

DECISION PROCEDURE AND PENALTIES MANUAL INSTRUMENT 2007

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 124(1) (Statement of policy);
 - (4) section 157(1) (Guidance);
 - (5) section 169(9) (Investigations etc. in support of overseas regulator);
 - (6) section 210(1) (Statements of policy); and
 - (7) section 395(5) (The Authority's procedures).

Commencement

- B. Annex A to this instrument comes into force on 28 August 2007.
- C. Annex B to this instrument comes into force on 1 November 2007.

Making the Decision Procedure and Penalties manual

- D. The Financial Services Authority gives the guidance set out in Annex A to this instrument.
- E. The manual in Annex A to this instrument (including its schedules) may be cited as the Decision Procedure and Penalties manual (or DEPP).

Changes to the Handbook

- F. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Citation

- G. This instrument may be cited as the Decision Procedure and Penalties Manual Instrument 2007.

By order of the Board
26 July 2007

Annex A

Decision Procedure and Penalties manual (DEPP)

This Annex makes the new Decision Procedure and Penalties manual (DEPP). All the text is new and is not shown underlined. This Annex contains the following sections of DEPP.

Chapter	Chapter Title	Sections made
1	Application and Purpose	Sections 1.1 to 1.2
2	Statutory notices and the allocation of decision making	Sections 2.1 to 2.5
3	The nature and procedure of the RDC	Sections 3.1 to 3.4
4	Decisions by FSA staff under executive procedures	Sections 4.1 to 4.2
5	Settlement decision procedure	Section 5.1
6	Penalties	Sections 6.1 to 6.7
7	The FSA's statement of policy on section 169(7) interviews	Sections 7.1 to 7.2

1 Application and Purpose

1.1 Application and Purpose

Application

- 1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FSA*. It sets out:
- (1) the *FSA's* decision-making procedure for giving *statutory notices*. These are *warning notices, decision notices* and *supervisory notices* (*DEPP* 1.2 to *DEPP* 5);
 - (2) the *FSA's* policy with respect to the imposition and amount of penalties under the *Act* (see *DEPP* 6);
 - (3) the *FSA's* policy with respect to the conduct of interviews by investigators appointed in response to a request from an overseas regulator (*DEPP* 7).

Purpose

- 1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 69(1), 93(1), 124(1), 169(7), 210(1) and 395 of *the Act* that the *FSA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.

1.2 Introduction to statutory notices

Statutory notices

- 1.2.1 G 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 procedure must be designed to secure, among other things, that the decision which gives rise to the obligation to give a *statutory notice* is taken by a person not directly involved in establishing the evidence on which that decision is based. The types of *statutory notices* and related notices, and the principal references to them in the *Act* and *DEPP* are set out in *DEPP* 1.2.2G.
- 1.2.2 G Table: Summary of statutory and related notices

Notice	Description	Act reference	Further information
<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.	Section 387	<i>DEPP</i> 2.2

<i>Decision notice</i>	Gives the recipient details about action that the <i>FSA</i> has decided to take. The <i>FSA</i> may also give a further <i>decision notice</i> if the recipient of the original <i>decision notice</i> consents.	Section 388	<i>DEPP</i> 2.3
<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.	Section 389	<i>DEPP</i> 1.2.4G and <i>DEPP</i> 3.2.26G
<i>Final notice</i>	Sets out the terms of the action that the <i>FSA</i> is taking.	Section 390	<i>DEPP</i> 1.2.4G
<i>Supervisory notice</i>	Gives the recipient details about action that the <i>FSA</i> has taken or proposes to take, for example to vary a <i>Part IV permission</i> .	Section 395(13)	<i>DEPP</i> 2.2 and 2.3

1.2.3 G In *DEPP* 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*".

1.2.4 G The requirement in section 395 of the *Act* to publish a procedure for the giving of notices does not extend to the giving of a *notice of discontinuance* or a *final notice*. Neither of these notices is a *statutory notice* for the purposes of *DEPP*; nor is the decision to give such a notice a *statutory notice associated decision*.

The decision makers

1.2.5 G Decisions on whether to give a *statutory notice* will be taken by a 'decision maker'. The *FSA*'s assessment of who is the appropriate decision maker is subject to the requirements of section 395 of the *Act* and will depend upon the nature of the decision, including its complexity, importance and urgency. References to the 'decision maker' in *DEPP* are to:

- (1) the *Regulatory Decisions Committee (RDC)*; or
- (2) *FSA* staff under *executive procedures*; or
- (3) *FSA* staff under the *settlement decision procedure*.

- 1.2.6 G The decision maker will also take decisions associated with a *statutory notice* (a '*statutory notice associated decision*'). *Statutory notice associated decisions* include decisions:
- (1) to set or extend the period for making representations;
 - (2) on whether the *FSA* is required to give a copy of the *statutory notice* to any third party and, if so, the period for the third party to make representations; and
 - (3) on whether to refuse access to *FSA* material, relevant to the relevant *statutory notice*, under section 394 of the *Act*.
- 1.2.7 G In each case, the decision maker will make decisions by applying the relevant statutory tests, having regard to the context and nature of the matter, that is, the relevant facts, law, and *FSA* priorities and policies (including on matters of legal interpretation).
- 1.2.8 G The *FSA* will make and retain appropriate records of those decisions, including records of meetings and the representations (if any) and materials considered by the decision makers.
- 1.2.9 G *DEPP 2* to *DEPP 5* set out:
- (1) which decisions require the giving of statutory notices and who takes them (*DEPP 2*);
 - (2) the nature and procedures of the *RDC* (*DEPP 3*);
 - (3) the procedure for decision making by *FSA* staff under *executive procedures* (*DEPP 4*);
 - (4) the procedure for decision making by *FSA* staff under the *settlement decision procedure* (*DEPP 5*).

2 Statutory notices and the allocation of decision making

2.1 Statutory notices

When statutory notices are required

- 2.1.1 G The circumstances in which the *warning notice* and *decision notice* procedure apply are set out in *DEPP 2 Annex 1G*.
- 2.1.2 G The circumstances in which the *supervisory notice* procedure apply are set out in *DEPP 2 Annex 2G*.
- 2.1.3 G *DEPP 2 Annex 1G* and *DEPP 2 Annex 2G* identify the provisions of the *Act* or other enactment giving rise to the need for the relevant notice, and whether the decision maker is the *RDC* or *FSA* staff under *executive procedures* in each case.

Consistent decision making

- 2.1.4 G *FSA* staff responsible for the taking of a *statutory notice* decision under *executive procedures* may refer the matter to the *RDC* for the *RDC* to decide whether to give the statutory notice if:
 - (1) the *RDC* is already considering, or is shortly to consider, a closely related matter; and
 - (2) the relevant *FSA* staff believe, having regard to all the circumstances, that the *RDC* should have responsibility for the decision. The relevant considerations might include:
 - (a) the desirability of consistency in *FSA* decision making;
 - (b) potential savings in the time and cost of reaching a decision;
 - (c) the factors identified in *DEPP 3.3.2G* as relevant to an assessment of whether a decision should be regarded as straightforward.

2.2 Warning notices and first supervisory notices

- 2.2.1 G If *FSA* staff consider that action requiring a *warning notice* or first *supervisory notice* is appropriate, they will recommend to the relevant decision maker that the notice be given.
- 2.2.2 G For first *supervisory notices*, the *FSA* staff will recommend whether the action should take effect immediately, on a specified date, or when the matter is no longer open to review (see *DEPP 2.2.5G*).
- 2.2.3 G The decision maker will:

- (1) consider whether the material on which the recommendation is based is adequate to support it; the decision maker may seek additional information about or clarification of the recommendation, which may necessitate additional work by the relevant *FSA* staff;
 - (2) satisfy itself that the action recommended is appropriate in all the circumstances;
 - (3) decide whether to give the notice and the terms of any notice given.
- 2.2.4 G 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.
- 2.2.5 G A matter is open to review (as defined in section 391(8) (Publication) of the *Act*) (in relation to a *supervisory notice* which does not take effect immediately or on a specified date) when:
- (1) the period during which any *person* may refer a matter to the *Tribunal* is still running; or
 - (2) the matter has been referred to the *Tribunal* but has not been dealt with; or
 - (3) the matter has been referred to the *Tribunal* and dealt with but the period during which an appeal may be brought against the *Tribunal's* decision is still running; or
 - (4) such an appeal has been brought but has not been determined.

2.3 Decision notices and second supervisory notices

Approach of decision maker

- 2.3.1 G If a decision maker is asked to decide whether to give a *decision notice* or second *supervisory notice*, it will:
- (1) review the material before it;
 - (2) consider any representations made (whether written, oral or both) and any comments by *FSA* staff or others in respect of those representations;
 - (3) decide whether to give the notice and the terms of any notice given.

Default procedures

- 2.3.2 G If the *FSA* receives no response or representations within the period specified in a *warning notice*, the decision maker may regard as undisputed the allegations or matters in that notice and a *decision notice* will be given

accordingly. A *person* who has received a *decision notice* and has not previously made any response or representations to the *FSA*, may nevertheless refer the *FSA's* decision to the *Tribunal*.

- 2.3.3 G If the *FSA* receives no response or representations within the period specified in a first *supervisory notice*, the *FSA* will not give a second *supervisory notice*. The outcome depends on when the relevant action took or takes effect (as stated in the notice). If the action:
- (1) took effect immediately, or on a specified date which has already passed, it continues to have effect (subject to any decision on a referral to the *Tribunal*); or
 - (2) was to take effect on a specified date which is still in the future, it takes effect on that date (subject to any decision on a referral to the *Tribunal*); or
 - (3) was to take effect when the matter was no longer *open for review*, it takes effect when the period to make representations (or the period for referral to the *Tribunal*, if longer) expires, unless the matter has been referred to the *Tribunal*.

- 2.3.4 G In exceptional cases, the decision maker may permit representations from a *person* who has received a *decision notice* (or a second *supervisory notice*) or against whom action, detailed in a first *supervisory notice*, has taken effect, 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 further *decision notice* (or a written notice or a *supervisory notice*).

Further decision notice

- 2.3.5 G 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 its 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 the *person* 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.

- 2.3.6 G For the purpose of establishing whether the *person* receiving the further *decision notice* gives its consent, the *FSA* will normally require consent in writing.

2.4 Third party rights and access to *FSA* material

- 2.4.1 G 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 *DEPP 2* Annex 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*.

2.5 Provision for certain categories of decision

Purpose

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

Different decision makers

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

Decisions relating to applications for authorisation or approval

- 2.5.3 G *FSA* staff under *executive procedures* will take the decision to give a *warning notice* if the *FSA* proposes to:
- (1) refuse an application for a *Part IV permission* or to refuse an application to cancel a *Part IV permission*;
 - (2) impose a limitation or a requirement which was not applied for, or specify a narrower description of regulated activity than that applied for, on the grant of a *Part IV permission*;
 - (3) 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 a requirement which was not applied for or by specifying a narrower description of regulated activity than that applied for);
 - (4) refuse *approved person* status;
 - (5) refuse an application for a *small e-money issuer certificate* (see *ELM* 8 (Small e-money issuers));
 - (6) refuse an application for variation or rescission of a requirement imposed on an *incoming EEA firm*.
- 2.5.4 G If no representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G within the period specified, a *decision notice* will be given accordingly: see *DEPP* 2.3.2G (Default procedures).
- 2.5.5 G If representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G(1), (4) or (5), then the *RDC* will take the decision to give a *decision notice*.
- 2.5.6 G If representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G(2) (3) or (6), then the *RDC* will take the decision to give a *decision notice* if the action involves a fundamental change (see *DEPP* 2.5.8G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.

FSA's own-initiative power

- 2.5.7 G The *RDC* will take the decision to give a *supervisory notice* exercising the *FSA's* own initiative power (by removing a regulated activity, by imposing a limitation or requirement or by specifying a narrower description of regulated activity) if the action involves a fundamental change (see *DEPP* 2.5.8G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.
- 2.5.8 G 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 relating to listing of securities

- 2.5.9 G *FSA* staff under *executive procedures* will take the following *statutory notice* decisions:
- (1) the refusal of an application for listing of securities;
 - (2) the suspension of *listing* on the *FSA's* own initiative or at the request of the issuer;
 - (3) the suspension of trading in a *financial instrument*;
 - (4) the discontinuance of *listing* of securities at the issuer's request;
 - (5) the exercise of any of the powers in sections 87K or 87L of the *Act* in respect of a breach of any applicable provision;
 - (6) the cancellation of a *person's* approval as a *sponsor* at the *sponsor's* request; and
 - (7) the refusal of an application by an issuer for cancellation of a suspension of *listing* made under section 77 of the *Act*.
- 2.5.10 G The *RDC* will take *statutory notice decisions* relating to the discontinuance of listing of securities on the *FSA's* own initiative.
- 2.5.11 G If securities have matured or otherwise ceased to exist the *FSA* will remove any reference to them from the official list. This is a purely administrative process, and not a discontinuance of listing in the sense used in Part 6 of the *Act*.

Modified procedures in collective investment scheme and certain other cases

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

- 2.5.13 G The decisions referred to in *DEPP 2.5.12G* are:
- (1) the decision to give a *supervisory notice* pursuant to section 259(3), (8) or 9(b) (directions on authorised unit trust schemes); section 268(3), 7(a) or 9(a) (directions in respect of recognised overseas schemes); or section 282(3), (6) or (7)(b) (directions in respect of relevant recognised schemes) of the *Act*;
 - (2) the decision to give a *warning notice* or *decision notice* pursuant to section 280(1) or (2)(a) (revocation of recognised investment scheme) of the *Act*;
 - (3) the decision to give a *supervisory notice* in accordance with regulation 27(3), (8) or 9(b) of the *OEIC Regulations*;
 - (4) the decision to give a *warning notice* or *decision notice* pursuant to regulation 24 or regulation 28 of the *OEIC Regulations*;
 - (5) the decision to give a direction under section 42B(1) of the Building Societies Act 1986 that a building society transfers all its engagements to one or more other building societies or that it transfers its business to an existing company (under section 94 or section 97 respectively of the Building Societies Act 1986); and
 - (6) the decision to give a decision notice under section 93(6) of the Building Societies Act 1986 (permission for successor society on amalgamation) where the terms of the permission have been agreed with the successor building society.
- 2.5.14 G In determining whether there is agreement to or acceptance of the action proposed, an indication by the following *persons* will be regarded as conclusive:
- (1) in relation to an authorised unit trust, the manager and trustee;
 - (2) in relation to an *ICVC*, the directors and the depositary;
 - (3) in relation to a *recognised scheme*, the *operator* and, if any, the trustee or *depositary*.
- 2.5.15 G A decision to give a *warning notice* or *decision notice* refusing an application for an *authorisation order* declaring a unit trust scheme to be an *AUT* will be taken by the *RDC* only if the application is by an *authorised fund manager* who is not the *operator* of an existing *AUT* or *ICVC*. Otherwise, the decision to give the *warning notice* or *decision notice* will be taken by *FSA* staff under executive procedures.
- 2.5.16 G A notice under section 264(2) of the *Act* (notification of non-compliance with *UK* law) relating to a collective investment scheme constituted in another *EEA* State is not a *warning notice*, but the *FSA* will operate a procedure for a section 264(2) notice which will be similar to the procedure for a *warning notice*.

Notices under the Building Societies Act 1986 and other enactments

- 2.5.17 G The *FSA* expects to adopt a procedure in respect of notices under enactments other than the *Act* which is similar to that for *statutory notices* under the *Act*, but which recognises any differences in the legislative framework and requirements. *DEPP 2 Annex 1G* and *DEPP 2 Annex 2G* therefore identify notices to be given pursuant to other enactments and the relevant *FSA* decision maker.
- 2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:
- (1) Building Societies Act 1986, section 36A: There is no right to refer a decision to issue a prohibition order under section 36A to the *Tribunal*. Accordingly, a *decision notice* under section 36A(5A) is not required to give an indication of whether any such right exists. A *decision notice* under section 36A(5A) may only relate to the issue of a prohibition order under section 36A. Where such a *decision notice* is given, no *final notice* is required under section 390 of the *Act* and the *FSA* may issue the order at the same time as or after giving the *decision notice*. For the purposes of section 391 of the *Act* (Publication), the *decision notice* is treated as if it were a *final notice*.
 - (2) Building Societies Act 1986, section 93(6): The *FSA* notifies the successor of the *permission* by giving it a *decision notice*. The *decision notice* is not preceded by the giving of a *warning notice*. No *final notice* is required under section 390 of the *Act* and for the purposes of section 391 of the *Act* (Publication), the *decision notice* is treated as if it were a *final notice*. The giving of *permission* is treated for the purposes of section 55 of the *Act* (Right to refer matters to the *Tribunal*) as if it were the determination of an application made by the successor under Part IV of the *Act*. Part IX of the *Act* (Hearings and appeals) accordingly applies, but with the omission of section 133(9), which would otherwise prevent the *FSA* from giving the *permission* on the terms notified in the *decision notice* until after any reference and appeal.
 - (3) Friendly Societies Act 1992, section 58: The *warning notice* and *decision notice* must set out the terms of the direction which the *FSA* proposes or has decided to give and any specification of when the friendly society is to comply with it. A *decision notice* given under section 58A(3) must give an indication of the society's right, given by section 58A(5), to have the matter referred to the *Tribunal*. A *decision notice* under section 58A(3) may only relate to action under the same section of the *Friendly Societies Act 1992* as the action proposed in the *warning notice*. A *final notice* under section 390 of the *Act* must set out the terms of the direction and state the date from which it takes effect. Section 392 of the *Act* is to be read as if it included references to a *warning notice* given under section 58A(1) and a *decision notice* given under section 58A(3).

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

Section of the Act	Description	Handbook reference	Decision maker
52(6)(a)	when the FSA is proposing 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	SUP 6	<i>Executive procedures</i>
52(6)(b)	when the FSA is proposing to grant an application to vary a <i>firm's Part IV permission</i> but, other 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>Executive procedures</i>
52(7)	when the FSA is proposing to refuse an application for a <i>Part IV permission</i>		<i>Executive procedures</i>
52(7)	when the FSA is proposing to refuse an application to vary a <i>firm's Part IV permission</i>	SUP 6	<i>Executive procedures</i>
52(7)	when the FSA is proposing to refuse an application to cancel a <i>firm's Part IV permission</i>	SUP 6	<i>Executive procedures</i>
52(9)(a)	when the FSA is 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>RDC</i> or <i>executive procedures</i> See DEPP 2.5.6G
52(9)(b)	when the FSA is deciding to grant an	SUP 6	<i>RDC</i> or

	application to vary a <i>firm's Part IV permission</i> but, other than as part of the application, to restrict the <i>Part IV permission</i> (either by imposing a <i>limitation or requirement</i> which was not applied for or by specifying a narrower description of <i>regulated activity</i> than that applied for)		<i>executive procedures</i> See <i>DEPP 2.5.6G</i>
52(9)(c)	when the <i>FSA</i> is deciding to refuse an application for a <i>Part IV permission</i>		<i>RDC or executive procedures</i> See <i>DEPP 2.5.5G</i>
52(9)(c)	when the <i>FSA</i> is deciding to refuse an application to vary a <i>firm's Part IV permission</i>	<i>SUP 6</i>	<i>RDC or executive procedures</i> See <i>DEPP 2.5.6G</i>
52(9)(c)	when the <i>FSA</i> is deciding to refuse an application to cancel a <i>firm's Part IV permission</i>	<i>SUP 6</i>	<i>RDC or executive procedures</i> See <i>DEPP 2.5.5G</i>
54(1)/(2)	when the <i>FSA</i> is proposing or deciding to cancel a <i>firm's Part IV permission</i> otherwise than at its request*		<i>RDC</i>
57(1)/(3)	when the <i>FSA</i> is proposing or deciding to make a <i>prohibition order</i> against an individual*		<i>RDC</i>
58(3)/(4)	when the <i>FSA</i> is proposing or deciding to refuse an application for the variation or revocation of a <i>prohibition order</i>		<i>RDC</i>
62(2)	when the <i>FSA</i> is proposing to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i>	<i>SUP 10</i>	<i>Executive procedures</i>
62(3)	when the <i>FSA</i> is deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i>	<i>SUP 10</i>	<i>RDC or executive procedures</i> See <i>DEPP 2.5.5G</i>
63(3)/(4)	when the <i>FSA</i> is proposing or deciding to		<i>RDC</i>

	withdraw approval from an <i>approved person</i> *		
67(1)/(4)	when the <i>FSA</i> is proposing or deciding to take action against an <i>approved person</i> by exercising the disciplinary powers conferred by section 66*		<i>RDC</i>
76(4)/(5)	when the <i>FSA</i> is proposing or deciding to refuse an application for <i>listing</i> of securities	<i>LR 2 and 3</i>	<i>Executive procedures</i>
78(10)/ (11)(a)	when the <i>FSA</i> has suspended the <i>listing</i> of securities and is proposing or deciding to refuse an application by an issuer for cancellation of the suspension	<i>LR 5</i>	<i>Executive procedures</i>
87M(2)/(3)	when the <i>FSA</i> is proposing or deciding to publish a statement censuring an issuer of <i>transferable securities</i> , a <i>person</i> offering <i>transferable securities</i> to the public or a <i>person</i> requesting the admission of <i>transferable securities</i> to trading on a <i>regulated market</i>		<i>RDC</i>
88(4)/(6)	when the <i>FSA</i> is proposing or deciding to (1) refuse a <i>person's</i> application for approval as a <i>sponsor</i> ; or (2) on its own initiative, cancel a <i>person's</i> approval as a <i>sponsor</i>	<i>LR 8</i>	<i>RDC</i>
88(4)/(6)	when the <i>FSA</i> is proposing or deciding to cancel a <i>person's</i> approval as a <i>sponsor</i> at the <i>sponsor's</i> request		<i>Executive procedures</i>
89(2)/(3)	when the <i>FSA</i> is proposing or deciding to publish a statement censuring a <i>sponsor</i>		<i>RDC</i>
92(1)/(4)	when the <i>FSA</i> is proposing or deciding to take action against any person under section 91 for breach of Part 6 rules		<i>RDC</i>
126(1)/ 127(1)	when the <i>FSA</i> is proposing or deciding to impose a sanction for <i>market abuse</i> *		<i>RDC</i>
183(3)/ 186(1)	when the <i>FSA</i> is proposing or deciding to object to a change in <i>control</i> following receipt of a notice of <i>control</i>	<i>SUP 11</i>	<i>Executive procedures</i>
185(3)/(4)	when the <i>FSA</i> is proposing or deciding to approve a change in <i>control</i> following	<i>SUP 11</i>	<i>Executive procedures</i>

	receipt of a notice of control but subject to conditions		
187(1)/(3) and 188(1)	when the <i>FSA</i> is proposing or deciding to object to a <i>person</i> who has failed to submit a notice of <i>control</i> or a notice on acquiring, or increasing, <i>control</i> , or to object to an existing <i>controller</i>	<i>SUP 11</i>	<i>Executive procedures</i>
200(4)/(5)	when the <i>FSA</i> is proposing or deciding to refuse an application for variation or rescission of a requirement imposed on an <i>EEA incoming firm</i>		<i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.6G</i>
207(1)/208(1)	when the <i>FSA</i> is proposing or 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 person</i> (under section 206)*		<i>RDC</i>
245(1)/(2)	when the <i>FSA</i> is proposing or deciding to refuse an application for an <i>authorisation</i> order declaring a <i>unit trust scheme</i> to be an <i>AUT</i>	<i>COLL 2</i>	<i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.15G</i>
252(1)/(4)	when the <i>FSA</i> is proposing or deciding to refuse approval of a proposal to replace the <i>trustee</i> or <i>manager</i> of an <i>AUT</i>	<i>COLL 2</i>	<i>Executive procedures</i>
255(1)/(2)	when the <i>FSA</i> is proposing or deciding to make an order under section 254 revoking the <i>authorisation order</i> of an <i>AUT</i> *	None, but see Chapter 14 of the Regulatory Guide <i>EG</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 or decides to refuse to revoke or vary the direction or proposes or decides to vary the direction otherwise than in accordance with the application		<i>RDC</i>
264(2)/265(4)	when the <i>FSA</i> is notifying or deciding not to withdraw a notice, to the <i>operator</i> 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>	<i>COLL 9</i> See <i>DEPP 2.5.16G</i>	<i>Executive procedures</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</i> law		
269(1)/(2)	when the <i>FSA</i> , on an application under section 267(4) or (5) 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 or decides to refuse the application or to vary the direction otherwise than in accordance with the application		<i>RDC</i>
271(1)/(3)	when the <i>FSA</i> is proposing or deciding to refuse approval of a <i>collective investment scheme</i> as a <i>recognised scheme</i> under section 270	<i>COLL 9</i>	<i>Executive procedures</i>
276(1)/(2)	when the <i>FSA</i> is proposing or 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>COLL 9</i>	<i>Executive procedures</i>
280(1)/(2)	when the <i>FSA</i> is proposing or 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>RDC</i>
321(8)/(9)	when the <i>FSA</i> is proposing or deciding to refuse an application for variation or revocation of a direction or a requirement imposed on a former underwriting member of Lloyd's*		<i>RDC</i>
331(1)/(3)	when the <i>FSA</i> is proposing or deciding to make an order disapplying the exemption from the <i>general prohibition</i> under section 327*		<i>RDC</i>
331(7)/(8)	when the <i>FSA</i> is proposing or deciding to refuse an application for the variation or revocation of an order made under section 329*		<i>RDC</i>
345(2)/(3)	when the <i>FSA</i> is proposing or 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		<i>RDC</i>

	the auditor of any <i>AUT</i> or <i>ICVC</i> *		
385(1)/ 386 (1)	when the <i>FSA</i> is proposing or deciding to exercise the power under section 384(5) to require a <i>person</i> to pay restitution*		<i>RDC</i>
Paragraph 15A(5) of Schedule 3	when the <i>FSA</i> is notifying or deciding not to withdraw a notice issued to an <i>EEA UCITS management company</i> wishing to deal in units in a <i>collective investment scheme</i> in the <i>United Kingdom</i> and relevant <i>EEA State</i> authorities, that the way in which the <i>EEA UCITS management company</i> intends to market a <i>relevant scheme</i> in the <i>United Kingdom</i> does not comply with <i>UK law</i>	<i>SUP 13A</i>	<i>Executive procedures</i>
Paragraph 19(8)/ (12) of Schedule 3	when the <i>FSA</i> is proposing or 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>

Section of the Building Societies Act 1986	Description	Handbook reference	Decision maker
36A(5)/(5A)	when the <i>FSA</i> is proposing or deciding to issue a prohibition order under section 36A prohibiting the continuance or carrying on of an activity and requiring the disposal of assets acquired or otherwise in a <i>building society's</i> possession by virtue of the activity, where the society has failed to carry into effect a restructuring plan which it has been directed to carry out by the <i>FSA</i> under section 36(8)	See <i>DEPP</i> 2.5.18G(1)	<i>RDC</i>
46A(1)(a)/ (3)(a)	when the <i>FSA</i> is proposing or deciding to give a direction under section 36(3), (5), (6), (7) or (10) requiring a <i>building society</i> to submit for its approval a restructuring plan or to submit to the society's members the requisite transfer resolutions for a transfer of the society's business to a company or (if such a direction is given) imposing limitations		<i>RDC</i>

	on the issue of shares, acceptance of deposits or making of loans or requiring the society to take certain steps or refrain from certain action or requiring the removal of a director or other officer		
46A(1)(b)/ (3)(b)	when the <i>FSA</i> is proposing or deciding to give a direction under section 42B(1) (other than a direction varying a previous direction with the agreement of the <i>building society</i> concerned) that a <i>building society</i> transfers all its engagements to one or more other <i>building societies</i> under section 94 or that it transfers its business to an existing company under section 97*		<i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.12G
93(6)	when the <i>FSA</i> , on an amalgamation between <i>building societies</i> , each of which has a <i>Part IV permission</i> to accept deposits , notifies the successor society of the terms of its <i>Part IV permission</i>	See <i>DEPP</i> 2.5.18G(2)	<i>RDC</i> or <i>executive procedures</i> see <i>DEPP</i> 2.5.12G

Section of the Credit Unions Act 1979	Description	Handbook reference	Decision maker
20	where the <i>FSA</i> is proposing to cancel or suspend the registration of a <i>credit union</i> or to petition for the winding up of a <i>credit union</i>	<i>CRED</i> 15 Annex 1G	<i>RDC</i>

Section of the Friendly Societies Act 1992	Description	Handbook reference	Decision maker
58A(1)(a)/ (3)(a)	when the <i>FSA</i> is proposing or deciding to give a direction under section 54 or section 55 requiring a <i>friendly society</i> to take or refrain from taking steps where certain activities have become disproportionate to those of the <i>friendly society</i> group or, as the case may be, the society, or varying such a direction other	See <i>DEPP</i> 2.5.18G(3)	<i>RDC</i>

	than at the request of the society*		
58A(1)(b)/ (3)(b)	when the <i>FSA</i> is proposing or deciding to give a direction under section 90 providing for a transfer of the engagements of a <i>friendly society</i> *		<i>RDC</i>
85(4A)	when the <i>FSA</i> , on an amalgamation between <i>friendly societies</i> each of which has a <i>Part IV permission</i> , notifies the successor society of the terms of its <i>Part IV permission</i>		<i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.12G

OEIC Regulations reference	Description	Handbook reference	Decision maker
Regulation 16(1)/(2)	when the <i>FSA</i> is proposing or deciding to refuse an application for an <i>authorisation order</i> in respect of a proposed <i>ICVC</i>	<i>COLL 2</i>	<i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.15G
Regulation 22(1)/(2)/ (4)/(5)	when the <i>FSA</i> is proposing to refuse approval of (or, having given a <i>warning notice</i> , deciding to refuse) a proposal to replace the <i>depository</i> or director of an <i>ICVC</i> , or any other proposal or decision falling within regulation 21	<i>COLL 2</i>	<i>Executive procedures</i>
Regulation 24(1)/(2)	when the <i>FSA</i> is proposing or deciding to revoke an <i>authorisation order</i> relating to an <i>ICVC</i> under regulation 23(1)*		<i>RDC</i>
Regulation 28(1)/(2)	when the <i>FSA</i> is proposing or 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>RDC</i>
Paragraph 20 of Schedule 5	when the <i>FSA</i> is proposing or deciding to use the disqualification powers under section 249(1)*		<i>RDC</i>

Regulated Activities	Description	Handbook	Decision
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Order		reference	maker
Article 95(2)/(3)	when the <i>FSA</i> is proposing or deciding not to include, or to remove, an <i>appointed representative</i> from the <i>Register</i> *	<i>SUP</i> 12.4.10G	<i>RDC</i>
Article 95(7)/(8)	when the <i>FSA</i> is proposing or deciding to refuse an application to revoke a determination not to include, or to remove, an <i>appointed representative</i> from the <i>Register</i> *	<i>SUP</i> 12.4.10G	<i>RDC</i>

DEPP 2 Supervisory notices
Annex 2G

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 firm's <i>Part IV permission</i>	<i>SUP</i> 6	<i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.7G
78(2)/(5)	when the <i>FSA</i> is proposing to discontinue or discontinues the <i>listing</i> of a security	<i>LR</i> 5	<i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.9G(4) and 2.5.10G
78(2)/(5)	when the <i>FSA</i> is proposing to suspend or suspends the <i>listing</i> of a security	<i>LR</i> 5	<i>Executive procedures</i>
87O(2)/(5)	when the <i>FSA</i> is proposing or deciding to exercise or deciding to maintain, vary or revoke any of the powers in sections 87K or 87L in respect of an infringement of any applicable provision.	<i>PR</i> 5	<i>Executive procedures</i>
96C	when the <i>FSA</i> is proposing to suspend or suspends trading in a <i>financial instrument</i>	<i>DTR</i>	<i>Executive procedures</i>
197(3)/	when the <i>FSA</i> is exercising its power of	<i>SUP</i> 14	<i>RDC</i> or

(6)/(7)(b)	intervention in respect of an <i>incoming firm</i>		<i>executive procedures</i> See <i>DEPP</i> 2.5.7G
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>COLL</i>	<i>RDC</i>
268(3)/(7)(a) or (9)(a) (as a result of (8)(b)/(13))	when the <i>FSA</i> is proposing or deciding to give or, on its own initiative, to vary a direction to the <i>operator</i> of a <i>recognised scheme</i>	<i>COLL</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>COLL</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		<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>COLL</i>	<i>RDC</i>

3 The nature and procedure of the RDC

3.1 The Regulatory Decisions Committee

- 3.1.1 G The *Regulatory Decisions Committee (RDC)* is a committee of the *FSA* Board. It is part of the *FSA*. It exercises certain regulatory powers on behalf of the *FSA* and is accountable to the *FSA* Board for its decisions generally.
- 3.1.2 G (1) The *RDC* is separate from the *FSA*'s executive management structure. Apart from its Chairman, none of the members of the *RDC* is an *FSA* employee.
- (2) All members of the *RDC* are appointed for fixed periods by the *FSA* Board. The *FSA* Board may remove a member of the *RDC*, but only in the event of that member's misconduct or incapacity.
- 3.1.3 G The *RDC* has its own legal advisers and support staff. The *RDC* staff are separate from the *FSA* staff involved in conducting investigations and making recommendations to the *RDC*.

3.2 The operation of the RDC

RDC meetings and composition of panels

- 3.2.1 G The *RDC* meets as often as necessary to discharge its functions. It may do so, in appropriate cases, in writing or by telephone or email or other electronic means. The *RDC* meets in private.
- 3.2.2 G The *RDC* may meet as a full committee, but will ordinarily meet in panels. Each meeting of the *RDC* will generally include:
- (1) its Chairman or a Deputy Chairman (who will chair the meeting); and
- (2) at least two other members.
- 3.2.3 G The composition and size of panels of the *RDC* may vary depending on the nature of the particular matter under consideration. In cases in which representations are made, it will be usual for the panel that is to consider the representations and decide whether to give a *decision notice* to include additional members of the *RDC* who have not previously considered the matter.

Conflicts of interest

- 3.2.4 G The *RDC* will seek not to invite a member to join a panel to consider a matter in which he has a potential conflict of interest.
- 3.2.5 G (1) If a member of the *RDC* has a potential conflict of interest in any matter in which he is asked to participate he will disclose the conflict

to the *RDC* Office, and disclose it:

- (a) in the case of the Chairman of the *RDC*, to the Chairman or Deputy Chairman of the *FSA*; or
- (b) in the case of a Deputy Chairman of the *RDC*, to the Chairman of the *RDC*, or if he is unavailable to the Chairman or Deputy Chairman of the *FSA*; or
- (c) in the case of any other member, to the Chairman or a Deputy Chairman of the *RDC*.

- (2) If the *person* to whom a conflict has been disclosed in accordance with (1)(a) to (c) considers it reasonable and appropriate, he will require the member of the *RDC* to stand down from consideration of that matter. He may ask another member of the *RDC* to assist him in considering the potential conflict.

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

Procedure: general

- 3.2.7 G The *RDC* will follow the procedure described in this section, but subject to that it will conduct itself in the manner the *RDC* Chairman or a Deputy Chairman considers suitable in order to enable the *RDC* to determine fairly and expeditiously the matter which it is considering.

- 3.2.8 G Each member of the *RDC* present is entitled to vote on the matter under consideration. The chairman of the meeting will have a vote as a member of the *RDC* and will have the casting vote in a tie.

- 3.2.9 G The *RDC* Chairman or a Deputy Chairman may, acting alone, decide:

- (1) matters relating to the arrangements for an *RDC* meeting, including its timing; and
- (2) the composition of the panel to consider a particular matter.

- 3.2.10 G If the *RDC* considers it relevant to its consideration, it may ask *FSA* staff to explain or provide any or all of the following:

- (1) additional information about the matter (which *FSA* staff may seek by further investigation); or
- (2) further explanation of any aspect of the *FSA* staff recommendation or accompanying papers; or
- (3) information about *FSA* priorities and policies (including as to the *FSA*'s view on the law or on the correct legal interpretation of provisions of the *Act*).

- 3.2.11 G The *RDC* has no power under the *Act* to require *persons* to attend before it or provide information. It is not a tribunal and will make a decision based

on all the relevant information available to it, which may include views of *FSA* staff about the relative quality of witness and other evidence.

Procedure: warning notices and first supervisory notices

- 3.2.12 G If *FSA* staff consider that action is appropriate in a matter for which the *RDC* is the decision maker, they will make a recommendation to the *RDC* that a *warning notice* or a *supervisory notice* should be given.
- 3.2.13 G In accordance with *DEPP* 2.2 the *RDC* will consider whether it is right in all the circumstances to give the statutory notice.
- 3.2.14 G If the *RDC* decides that the *FSA* should give a *warning notice* or a first *supervisory notice*:
- (1) the *RDC* will settle the wording of the *warning notice* or first *supervisory notice*, and will ensure that the *notice* complies with the relevant provisions of the *Act*;
 - (2) the *RDC* will make any relevant *statutory notice associated decisions*;
 - (3) the *RDC* staff will make appropriate arrangements for the *notice* to be given; and
 - (4) the *RDC* staff will make appropriate arrangements for the disclosure of the substantive communications between the *RDC* and the *FSA* staff who made the recommendation on which the *RDC's* decision is based. This may include providing copies in electronic format.

Procedure: representations

- 3.2.15 G (1) A *warning notice* or a first *supervisory notice* will (as required by the *Act*) specify the time allowed for making representations. This will not be less than 28 days.
- (2) The *FSA* will also, when giving a *warning notice* or a first *supervisory notice*, specify a time within which the recipient is required to indicate whether he wishes to make oral representations.
- 3.2.16 G (1) The recipient of a *warning notice* or a first *supervisory notice* may request an extension of the time allowed for making representations. Such a request must normally be made within 14 days of the notice being given.
- (2) If a request is made, the Chairman or a Deputy Chairman of the *RDC* will decide whether to allow an extension, and, if so, how much additional time is to be allowed for making representations. In reaching his decision he may take account of any relevant comments from the *FSA* staff responsible for the matter.
- (3) The *RDC* staff will notify the relevant party and the *FSA* staff responsible for the matter of the decision in writing.

- 3.2.17 G (1) If the recipient of a *warning notice* or a first *supervisory notice* indicates that he wishes to make oral representations, the *RDC* staff, in conjunction with the Chairman or a Deputy Chairman of the *RDC*, will fix a date or dates for a meeting at which the relevant *RDC* members will receive those representations.
- (2) In making those arrangements the *RDC* staff will draw the Chairman's or Deputy Chairman's attention to any particular issues about the timing of the meeting which have been raised by the recipient of the *notice* or the relevant *FSA* staff.
- 3.2.18 G The chairman of the relevant meeting will ensure that the meeting is conducted so as to enable:
- (1) the recipient of the *warning notice* or first *supervisory notice* to make representations;
- (2) the relevant *FSA* staff to respond to those representations;
- (3) the *RDC* members to raise with those present any points or questions about the matter (whether in response to particular representations or more generally about the matter); and
- (4) the recipient of the notice to respond to points made by *FSA* staff or the *RDC*;
- but the chairman may ask the recipient of the notice or *FSA* staff to limit their representations or response in length or to particular issues arising from the *warning notice* or first *supervisory notice*.
- 3.2.19 G The recipient of the *warning notice* or *supervisory notice* may wish to be legally represented at the meeting, but this is not a requirement.
- 3.2.20 G In appropriate cases, the chairman of a meeting for oral representations may ask those present to provide additional information in writing after the meeting. If he does so, he will specify the time within which that information is to be provided.
- 3.2.21 G The *RDC* will not, after the *FSA* has given a *warning notice* or a first *supervisory notice*, meet with or discuss the matter whilst it is still ongoing with the *FSA* staff responsible for the case without other relevant parties being present or otherwise having the opportunity to respond.

Procedure: decision notices and second supervisory notices

- 3.2.22 G If no representations are made in response to the *warning notice* or first *supervisory notice*, the *FSA* will regard as undisputed the allegations or matters set out in the notice and the default procedure will apply: see *DEPP* 2.3.2G to 2.3.4G).
- 3.2.23 G However, if representations are made, in accordance with *DEPP* 2.3.1G the *RDC* will consider whether it is right in all the circumstances to give the *decision notice* or a second *supervisory notice* (as appropriate).

- 3.2.24 G If the *RDC* decides that the *FSA* should give a *decision notice* or a second *supervisory notice*:
- (1) the *RDC* will settle the wording of the *notice* which will include a brief summary of the key representations made and how they have been dealt with, and will ensure that the *notice* complies with the relevant provisions of the *Act*;
 - (2) the *RDC* will make any relevant *statutory notice associated decisions*, including whether the *FSA* is required to give a copy of the *notice* to a third party; and
 - (3) the *RDC* staff will make appropriate arrangements for the *notice* to be given.
- 3.2.25 G If the *RDC* decides that the *FSA* should not give a *decision notice* or a second *supervisory notice* the *RDC* staff will notify the relevant parties (including the relevant *FSA* staff) in writing of that decision.

Discontinuance of *FSA* action

- 3.2.26 G *FSA* staff responsible for recommending action to the *RDC* will continue to assess the appropriateness of the proposed action in the light of new information or representations they receive and any material change in the facts or circumstances relating to a particular matter. It may be therefore that they decide to give a *notice of discontinuance* to a *person* to whom a *warning notice* or *decision notice* has been given. The decision to give a *notice of discontinuance* does not require the agreement of the *RDC*, but *FSA* staff will inform the *RDC* of the discontinuance of the proceedings.

Tribunal proceedings

- 3.2.27 G A decision by the *RDC* to give a *decision notice* or *supervisory notice* may lead to a reference to the *Tribunal* under the *Act*. The conduct of proceedings before the *Tribunal* is not however a matter for the *RDC*.

3.3 Straightforward decisions

- 3.3.1 G In *statutory notice* cases for which the *RDC* is the decision-maker, the Chairman or a Deputy Chairman of the *RDC* may take a straightforward decision to give the *statutory notice*.
- 3.3.2 G The Chairman or, if he is unavailable, a Deputy Chairman will decide whether a decision is straightforward. In doing so he will have regard to all the circumstances. These may include:
- (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, including whether representations have been made;
 - (4) the range of alternative options;
 - (5) the extent to which the facts relating to the decision are or may be disputed.
- 3.3.3 G The *RDC* Chairman or a Deputy Chairman may, notwithstanding the fact that a decision is straightforward, take the decision to give the *statutory notice* jointly with one or more other members of the *RDC* if he considers it appropriate to do so.

3.4 Urgent supervisory notice cases

- 3.4.1 G In urgent *supervisory notice* cases for which the *RDC* is the decision maker, the decision to give the *supervisory notice* may be taken by the *RDC* Chairman or, if he is unavailable, a Deputy Chairman, and, if it is practicable, one or more other *RDC* members.
- 3.4.2 G The *RDC* Chairman or Deputy Chairman will take such a decision only if satisfied that the action proposed should occur before it is practicable to convene an *RDC* panel.
- 3.4.3 G In an exceptionally urgent case the decision to give a *supervisory notice* may be taken by a member of the *FSA's* executive of at least director of division level if:
- (1) *FSA* staff consider that the action should be taken before a recommendation to the Chairman or a Deputy Chairman of the *RDC* can be made; and
 - (2) an urgent decision on the proposed action is necessary to protect the interests of consumers.
- 3.4.4 G In the circumstances described in *DEPP* 3.4.3G, the *FSA* considers that it may be necessary for an *FSA* director of division to take the decision to give the *supervisory notice* even if he has been involved in establishing the evidence on which the decision is based, as permitted by section 395(3) of the *Act*. Where practicable, however, *FSA* staff will seek to ensure that the *FSA* director has not been so involved.

4 Decisions by FSA staff under executive procedures

4.1 Executive decision maker

Who takes the decision

4.1.1 G All *statutory notice decisions* under *executive procedures* will be taken either by a *senior staff committee* or by an individual *FSA* staff member.

4.1.2 G In either case, the decision will be taken by *FSA* staff who have not been directly involved in establishing the evidence on which the decision is based, except in accordance with section 395(3) of the *Act*.

Decisions by senior staff committee

4.1.3 G The *FSA's* senior executive committee will from time to time determine that particular categories of *statutory notice decision* to be taken under *executive procedures* will be taken by a *senior staff committee*.

4.1.4 G A *senior staff committee* will consist of such *FSA* staff members as the *FSA's* senior executive committee may from time to time determine. The *FSA's* senior executive committee may authorise the chairman of a *senior staff committee* to select its other members. A *senior staff committee* is accountable for its decisions to the *FSA's* senior executive committee and, through it, to the *FSA* Board.

4.1.5 G 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.

4.1.6 G 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.

Decisions by individual *FSA* staff members

4.1.7 G *Statutory notice decisions* to be taken under *executive procedures*, and not falling within the responsibility of a *senior staff committee*, will be taken by an individual *FSA* staff member. 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.
- 4.1.8 G 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.
- 4.1.9 G An *FSA* staff member who considers that a *statutory notice 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.
- 4.1.10 G If an individual responsible for a decision under *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.

Conflicts of interest

- 4.1.11 G
- (1) *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 subject to a conflict of interest must declare that interest to the *person* to whom they are immediately responsible for a decision.
 - (2) If a member of a *senior staff committee* has a potential conflict of interest in any matter in which he is asked to participate he will disclose the conflict to the secretariat of the *senior staff committee*, and disclose it:
 - (a) in the case of the chairman of the senior staff committee, to a member of the *FSA's* senior executive committee or, if the *person* with the conflict is the chairman of the *FSA's* senior executive committee, to the Chairman of the *FSA*;
 - (b) in the case of the deputy chairman of the senior staff committee, to the chairman of the committee, or if he is unavailable, to a member of the *FSA's* senior executive committee;
 - (c) in the case of any other member to the chairman or deputy chairman of the *senior staff committee*.

- (3) If the person to whom the conflict has been disclosed in accordance with *DEPP* 4.1.11G(2) considers it reasonable and appropriate, he will require the member of the *senior staff committee* to stand down from consideration of the matter.

- 4.1.12 G The secretariat to the *senior staff committee* will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

Procedure

- 4.1.13 G The procedure for taking decisions under *executive procedures* will generally be less formal and structured than that for decisions by the *RDC*. Broadly, however, *FSA* staff responsible for taking *statutory notice* decisions under *executive procedures* will follow a procedure similar to that described at *DEPP* 3.2.7G to 3.2.27G for the *RDC* except that:

- (1) in a case where the decision will be taken by a *senior staff committee*:
 - (a) the chairman or deputy chairman of the *senior staff committee* will perform the role of the Chairman of the *RDC*; and
 - (b) the secretariat to the *senior staff committee* will perform the role of the *RDC* staff;
- (2) in a case where the decision will be taken by individual members of *FSA* staff, the distinction between the role of the *RDC*, its Chairman and the *RDC* staff has no application;
- (3) the *FSA* staff responsible for taking the *statutory notice decision* may be advised by legal advisers who have also advised *FSA* staff recommending action by the *FSA*;
- (4) the *FSA* will not normally disclose the communications between the *FSA* staff recommending that action be taken and those responsible for the decision to give the *statutory notice* unless the *FSA* has stated publicly that it will adopt a practice of disclosing such communications, or a class of communications, in respect of particular categories of decision taken by *FSA* staff under *executive procedures*; and
- (5) *DEPP* 3.2.11G and 3.2.21G will not apply.

4.2 Urgent statutory notice cases

- 4.2.1 G If *FSA* staff recommend that action be taken and they consider that the decision falls within the responsibility of a *senior staff committee*:

- (1) in general the *FSA* staff's recommendation will go before the *senior staff committee*;
- (2) in urgent *statutory notice* cases for which a *senior staff committee* is responsible, the decision to give the *statutory notice* may be taken by the chairman or, if he is unavailable, a deputy chairman of the *senior staff committee*, and, if it is practicable, one or more other members of the committee;
- (3) the chairman or deputy chairman of the senior staff committee will take such a decision only if satisfied that the action proposed should occur before it is practicable to convene a meeting of the senior staff committee;
- (4) in an exceptionally urgent *statutory notice* 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 decision may be taken by a member of the *FSA*'s executive of at least director of division level or, in the case of a *senior staff committee* which reports directly to the *FSA*'s senior executive committee, by a member of that committee.

- 4.2.2 G In the circumstances described in *DEPP* 4.2.1G(4) the *FSA* considers that it may be necessary for an *FSA* director of division or member of a *senior staff committee* to take the decision to give a *supervisory notice* even if he has been involved in establishing the evidence on which the decision is based, as permitted by section 395(3) of the *Act*. Where practicable, however, *FSA* staff will seek to ensure that the *FSA* director or committee member has not been so involved.

5 Settlement decision procedure

5.1 Settlement decision makers

Introduction

- 5.1.1 G (1) A *person* subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the *FSA*.
- (2) The fact that he does so 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 to give that statutory notice will be taken by senior *FSA* staff.
- (3) 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*").
- (4) 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*.)
- (5) "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*.

Procedure: general

- 5.1.2 G A *person* who is or may be subject to enforcement action may wish to discuss the proposed action with *FSA* staff through settlement discussions.
- 5.1.3 G Settlement discussions may take place at any time during the enforcement process if both parties agree. This might be before the giving of a *warning notice*, before a *decision notice*, or even after referral of the matter to the *Tribunal*. But the *FSA* would not normally agree to detailed settlement discussions until it has a sufficient understanding of the nature and gravity of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome. Settlement after a *decision notice* will be rare.
- 5.1.4 G *FSA* staff and the *person* concerned may agree that neither the *FSA* nor the *person* concerned would seek to rely against the other on any admissions or statements made in the course of their settlement discussions if the matter is considered subsequently by the *RDC* or the *Tribunal*.

Procedure: participation of decision makers in discussions

- 5.1.5 G (1) The *settlement decision makers* may, but need not, participate in the discussions exploring possible settlement.
- (2) 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.
- 5.1.6 G The terms of any proposed settlement:
- (1) will be put in writing and be agreed by *FSA* staff and the *person* concerned;
- (2) may refer to a draft of the proposed *statutory notices* setting out the facts of the matter and the *FSA's* conclusions;
- (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the *person* concerned to:
- (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FSA* and any secondary material which might undermine the *FSA* decision to give the *statutory* notice;
- (b) waive and not exercise any rights under section 387 of the *Act* or otherwise to make representations to the *RDC* in respect of a *warning notice* or first *supervisory notice*;
- (c) not object to the giving of a *decision notice* before the expiry of the 28 day period after the giving of a *warning notice* specified under section 387 of the *Act*;
- (d) not dispute with the *FSA* the facts and matters set out in a *warning notice*, *decision notice*, *supervisory notice* or *final notice* and to waive and not exercise any right under section 208 (Decision notice) of the *Act* to refer the matter to the *Tribunal*.
- 5.1.7 G The *settlement decision makers* may:
- (1) accept the proposed settlement by deciding to give a *statutory notice* based on the terms of the settlement; or
- (2) decline the proposed settlement;
- whether or not the *settlement decision makers* have met with the relevant *FSA* staff or the *person* concerned.

- 5.1.8 G (1) 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 first *supervisory notice*; or
- (b) if representations have been made in response to a *warning notice* or first *supervisory notice*, whether to proceed to give a *decision notice* or second *supervisory notice*.

Settlement by mediation

- 5.1.9 G The *FSA* and other parties may agree to mediation as a way of facilitating settlement in appropriate cases.

Third party rights

- 5.1.10 G (1) *DEPP 2.4* sets out the *FSA's* approach to giving third parties copies of *statutory notices* pursuant to section 393 (Third party rights) 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*.

6 Penalties

6.1 Introduction

- 6.1.1 G *DEPP* 6 includes the *FSA*'s statement of policy with respect to the imposition and amount of penalties under the *Act*, as required by sections 69(1), 93(1), 124(1), and 210(1) of the *Act*.
- 6.1.2 G The principal purpose of imposing a financial penalty or issuing a *public censure* is to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches*, helping to deter other *persons* from committing similar *breaches*, and demonstrating generally the benefits of compliant behaviour. Financial penalties and *public censures* are therefore tools that the *FSA* may employ to help it to achieve its *regulatory objectives*.

6.2 Deciding whether to take action

- 6.2.1 G The *FSA* will consider the full circumstances of each case when determining whether or not to take action for a financial penalty or *public censure*. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.
- (1) The nature, seriousness and impact of the suspected *breach*, including:
 - (a) whether the *breach* was deliberate or reckless;
 - (b) the duration and frequency of the *breach*;
 - (c) the amount of any benefit gained or loss avoided as a result of the *breach*;
 - (d) whether the *breach* reveals serious or systemic weaknesses of the management systems or *internal controls* relating to all or part of a *person's* business;
 - (e) the impact or potential impact of the *breach* on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;
 - (f) the loss or risk of loss caused to *consumers* or other market users;
 - (g) the nature and extent of any *financial crime* facilitated,

- occasioned or otherwise attributable to the *breach*; and
- (h) whether there are a number of smaller issues, which individually may not justify disciplinary action, but which do so when taken collectively.
- (2) The conduct of the *person* after the *breach*, including the following:
- (a) how quickly, effectively and completely the *person* brought the *breach* to the attention of the *FSA* or another relevant regulatory authority;
 - (b) the degree of co-operation the *person* showed during the investigation of the *breach*;
 - (c) any remedial steps the *person* has taken in respect of the *breach*;
 - (d) the likelihood that the same type of *breach* (whether on the part of the *person* under investigation or others) will recur if no action is taken;
 - (e) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to his *behaviour* (for example, where relevant, those of the *Takeover Panel* or an *RIE*); and
 - (f) the nature and extent of any false or inaccurate information given by the *person* and whether the information appears to have been given in an attempt to knowingly mislead the *FSA*.
- (3) The previous disciplinary record and compliance history of the *person* including:
- (a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action resulting in adverse findings against the *person*;
 - (b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;
 - (c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm*, using its own initiative powers, by means of a variation of a *Part IV permission* or otherwise, or has previously requested the *firm* to take remedial action, and the extent to which such action has been taken; and
 - (d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously issued the *person* with a private warning.

(4) *FSA guidance* and other published materials:

The *FSA* will not take action against a person for *behaviour* that it considers to be in line with *guidance*, other materials published by the *FSA* in support of the *Handbook* or *FSA*-confirmed Industry Guidance which were current at the time of the *behaviour* in question. (The manner in which *guidance* and other published materials may otherwise be relevant to an enforcement case is described in *EG 2*.)

(5) Action taken by the *FSA* in previous similar cases.

(6) Action taken by other domestic or international regulatory authorities:

Where other regulatory authorities propose to take action in respect of the *breach* which is under consideration by the *FSA*, or one similar to it, the *FSA* will consider whether the other authority's action would be adequate to address the *FSA*'s concerns, or whether it would be appropriate for the *FSA* to take its own action.

6.2.2 G When deciding whether to take action for *market abuse* or *requiring or encouraging*, the *FSA* may consider the following additional factors:

(1) The degree of sophistication of the users of the market in question, the size and liquidity of the market, and the susceptibility of the market to *market abuse*.

(2) The impact, having regard to the nature of the *behaviour*, that any financial penalty or *public censure* may have on the financial markets or on the interests of *consumers*:

(a) a penalty may show that high standards of market conduct are being enforced in the financial markets, and may bolster market confidence;

(b) a penalty may protect the interests of *consumers* by deterring future *market abuse* and improving standards of conduct in a market;

(c) in the context of a *takeover bid*, the *FSA* may consider that the impact of the use of its powers is likely to have an adverse effect on the timing or outcome of that bid, and therefore it would not be in the interests of financial markets or *consumers* to take action for *market abuse* during the *takeover bid*. If the *FSA* considers that the proposed use of its powers may have that effect, it will consult the *Takeover Panel* and give due weight to its views.

Discipline for breaches of *FSA* rules on systems and controls against money laundering

6.2.3 G The *FSA's* rules on systems and controls against *money laundering* are set out in *SYSC 3.2* and *SYSC 6.3*. The *FSA*, when considering whether to take action for a financial penalty or censure in respect of a breach of those rules, will have regard to whether a *firm* has followed relevant provisions in the *Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group*.

Action against approved persons under section 66 of the Act

6.2.4 G The primary responsibility for ensuring compliance with a *firm's* regulatory obligations rests with the *firm* itself. However, the *FSA* may take disciplinary action against an *approved person* where there is evidence of personal culpability on the part of that *approved person*. Personal culpability arises where the *behaviour* was deliberate or where the *approved person's* standard of *behaviour* was below that which would be reasonable in all the circumstances at the time of the conduct concerned.

6.2.5 G In some cases it may not be appropriate to take disciplinary measures against a *firm* for the actions of an *approved person* (an example might be where the *firm* can show that it took all reasonable steps to prevent the *breach*). In other cases, it may be appropriate for the *FSA* to take action against both the *firm* and the *approved person*. For example, a *firm* may have breached the *rule* requiring it to take reasonable care to establish and maintain such systems and controls as are appropriate to its business (*SYSC 3.1.1R* or *SYSC 4.1.1R*), and an *approved person* may have taken advantage of those deficiencies to front run orders or misappropriate assets.

6.2.6 G In addition to the general factors outlined in *DEPP 6.2.1G*, there are some additional considerations that may be relevant when deciding whether to take action against an *approved person* pursuant to section 66 of the *Act*. This list of those considerations is non-exhaustive. Not all considerations below may be relevant in every case, and there may be other considerations, not listed, that are relevant.

(1) The *approved person's* position and responsibilities. The *FSA* may take into account the responsibility of those exercising *significant influence functions* in the *firm* for the conduct of the *firm*. The more senior the *approved person* responsible for the misconduct, the more seriously the *FSA* is likely to view the misconduct, and therefore the more likely it is to take action against the *approved person*.

(2) Whether disciplinary action against the *firm* rather than the *approved person* would be a more appropriate regulatory response.

(3) Whether disciplinary action would be a proportionate response to the nature and seriousness of the breach by the *approved person*.

6.2.7 G The *FSA* will not discipline *approved persons* on the basis of vicarious liability (that is, holding them responsible for the acts of others), provided appropriate delegation and supervision has taken place (see *APER 4.6.13G* and *APER 4.6.14G*). In particular, disciplinary action will not be taken

against an *approved person* performing a *significant influence function* simply because a regulatory failure has occurred in an area of business for which he is responsible. The *FSA* will consider that an *approved person* performing a *significant influence function* may have breached *Statements of Principle 5 to 7* only if his conduct was below the standard which would be reasonable in all the circumstances at the time of the conduct concerned (see also *APER 3.1.8G*).

- 6.2.8 G An *approved person* will not be in breach if he has exercised due and reasonable care when assessing information, has reached a reasonable conclusion and has acted on it.
- 6.2.9 G Where disciplinary action is taken against an *approved person* the onus will be on the *FSA* to show that the *approved person* has been guilty of misconduct.
- Action against directors, former directors and persons discharging managerial responsibilities for breaches under Part VI of the Act
- 6.2.10 G The primary responsibility for ensuring compliance with Part VI of the *Act*, the *Part 6 rules*, the *prospectus rules* or a provision otherwise made in accordance with the *Prospectus Directive* or a requirement imposed under such provision rests with the persons identified in section 91(1) and section 91(1A) (Penalties for breach of Part 6 rules) of the *Act* respectively. Normally therefore, any disciplinary action taken by the *FSA* for contraventions of these obligations will in the first instance be against those persons.
- 6.2.11 G However, in the case of a contravention by a *person* referred to in section 91(1)(a) or section 91(1)(b)(i) or section 91(1A) of the *Act* ("P"), where the *FSA* considers that another *person* who was at the material time a *director* of P was knowingly concerned in the contravention, the *FSA* may take disciplinary action against that *person*. In circumstances where the *FSA* does not consider it appropriate to seek a disciplinary sanction against P (notwithstanding a breach of relevant requirements by such person), the *FSA* may nonetheless seek a disciplinary sanction against any other person who was at the material time a *director* of P and was knowingly concerned in the contravention.
- 6.2.12 G *Persons* discharging managerial responsibilities within an issuer and their *connected persons*, who have requested or approved the admission of a *financial instrument* to trading on a *regulated market*, and *connected persons* have their own responsibilities under the *disclosure rules*, as set out in *DTR 3*, for which they are primarily responsible. Accordingly, disciplinary action for a breach of the *disclosure rules* will not necessarily involve the issuer.

[**Note:** In paragraph 6.2.12, 'connected person' has the meaning in relation to a *person discharging managerial responsibilities* within an *issuer* attributed to it in subsection (5) of the definition of 'connected person' in the *Handbook Glossary*.]

- 6.2.13 G In deciding whether to take action, the *FSA* will consider the full circumstances of each case. Factors that may be relevant for this purpose include, but are not limited to, the factors at *DEPP* 6.2.1G.

Discipline for breaches of the Principles for Businesses

- 6.2.14 G The *Principles* are set out in *PRIN* 2.1.1R. The *Principles* are a general statement of the fundamental obligations of *firms* under the *regulatory system*. The *Principles* derive their authority from the *FSA's* rule-making powers set out in section 138 (General rule-making power) of the *Act*. A breach of a *Principle* will make a *firm* liable to disciplinary action. Where the *FSA* considers this is appropriate, it will discipline a *firm* on the basis of the *Principles* alone.

- 6.2.15 G In determining whether a *Principle* has been breached, it is necessary to look to the standard of conduct required by the *Principle* in question at the time. Under each of the *Principles*, the onus will be on the *FSA* to show that a *firm* has been at fault in some way.

Discipline for breaches of the Listing Principles

- 6.2.16 G The Listing Principles are set out in *LR* 7. The Listing Principles are a general statement of the fundamental obligations of *listed companies*. The Listing Principles derive their authority from the *FSA's* rule making powers set out in section 73A(1) (Part 6 Rules) of the *Act*. A breach of a Listing Principle will make a *listed company* liable to disciplinary action by the *FSA*.

- 6.2.17 G In determining whether a Listing Principle has been broken, it is necessary to look to the standard of conduct required by the Listing Principle in question. Under each of the Listing Principles, the onus will be on the *FSA* to show that a *listed company* has been at fault in some way. This requirement will differ depending upon the Listing Principle.

- 6.2.18 G In certain cases, it may be appropriate to discipline a *listed company* on the basis of the Listing Principles alone. Examples include the following:

- (1) where there is no detailed listing rule which prohibits the *behaviour* in question, but the *behaviour* clearly contravenes a Listing Principle;
- (2) where a *listed company* has committed a number of breaches of detailed rules which individually may not merit disciplinary action, but the cumulative effect of which indicates the breach of a Listing Principle.

Action involving other regulatory authorities or enforcement agencies

- 6.2.19 G Some types of *breach* may potentially result not only in action by the *FSA*, but also action by other domestic or overseas regulatory authorities or enforcement agencies.

- 6.2.20 G When deciding how to proceed in such cases, the *FSA* will examine the circumstances of the case, and consider, in the light of the relevant investigation, disciplinary and enforcement powers, whether it is appropriate for the *FSA* or another authority to take action to address the *breach*. The *FSA* will have regard to all the circumstances of the case including whether the other authority has adequate powers to address the *breach* in question.
- 6.2.21 G In some cases, it may be appropriate for both the *FSA* and another authority to be involved, and for both to take action in a particular case arising from the same facts. For example, a breach of *RIE* rules may be so serious as to justify the *FSA* varying or cancelling the *firm's Part IV permission*, or withdrawing approval from *approved persons*, as well as action taken by the *RIE*. In such cases, the *FSA* will work with the relevant authority to ensure that cases are dealt with efficiently and fairly, under operating arrangements in place (if any) between the *FSA* and the relevant authority.
- 6.2.22 G In relation to *behaviour* which may have happened or be happening in the context of a *takeover bid*, the *FSA* will refer to the *Takeover Panel* and give due weight to its views in the context of the *Takeover Panel's* powers and responsibilities. Where the *Takeover Code* has procedures for complaint about any behaviour, the *FSA* expects parties to exhaust those procedures. The *FSA* will not, save in exceptional circumstances, take action under any of section 123 (*FSA's* power to impose penalties), section 129 (Power of court to impose penalties), section 381 (Injunctions), sections 383 or 384 (Restitution) in respect of *behaviour* to which the *Takeover Code* is relevant before the conclusion of the procedures available under the *Takeover Code*.
- 6.2.23 G The *FSA* will not take action against a *person* over *behaviour* which (a) conforms with the *Takeover Code* or rules of an *RIE* and (b) falls within the terms of any provision of the *Code of Market Conduct* which states that *behaviour* so conforming does not amount to *market abuse*. The *FSA* will seek the *Takeover Panel's* or relevant *RIE's* views on whether *behaviour* complies with the *Takeover Code* or *RIE* rules and will attach considerable weight to its views.
- 6.2.24 G If any of the circumstances in *DEPP* 6.2.26G apply, and the *FSA* considers that the use of its disciplinary powers under section 123 or section 129, or of its injunctive powers under section 381 or of its powers relating to restitution under section 383 or 384 is appropriate, it will not take action during an offer to which the *Takeover Code* applies except in the circumstances set out in *DEPP* 6.2.27G.
- 6.2.25 G In any case where the *FSA* considers that the use of its powers under any of sections 123, 129, 381, 383 or 384 of the *Act* may be appropriate, if that use may affect the timetable or outcome of a *takeover bid* or where it is appropriate in the context of any exercise by the *Takeover Panel* of its powers and authority, the *FSA* will consult the *Takeover Panel* before using any of those powers.

- 6.2.26 G Where the *behaviour* of a *person* which amounts to *market abuse* is *behaviour* to which the *Takeover Code* is relevant, the use of the *Takeover Panel's* powers will often be sufficient to address the relevant concerns. In cases where this is not so, the *FSA* will need to consider whether it is appropriate to use any of its own powers under the *market abuse regime*. The principal circumstances in which the *FSA* is likely to consider such exercise are:
- (1) where the *behaviour* falls within sections 118(2), 118(3) or 118(4) of the *Act*;
 - (2) where the *FSA's* approach in previous similar cases (which may have happened otherwise than in the context of a *takeover bid*) suggests that a financial penalty should be imposed;
 - (3) where the *behaviour* extends to *securities* or a class of *securities* which may be outside the *Takeover Panel's* jurisdiction;
 - (4) where the *behaviour* threatens or has threatened the stability of the *financial system*; and
 - (5) where for any other reason the *Takeover Panel* asks the *FSA* to consider the use of any of its powers referred to in *DEPP* 6.2.22G.
- [**Note:** In this section, 'securities' has the same meaning given in subsection (1) of the definition of 'security' in the *Handbook Glossary*]
- 6.2.27 G The exceptional circumstances in which the *FSA* will consider the use of powers during a *takeover bid* are listed in *DEPP* 6.2.26G(1), *DEPP* 6.2.26G(3) and *DEPP* 6.2.26G(4), and, depending on the circumstances, *DEPP* 6.2.26G(5).
- 6.2.28 G *DEPP* 6.2.26G and *DEPP* 6.2.27G do not apply to a *person* who has no responsibilities under the *Takeover Code*.

6.3 Penalties for market abuse

- 6.3.1 G Section 123(2) of the *Act* states that the *FSA* may not impose a penalty on a *person* if there are reasonable grounds to be satisfied that:
- (1) the *person* concerned believed, on reasonable grounds, that his *behaviour* did not amount to *market abuse* or *requiring or encouraging*; or
 - (2) the *person* concerned took all reasonable precautions and exercised all due diligence to avoid engaging in *market abuse* or *requiring or encouraging*.
- 6.3.2 G The factors which the *FSA* may take into account when deciding whether

either of the two conditions in *DEPP* 6.3.1G are met include, but are not limited to:

- (1) whether, and if so to what extent, the *behaviour* in question was or was not analogous to *behaviour* described in the *Code of Market Conduct* (see *MAR* 1) as amounting or not amounting to *market abuse* or *requiring or encouraging*;
- (2) whether the *FSA* has published any *guidance* or other materials on the *behaviour* in question and if so, the extent to which the *person* sought to follow that *guidance* or take account of those materials (see the Reader's Guide to the *Handbook* regarding the status of *guidance*.) The *FSA* will consider the nature and accessibility of any *guidance* or other published materials when deciding whether it is relevant in this context and, if so, what weight it should be given;
- (3) whether, and if so to what extent, the *behaviour* complied with the rules of any relevant *prescribed market* or any other relevant market or other regulatory requirements (including the *Takeover Code*) or any relevant codes of conduct or best practice;
- (4) the level of knowledge, skill and experience to be expected of the *person* concerned;
- (5) whether, and if so to what extent, the *person* can demonstrate that the *behaviour* was engaged in for a legitimate purpose and in a proper way;
- (6) whether, and if so to what extent, the *person* followed internal consultation and escalation procedures in relation to the *behaviour* (for example, did the *person* discuss the *behaviour* with internal line management and/or internal legal or compliance departments);
- (7) whether, and if so the extent to which, the *person* sought any appropriate expert legal or other expert professional advice and followed that advice; and
- (8) whether, and if so to what extent, the *person* sought advice from the market authorities of any relevant *prescribed market* or, where relevant, consulted the *Takeover Panel*, and followed the advice received.

6.4 Financial penalty or public censure

- 6.4.1 G The *FSA* will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a *public censure*. As such, the factors set out in *DEPP* 6.4.2G are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.

- 6.4.2 G The criteria for determining whether it is appropriate to issue a *public censure* rather than impose a financial penalty are similar to those for determining the amount of penalty set out in *DEPP* 6.5. Some particular considerations that may be relevant when the *FSA* determines whether to issue a *public censure* rather than impose a financial penalty are:
- (1) whether or not deterrence may be effectively achieved by issuing a *public censure*;
 - (2) if the *person* has made a profit or avoided a loss as a result of the *breach*, this may be a factor in favour of a financial penalty, on the basis that a *person* should not be permitted to benefit from its *breach*;
 - (3) if the *breach* is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the *breach*; other things being equal, the more serious the *breach*, the more likely the *FSA* is to impose a financial penalty;
 - (4) if the *person* has brought the *breach* to the attention of the *FSA*, this may be a factor in favour of a *public censure*, depending upon the nature and seriousness of the *breach*;
 - (5) if the *person* has admitted the *breach* and provides full and immediate co-operation to the *FSA*, and takes steps to ensure that those who have suffered loss due to the *breach* are fully compensated for those losses, this may be a factor in favour of a *public censure*, rather than a financial penalty, depending upon the nature and seriousness of the *breach*;
 - (6) if the *person* has a poor disciplinary record or compliance history (for example, where the *FSA* has previously brought disciplinary action resulting in adverse findings in relation to the same or similar *behaviour*), this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases;
 - (7) the *FSA's* approach in similar previous cases: the *FSA* will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a *public censure*; and
 - (8) the impact on the *person* concerned. In exceptional circumstances, if the *person* has inadequate means (excluding any manipulation or attempted manipulation of their assets) to pay the level of financial penalty which their *breach* would otherwise attract, this may be a factor in favour of a lower level of penalty or a public statement. However, it would only be in an exceptional case that the *FSA* would be prepared to agree to issue a *public censure* rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could

include where there is:

- (a) verifiable evidence that a *person* would suffer serious financial hardship if the *FSA* imposed a financial penalty;
- (b) verifiable evidence that the *person* would be unable to meet other regulatory requirements, particularly financial resource requirements, if the *FSA* imposed a financial penalty at an appropriate level; or
- (c) in Part VI cases in which the *FSA* may impose a financial penalty, where there is the likelihood of a severe adverse impact on a *person's* shareholders or a consequential impact on market confidence or market stability if a financial penalty was imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a *person's* shareholders.

6.5 Determining the appropriate level of financial penalty

- 6.5.1 G (1) The *FSA* will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the *breach* concerned. The list of factors in *DEPP* 6.5.2G is not exhaustive: not all of these factors may be relevant in a particular case, and there may be other factors, not included below, that are relevant.
- (2) The *FSA* does not apply a tariff of penalties for different kinds of *breach*. This is because there will be very few cases in which all the circumstances of the case are essentially the same and because of the wide range of different *breaches* in respect of which the *FSA* may take action. The *FSA* considers that, in general, the use of a tariff for particular kinds of *breach* would inhibit the flexible and proportionate policy which it adopts in this area.
- 6.5.2 G The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a *person* under the *Act*:
- (1) Deterrence
- When determining the appropriate level of penalty, the *FSA* will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches* and helping to deter other *persons* from committing similar *breaches*, as well as demonstrating generally the benefits of compliant business.
- (2) The nature, seriousness and impact of the *breach* in question

The *FSA* will consider the seriousness of the *breach* in relation to the nature of the *rule*, requirement or provision breached. The following considerations are among those that may be relevant:

- (a) the duration and frequency of the *breach*;
 - (b) whether the *breach* revealed serious or systemic weaknesses in the *person's* procedures or of the management systems or *internal controls* relating to all or part of a *person's* business;
 - (c) in market abuse cases, the *FSA* will consider whether the breach had an adverse effect on markets and, if it did, how serious that effect was, which may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk. This factor may also be relevant in other types of case;
 - (d) the loss or risk of loss caused to *consumers*, investors or other market users;
 - (e) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the *breach*; and
 - (f) in the context of contraventions of Part VI of the *Act*, the extent to which the *behaviour* which constitutes the contravention departs from current market practice.
- (3) The extent to which the *breach* was deliberate or reckless

The *FSA* will regard as more serious a *breach* which is deliberately or recklessly committed. The matters to which the *FSA* may have regard in determining whether a *breach* was deliberate or reckless include, but are not limited to, the following:

- (a) whether the *breach* was intentional, in that the *person* intended or foresaw the potential or actual consequences of its actions;
- (b) where the *person* has not followed a *firm's* internal procedures and/or *FSA guidance*, the reasons for not doing so;
- (c) where the *person* has taken decisions beyond its or his field of competence, the reasons for the decisions and for them being taken by that *person*;
- (d) whether the *person* has given no apparent consideration to the consequences of the *behaviour* that constitutes the *breach*;
- (e) in the context of a contravention of any *rule* or requirement imposed by or under Part VI of the *Act*, whether the *person* sought any professional advice before the contravention

occurred and whether the *person* followed that professional advice. Seeking professional advice does not remove a *person's* responsibility for compliance with applicable *rules* and requirements.

If the *FSA* decides that the *breach* was deliberate or reckless, it is more likely to impose a higher penalty on a *person* than would otherwise be the case.

- (4) Whether the person on whom the penalty is to be imposed is an individual

When determining the amount of a penalty to be imposed on an individual, the *FSA* will take into account that individuals will not always have the resources of a *body corporate*, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a *body corporate*. The *FSA* will also consider whether the status, position and/or responsibilities of the individual are such as to make a *breach* committed by the individual more serious and whether the penalty should therefore be set at a higher level.

- (5) The size, financial resources and other circumstances of the person on whom the penalty is to be imposed

- (a) The *FSA* may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the *person* were to pay the level of penalty appropriate for the particular *breach*. The *FSA* regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.
- (b) The purpose of a penalty is not to render a *person* insolvent or to threaten the *person's* solvency. Where this would be a material consideration, the *FSA* will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a *person* with lower financial resources; but if a *person* reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the *FSA* will take account of those assets when determining the amount of a penalty.
- (c) The degree of seriousness of a *breach* may be linked to the size of the *firm*. For example, a systemic failure in a large *firm* could damage or threaten to damage a much larger number of *consumers* or investors than would be the case with a small *firm*: *breaches* in *firms* with a high volume of business over a protracted period may be more serious than *breaches* over

similar periods in *firms* with a smaller volume of business.

- (d) The size and resources of a *person* may also be relevant in relation to mitigation, in particular what steps the *person* took after the *breach* had been identified; the *FSA* will take into account what it is reasonable to expect from a *person* in relation to its size and resources, and factors such as what proportion of a *person's* resources were used to resolve a problem.
- (e) The *FSA* may decide to impose a financial penalty on a mutual (such as a *building society*), even though this may have a direct impact on that mutual's *customers*. This reflects the fact that a significant proportion of a mutual's *customers* are shareholder-members; to that extent, their position involves an assumption of risk that is not assumed by *customers* of a *firm* that is not a mutual. Whether a *firm* is a mutual will not, by itself, increase or decrease the level of a financial penalty.

(6) The amount of benefit gained or loss avoided

The *FSA* may have regard to the amount of benefit gained or loss avoided as a result of the *breach*, for example:

- (a) the *FSA* will propose a penalty which is consistent with the principle that a *person* should not benefit from the *breach*; and
- (b) the penalty should also act as an incentive to the *person* (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the *breach*

A *person's* incentive to commit a *breach* may be greater where the *breach* is, by its nature, harder to detect. The *FSA* may, therefore, impose a higher penalty where it considers that a *person* committed a *breach* in such a way as to avoid or reduce the risk that the *breach* would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the *behaviour* in question.

(8) Conduct following the *breach*

The *FSA* may take the following factors into account:

- (a) the conduct of the *person* in bringing (or failing to bring) quickly, effectively and completely the *breach* to the *FSA's* attention (or the attention of other regulatory authorities, where relevant);

- (b) the degree of co-operation the *person* showed during the investigation of the *breach* by the *FSA*, or any other regulatory authority allowed to share information with the *FSA*, such as an *RIE* or the *Takeover Panel*. Where a *person* has fully co-operated with the *FSA*'s investigation, this will be a factor tending to reduce the level of financial penalty;
 - (c) any remedial steps taken since the *breach* was identified, including whether these were taken on the *person*'s own initiative or that of the *FSA* or another regulatory authority; for example, identifying whether *consumers* or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and
 - (d) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to the *breach* (for example, where relevant, those of the *Takeover Panel*).
- (9) Disciplinary record and compliance history

The *FSA* may take the previous disciplinary record and general compliance history of the *person* into account. This will include:

- (a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action against the *person*;
- (b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;
- (c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm* using its own initiative powers, by means of a variation of a *firm*'s *Part IV permission*, or has previously requested the *firm* to take remedial action and the extent to which that action has been taken.
- (d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously brought to the *person*'s attention, including by way of a private warning, issues similar or related to the conduct that constitutes the *breach* in respect of which the penalty is imposed.

A *person*'s disciplinary record could lead to the *FSA* imposing a higher penalty, for example where the *person* has committed similar *breaches* in the past.

In assessing the relevance of a *person's* disciplinary record and compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

(10) Other action taken by the *FSA* (or a *previous regulator*)

Action that the *FSA* (or a *previous regulator*) has taken in relation to similar *breaches* by other *persons* may be taken into account. This includes previous actions in which the *FSA* (whether acting by the *RDC* or the *settlement decision makers*) and a *person* on whom a penalty is to be imposed have reached agreement as to the amount of the penalty. As stated at *DEPP* 6.5.1G(2), the *FSA* does not operate a tariff system. However, the *FSA* will seek to apply a consistent approach to determining the appropriate level of penalty.

(11) Action taken by other domestic or international regulatory authorities

Considerations could include, for example:

- (a) action taken or to be taken against a *person* by other regulatory authorities which may be relevant where that action relates to the *breach* in question;
- (b) the degree to which any remedial or compensatory steps required by other regulatory authorities have been taken (and whether taken promptly).

(12) *FSA guidance* and other published materials

- (a) A *person* does not commit a *breach* by not following *FSA guidance* or other published examples of compliant *behaviour*. However, where a *breach* has otherwise been established, the fact that *guidance* or other published materials had raised relevant concerns may inform the seriousness with which the *breach* is to be regarded by the *FSA* when determining the level of penalty.
- (b) The *FSA* will consider the nature and accessibility of the *guidance* or other published materials when deciding whether they are relevant to the level of penalty and, if they are, what weight to give them in relation to other relevant factors.

(13) The timing of any agreement as to the amount of the penalty

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, *DEPP* 6.7 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.

- 6.5.3 G Part III (Penalties and fees) of Schedule 1 to the *Act* specifically provides that the *FSA* may not, in determining its policy with respect to the amount of penalties, take account of expenses which it incurs, or expects to incur, in discharging its functions.

6.6 Financial penalties for late and incomplete submission of reports

- 6.6.1 G (1) The *FSA* attaches considerable importance to the timely submission by *firms* of reports. This is because the information that they contain is essential to the *FSA's* assessment of whether a *firm* is complying with the requirements and standards of the *regulatory system* and to the *FSA's* understanding of that *firm's* business.
- (2) *DEPP* 6.6.1G to 6.6.5G set out the *FSA's* policy in relation to financial penalties for late submission of reports and is in addition to the *FSA's* policy relating to financial penalties including the factors relevant to determining their appropriate level (see *DEPP* 6.5.2 G).
- 6.6.2 G In addition to the factors relevant to determining the appropriate level of financial penalty (see *DEPP* 6.5.2 G), the following considerations are relevant.
- (1) In general, the *FSA's* approach to disciplinary action arising from the late submission of a report will depend upon the length of time after the due date that the report in question is submitted.
- (2) If the *person* concerned is an individual, it is open to him to make representations to the *FSA* as to why he should not be the subject of a financial penalty, or why a lower penalty should be imposed. If he does so, the matters to which the *FSA* will have regard will include the matters set out in *DEPP* 6.5.2G(4) and (5). It should be noted that an administrative difficulty such as pressure of work does not, in itself, constitute a relevant circumstance for this purpose.
- (3) The *FSA* will have regard to repeated failures to submit reports on time. In the majority of cases involving such repeated failure, the *FSA* considers that it will be appropriate to seek more serious disciplinary sanctions or other enforcement action, including seeking to apply for the cancellation of the *firm's* permission.
- (4) The *FSA* will also have regard to the submission frequency of the late report when assessing the seriousness of the contravention. For example, a short delay in submitting a weekly or monthly report can have serious implications for the supervision of the *firm* in question. Such a delay may therefore be subject to a higher penalty than might otherwise be the case.
- 6.6.3 G In addition, in appropriate cases, the *FSA* may bring disciplinary action against the *approved persons* within the *firm's* management who are

ultimately responsible for ensuring that the *firm's* reports are completed and returned to the *FSA*.

- 6.6.4 G In applying the *guidance* in this section, the *FSA* may treat a report which is materially incomplete or inaccurate as not received until it has been submitted in a form which is materially complete and accurate. For the purposes of the *guidance*, the *FSA* may also treat a report as not received where the method by which it is submitted to the *FSA* does not comply with the prescribed method of submission.
- 6.6.5 G In most late reporting cases, it will not be necessary for the *FSA* to appoint an investigator since the fact of the breach will be clear. It follows that the *FSA* will not usually send the *firm* concerned a preliminary findings letter for late-reporting disciplinary action.

6.7 Discount for early settlement

- 6.7.1 G *Persons* subject to enforcement action may be prepared to agree the amount of any financial penalty and other conditions which the *FSA* seeks to impose by way of such 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 a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.
- 6.7.2 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 *DEPP* 6.5.2G. (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 *breach*. 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.
- 6.7.3 G (1) *The FSA* has identified four stages of an 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 *breach* 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 *DEPP* 6.7.3 G (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:

Stage at which agreement reached	Percentage reduction
Stage 1	30
Stage 2	20
Stage 3	10
Stage 4	0

- 6.7.4 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 *DEPP* 6.7.3G(3). It may be, for example, that the *FSA* no longer wishes to pursue its action in respect of all of the acts or omissions previously alleged to give rise to the *breach*. 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 the *FSA* may accept that there has been a substantial change in the nature or seriousness of the 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.

6.7.5 G In cases in which the *settlement discount scheme* is applied, the fact of settlement and the level of the discount to the financial penalty imposed by the *FSA* will be set out in the *final notice*.

7 Statement of policy on section 169(7) interviews

7.1 Application and purpose

Application

- 7.1.1 G *DEPP 7* applies when the *FSA* :
- (1) has appointed an investigator at the request of an *overseas regulator*, under section 169(1)(b) (Assistance to overseas regulators) of the *Act*; and
 - (2) has directed, or is considering directing, the investigator, under section 169(7) of the *Act*, to permit a representative of the *overseas regulator* to attend, and take part in, any interview conducted for the purposes of the investigation.
- 7.1.2 G In *DEPP 7*, a "section 169(7) interview" means any interview conducted for the purposes of an investigation under section 169(1)(b) of the *Act* in relation to which the *FSA* has given a direction under section 169(7) of the *Act*.

Purpose

- 7.1.3 G The purpose of *DEPP 7* is to set out the *FSA*'s statement of policy on the conduct of interviews to which a direction under section 169(7) has been given or the *FSA* is considering giving. The *FSA* is required to prepare and publish this statement of policy by section 169(9) and (11) of the *Act*. As required by section 169(10) of the *Act*, the Treasury has approved the statement of policy.
- 7.1.4 G The *FSA* is keen to promote co-operation with *overseas regulators*. It views provision of assistance to *overseas regulators* as an essential part of the principles set out in section 2(3)(e) of the *Act* to which it must have regard in discharging its general functions.

7.2 Interviews

Appointment of investigator and confidentiality of information

- 7.2.1 G Under section 169(1)(b) of the *Act*, the *FSA* may appoint an investigator to investigate any matter at the request of an *overseas regulator*. The powers of the investigator appointed by the *FSA* (referred to here as the '*FSA*'s investigator') include the power to require *persons* to attend at a specified time and place and answer questions (the compulsory interview power).
- 7.2.2 G Where the *FSA* appoints an investigator in response to a request from an *overseas regulator* it may, under section 169(7) of the *Act*, direct him to permit a representative of that regulator to attend and take part in any

interviews conducted for the purposes of the investigation. The *FSA* may only give a direction under section 169(7) if it is satisfied that any information obtained by an *overseas regulator* as a result of the interview will be subject to the safeguards equivalent to those contained in Part XXIII (Public Record, Disclosure of Information and Cooperation) of the *Act*.

- 7.2.3 G Part XXIII of the *Act* contains restrictions on the disclosure of confidential information. The restrictions are subject to exceptions contained in regulations made by the Treasury under section 349.

Policy on use of investigative powers

- 7.2.4 G The *FSA's* policy on how it will use its investigative powers, including its power to appoint investigators, in support of *overseas regulators*, is set out in the *FSA's* Enforcement Guide (*EG*).

Use of direction powers

- 7.2.5 G The *FSA* may need to consider whether to use its direction power at two stages of an investigation:

- (1) at the same time that it considers the request from the *overseas regulator* to appoint investigators;
- (2) after it has appointed investigators, either at the request of the *overseas regulator* or on the recommendation of the investigators.

- 7.2.6 G Before making a direction under section 169(7) the *FSA* will discuss and determine with the *overseas regulator* how this statement of policy will apply to the conduct of the interview, taking into account all the circumstances of the case. Amongst other matters, the *FSA* will at this stage determine the extent to which the representative of the *overseas regulator* will be able to participate in the interview. The *overseas regulator* will be notified of this determination on the issuing of the direction.

- 7.2.7 G The direction will contain the identity of the representative of the *overseas regulator* that is permitted to attend any interview and the role that he will play in the interview. If the *FSA* envisages that there will be more than one interview in the course of the investigation, the direction may also specify which interview(s) the overseas representative is allowed to attend.

Conduct of interview

- 7.2.8 G In circumstances where an interview is to be conducted as part of the investigation, the *FSA's* investigator will have conduct of the interview. In general, the *FSA's* investigators will be employees of the *FSA*, but in appropriate cases the *FSA* may appoint *persons* who are not its employees. In those cases, the *FSA* may choose to require that an *FSA* employee is present at the interview and may choose to appoint that *person* as an investigator.

- 7.2.9 G The *FSA's* investigator will act on behalf of the *FSA* and under its control. He may be instructed to permit the representative of the *overseas regulator* to assist in the preparation of the interview. Where the *FSA* considers it appropriate, it may permit the representative to attend and ask questions of the interviewee in the course of the interview. The interview will be conducted according to the terms of the direction and the notification referred to in *DEPP 7.2.6G*.
- 7.2.10 G If the direction does permit the representative of an *overseas regulator* to attend the interview and ask the interviewee questions, the *FSA's* investigator will retain control of the interview throughout. Control of the interview means the following will apply:
- (1) The *FSA's* investigator instigates and concludes the interview, introduces everyone present and explains the procedure of the interview. He warns the interviewee of the possible consequences of refusing to answer questions and the uses to which any answers that are given can and cannot be put. The *FSA's* investigator will always ask preliminary questions, such as those establishing the identity of the interviewee.
 - (2) The *FSA's* investigator determines the duration of the interview and when, if at all, there should be any breaks in the course of it.
 - (3) The *FSA's* investigator has responsibility for making a record of the interview. The record should note the times and duration of any breaks in the interview and any periods when the representative of the *overseas regulator* was either present or not present.
 - (4) Where the *FSA's* investigator considers it appropriate, he may either suspend the interview, ask the overseas representative to leave the interview, or terminate the interview and reschedule it for another occasion. In making that decision he will bear in mind the terms of the direction, any agreement made with the *overseas regulator* as to the conduct of the interview and the contents of this statement of policy.
- 7.2.11 G The *FSA* will in general provide written notice of the appointment of an investigator to the *person* under investigation pursuant to the request of an *overseas regulator*. Whether or not the interviewee is the *person* under investigation, the *FSA's* investigator will inform the interviewee of the provisions under which he has been appointed, the identity of the requesting authority and general nature of the matter under investigation. The interviewee will also normally be informed if a representative of the *overseas regulator* is to attend and take part in the interview. Notification of any of these matters may not be provided in advance of the interview if the *FSA* believes that the circumstances are such that notification would be likely to result in the investigation being frustrated.
- 7.2.12 G The interviewee will normally be given a copy of the direction issued under section 169(7) in advance of the interview unless to do so would be likely to

result in the investigation being frustrated. The interviewee will also be provided with a copy of this statement of policy.

- 7.2.13 G The *FSA's* investigator will determine the venue and timing of the interview. The interviewee will be notified of the venue and timing of the interview in advance and in writing.
- 7.2.14 G When the *FSA's* investigator has exercised the compulsory interview power, at the outset of the interview the interviewee will be given an appropriate warning. The warning, amongst other things, must state that the interviewee is obliged to answer all questions put to them during the interview, including any put by the representative of the *overseas regulator*. It will also state that in criminal proceedings or proceedings for *market abuse* the *FSA* will not use as evidence against the interviewee any information obtained under compulsion during the interview.
- 7.2.15 G The *FSA's* investigator may decide which documents or other information may be put to the interviewee, and whether it is appropriate to give the interviewee sight of the *documents* before the interview takes place. Where the *overseas regulator* wishes to ask questions about *documents* during the interview and the *FSA's* investigator wishes to inspect those *documents* before the interview, he will be given the opportunity to do so. If the *FSA's* investigator wishes to inspect them and has not been able to do so before the interview, he may suspend the interview until he has had an opportunity to inspect them.
- 7.2.16 G When the *FSA's* investigator has exercised the compulsory interview power, the *FSA's* investigator will require the *person* attending the interview to answer questions. Where appropriate, questions may also be posed by the representative of the *overseas regulator*. The interviewee will also be required to answer these questions. The *FSA's* investigator may intervene at any stage during questioning by the representative of the *overseas regulator*.

Language

- 7.2.17 G Interviews will, in general, be conducted in English. Where the interviewee's first language is not English, at the request of the interviewee arrangements will be made for the questions to be translated into the interviewee's first language and for his answers to be translated back into English. If a translator is employed at the request of the representative of the *overseas regulator* then the translation costs will normally be met by the *overseas regulator*. Where interviews are being conducted in pursuance of a Community obligation these costs will be met by the *FSA*. In any event, the meeting of costs in relation to translators and, where applicable, the translation of *documents* will always be agreed in advance with the *overseas regulator*.

Tape-recording

- 7.2.18 G All compulsory interviews will be tape-recorded. The method of recording will be decided on and arranged by the *FSA's* investigator. Costs will be

addressed similarly to that set out in the preceding paragraph. The *FSA* will not provide the *overseas regulator* with transcripts of the tapes of interviews unless specifically agreed to, but copies of the tapes will normally be provided where requested. The interviewee will be provided with a copy of tapes of the interview but will only be provided with transcripts of the tapes or translations of any transcripts if he agrees to meet the cost of producing them.

Representation

- 7.2.19 G The interviewee may be accompanied at the interview by a legal adviser or a non-legally qualified observer of his choice. The costs of any representation will not be met by the *FSA*. The presence at the interview of a representative of the *overseas regulator* may mean that the interviewee wishes to be represented or accompanied by a *person* either from or familiar with that regulator's jurisdiction. As far as practical the arrangements for the interview should accommodate this wish. However, the *FSA* reserves the right to proceed with the interview if it is not possible to find such a *person* within a reasonable time or no such *person* is able to attend at a suitable venue.
- 7.2.20 G In relation to the publication of investigations by *overseas regulators*, the *FSA* will pursue a policy similar to the policy that relates to its own investigations.

DEPP TP 1 Transitional provisions applying to the Decision Procedure and Penalties Manual

G

1. Table DEPP TP 1

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision dates in force:	(6) Handbook provision coming into force
1	<i>DEPP</i>	G	<i>GEN</i> contains some transitional provisions that apply throughout the <i>Handbook</i> and which are designed to ensure a smooth transition at <i>commencement</i> .	From <i>commencement</i>	(Various dates)
2	<i>DEPP</i> 6.7 (Discount for early settlement),	G	These provisions (in summary, relating to the discount scheme) apply only to cases where investigators are appointed on or after 20 October 2005.	From 20 October 2005	20 October 2005
3	<i>DEPP</i>	G	<i>DEPP</i> 1 to <i>DEPP</i> 5 take effect on 28 August 2007, save to the	From 28 August 2007	28 August 2007

			<p>extent described below:</p> <p><i>DEPP 1 to DEPP 5 do not apply to any statutory notice or related notice issued on or after 28 August where a warning notice, first supervisory notice or decision notice was given by the FSA before 28 August in relation to the same matter. The procedure to be followed in respect of such statutory notices or related notices given on or after 28 August will be the same as that described in the Decision making manual (DEC) immediately before DEPP comes into effect.</i></p>		
4	<i>DEPP</i>	G	<p><i>DEPP 6 takes effect on 28 August 2007, save to the extent described below.</i></p> <p><i>The FSA's policy in respect of the imposition and amount of penalty will continue to be as described in the Enforcement manual (ENF) in relation to any statutory notice or related notice given on or after 28 August where a warning notice, first supervisory notice or decision notice was given by the FSA before 28 August in relation to the same matter.</i></p>	From 28 August 2007	28 August 2007

Annex B

Amendment to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underling indicates new text and striking through indicates deleted text

DEPP 2 Annex 1G

Section of the Act	Description	Handbook reference	Decision maker
...			
280(1)/(2)	when the <i>FSA</i> is proposing or 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>RDC</i>
<u>301C(5)/(7)</u>	<u>when the <i>FSA</i> is proposing/deciding to object to a change in control of a <i>UK RIE</i> following receipt of a notice of control.</u>	<u>REC 4.2C</u>	<u><i>Executive procedures</i></u>
<u>301D(1)/(3)/(4)</u>	<u>when the <i>FSA</i> has imposed a requirement on an institution to suspend a <i>financial instrument</i> from trading and it is proposing/deciding to refuse an application by the institution or the issuer for the revocation of the requirement.</u>	<u>REC 4.2C</u>	
<u>313B(9)</u>	<u>when the <i>FSA</i> has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension.</u>	<u>REC 4.2.4</u>	<u><i>Executive procedures</i></u>
321(8)/(9)	when the <i>FSA</i> is proposing or deciding to refuse an application for variation or revocation of a direction or a requirement imposed on a former underwriting member of Lloyd's*		<i>RDC</i>
...			
385(1)/386(1)	when the <i>FSA</i> is proposing/deciding to		<i>RDC</i>

	exercise the power under section 384(5) to require a <i>person</i> to pay restitution*		
<u>412B(2)/(3)</u>	<u>when the FSA is proposing/deciding to refuse to approve a relevant system as defined in section 412A(9) of the Act</u>		<u>Executive procedures</u>
<u>412B(4)/(5)</u>	<u>when the FSA is proposing/deciding to suspend or withdraw its approval in relation to a relevant system as defined in section 412A(9) of the Act*</u>		<u>Executive procedures</u>
<u>412B(8)/(9)</u>	<u>when the FSA is proposing/deciding to refuse an application to cancel the suspension of approval in relation to a relevant system as defined in section 412A(9) of the Act*</u>		<u>Executive procedures</u>
...			