the RDC any such admissions or statements made by the other.
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 in accordance with the settlement decision procedure set out in DEC App 1.2.2AG by the RDC.

The fact that the person subject to enforcement action agrees to a financial penalty or other outcome will not usually obviate the need for a statutory notice recording the FSA’s decision to take that action.

Where, however, the person subject to enforcement action agrees not to contest the content of a proposed statutory notice, the decision whether to give that statutory notice will be taken by senior FSA staff.

The decision will be taken jointly by two members of the FSA’s executive of at least director of division level (the “settlement decision makers”).

One of the directors taking the decision will usually be, but need not be, the director of Enforcement. (In exceptional cases, the director of Enforcement may have been directly involved in establishing the evidence on which the decision is based and would not therefore be able to participate (see section 395(2) of the Act).)

“Statutory notice” for these purposes:

(a) means any statutory notice the giving of which would otherwise require a decision by the RDC;

(b) includes a statutory notice associated decision.

The settlement decision makers will often participate in the without prejudice discussions exploring possible settlement. Their involvement may facilitate agreement between FSA staff and the person concerned and avoid the delay that might otherwise result from needing to explain the basis for any settlement reached.

If the settlement decision makers have not been involved in the discussions, but an agreement has been reached, they may ask to meet the relevant FSA staff or the person concerned in order to assist in the consideration of the proposed settlement.

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.
accept the proposed settlement by issuing a decision notice, second supervisory 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 settlement decision makers have met with the relevant FSA staff or the person concerned.

1.2.4 G (1) 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.

Where the settlement decision makers decline to issue a statutory notice despite the proposed settlement, they may invite FSA staff and the person concerned to enter into further discussions to try to achieve an outcome the settlement decision makers would be prepared to endorse.

(2) However, if the proposed action by the FSA has been submitted to the RDC for consideration, it will be for the RDC to decide:

(a) whether to extend the period for representations in response to a warning notice; or

(b) if representations have been made in response to a warning notice, whether to proceed to give a decision notice.

…

1.3.2 G 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 settlement decision makers, the terms of the proposed settlement will form the basis of a decision notice, and subsequent final notice, or second supervisory notice or (where appropriate) notice of discontinuance, given by the FSA.

1.3.3 G 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 mediation if the parties consider that the involvement of a neutral mediator is required to facilitate further progress in any settlement discussions.
1.6.1 G If a case is submitted to mediation, the parties will send a joint mediation notice in an agreed form to:

(1) the mediation provider; and

(2) if the mediation is between the giving of the warning notice and the decision notice, the secretary to the RDC Office.

1.7.8 G (1) ...

(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 settlement decision makers RDC, be incorporated in a decision notice, and subsequent final notice or second supervisory notice, or (where appropriate) notice of discontinuance which may be made public;

1.7.9 G (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) One or both of the settlement decision makers who would make the decision as to the giving of the statutory notice or notices in the event of a settlement may also attend. If their attendance is impracticable, the FSA will endeavour to ensure that the settlement decision makers are available for consultation during the mediation. This is to enable a clear indication to be given to the parties and the mediator whether the settlement decision makers will find the proposed settlement terms acceptable. 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. [deleted]

... 1.10.3 G

If a settlement proposal is agreed, it will be considered in accordance with the settlement decision procedure 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 return to the point it had reached in the enforcement process prior to the mediation.

... DEC App 1.13

Position of third parties on settlement

1.13.1 G

(1) DEC 2.4.7G to DEC 2.4.12G set out the FSA’s approach to giving third parties copies of statutory notices pursuant to section 393 of the Act.

(2) The decision to give a warning notice or a decision notice to a third party is a statutory notice associated decision.

(3) In cases therefore where the decision to give a warning notice or decision notice is taken by settlement decision makers, those decision makers will decide whether a copy of the notice should be given to a third party in accordance with section 393 of the Act. Any representations made by the third party in response to a warning notice will be considered by the settlement decision makers.
Annex F

Amendments to the Credit Unions sourcebook

In this Annex, underlining indicates new text and striking through indicates deleted text.

...  

13.3.3 G A credit union must become authorised under the Act (see CRED 13.5 CRED 13.8) before it can undertake the activity of accepting deposits.

...  

13.5.4 G The FSA's Authorisation manual (AUTH) explains in full the circumstances in which authorisation is required, the authorisation process and the FSA's powers in relation to authorisation. The key chapters of AUTH for a person applying, or considering applying, to the FSA to become a credit union with a Part IV permission to accept deposits are:

(1)  AUTH 3: Applications for Part IV permission;

(2)  AUTH 4: Authorisation fees; and

(3)  AUTH 6: Approved persons, and

(4)  AUTH 8: Determining applications.

...  

CRED Section 13.8 is deleted in its entirety. The deleted text is not shown struck through.

CRED 13.8 [deleted]
Annex G

Amendments to the Electronic Money sourcebook

In this Annex, striking through indicates deleted text.

...

8.3.9  G  The application for a small e-money issuer certificate must be determined by the FSA within six months from when it receives the completed application or, if the application is incomplete, within 12 months. The applicant may withdraw his application by written notice. The FSA must give the applicant written notice of the grant of the application or a warning notice if it proposes to refuse the application. Guidance on the decision making procedures is given in AUTH 8 (Determining applications) and DEC 2 (Statutory notice procedure: warning notice and decision notice procedure).

...