

**DECISION MAKING MANUAL (EXTENSION OF SCOPE OF MEDIATION
SCHEME) INSTRUMENT 2004**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the power under section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (“the Act”).

Commencement

- B. This instrument comes into force on 1 February 2004.

Amendments to the Decision making manual and amendments to the Enforcement manual

- C. The Decision making manual is amended in accordance with Annex A to this instrument.
- D. The Enforcement manual is amended in accordance with Annex B to this instrument.

Citation

- D. This instrument may be cited as the Decision Making Manual (Extension of scope of Mediation Scheme) Instrument 2004.

By Order of the Board
15 January 2004

Annex A

Amendments to the Decision making manual

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

DEC App 1 Settlement procedure and mediation scheme for FSA ~~disciplinary~~ enforcement cases

1.1 Introduction

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

1.2 Settlement

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

...

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

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

...

1.3 Mediation

...

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

...

1.4 Scope and availability of the mediation scheme

1.4.1 G Mediation will not be available in enforcement cases where the *FSA* is contemplating bringing a criminal prosecution or cases involving disciplinary action for late submission of a report to which *ENF* 13.5 (Financial penalties for late submission of reports) applies. ~~involving disciplinary matters and market abuse subject to the exceptions set out in *DEC* App 1.4.2G.~~

1.4.2 G Mediation will be available in all other enforcement cases falling within the scope of the *RDC*. In those cases involving allegations of unfitness and impropriety based on judgements about dishonesty or lack of integrity and the exercise of the *FSA's* own initiative powers on a variation or cancellation of permission, mediation will be available subject to the *FSA's* consent. ~~not be available in:~~

- ~~(1) — cases involving allegations of a criminal offence or offences; or~~
- ~~(2) — cases involving allegations of unfitness or impropriety based on judgements about dishonesty or lack of integrity; or~~
- ~~(3) — cases involving the exercise of the *FSA's* own initiative powers on a variation of permission or~~
- ~~(4) — cases involving disciplinary action for late submission of a report as referred to in *ENF* 13.5.~~

1.4.3 G In a case falling within the scope of the scheme, In each appropriate enforcement case (see *DEC* App 1.4.1 and *DEC* App 1.4.2), the mediation scheme will be available to the person against whom a warning notice is issued. The mediation scheme will be available mediation will take place where an election to mediate is made after the *warning notice* has been issued and before the *FSA* issues a *final decision notice* \mp (the relevant *warning notice* will state the circumstances in which mediation is available for that matter under the terms of the scheme). Where an election to mediate is made before the issue of a *warning notice* or after the issue of a *decision notice*, mediation will be available subject to the *FSA's* consent.

- 1.4.4 G ~~The~~ A person is not obliged to take part in a mediation in the course of the enforcement process ~~submit his case for mediation.~~
- ...
- 1.6 Starting the mediation
- 1.6.1 G ~~The FSA will offer the mediation facility in all appropriate enforcement cases (see DEC App1.4.1G).~~ If the person agrees to submit the a case is submitted to mediation, the parties will send a joint mediation notice in an agreed form to:
- ...
- Confidentiality
- ...
- 1.7.7 G ...
- 1.7.8 G (2) Under the mediation scheme, however, confidentiality will be limited in that:
- ...
- (b) the terms of any settlement reached will, if approved by the *RDC* be incorporated in a *decision notice* and subsequent *final notice* or second *supervisory notice*, or (where appropriate) a *notice of discontinuance* which may be made public;
- ...
- 1.10 Result of the mediation
- ...
- 1.10.2 G If no agreed proposal is reached, the mediation will be terminated and the case will return to the point it had reached in the enforcement process prior to the mediation ~~proceed to the *decision notice* or stage.~~
- 1.10.3 G If a settlement proposal is agreed, it will be considered by the *RDC*, which will decide whether to approve it. If it is approved, a *decision notice* and subsequently a *final notice*, or second *supervisory notice*, will be issued reflecting the terms of the agreement reached. If it is not approved, the parties may return to the mediation only with the *RDC's* consent. If the *RDC* does not consent, the case will return to the point it had reached in the enforcement process prior to the mediation ~~continue towards the *decision notice* stage.~~
- 1.10.4 G A person may elect to mediate only once during the course of the enforcement process.
- ...
- 1.12 Review of mediation procedure
- 1.12.1 G The use of mediation in the disciplinary context is a novel approach in the area of financial regulation, but reflects current trends in civil litigation. The

mediation provider will administer the mediation scheme and tThe *FSA* proposes to operate the mediation scheme on a pilot basis for one year and will monitor it and review its operation at the end of each year that period. The *FSA* proposes to publish core information relating to the operation of the scheme in the *FSA* 's Annual Report.

...

DEC 2 Annex 5G

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The *FSA* operates a mediation scheme for certain *disciplinary and market abuse enforcement* cases, where settlement discussions have taken place but are, in the opinion of either party, unlikely to lead to an agreed settlement ~~broken down~~.

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Annex B

Amendments to the Enforcement manual

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

1.3.1 G (3) the FSA will seek to ensure fair treatment when exercising its enforcement powers. For example, the FSA's decision making process for regulatory enforcement cases generally gives an opportunity for both written and oral representations to be made, and also provides a facility for mediation (where settlement discussions are unlikely to lead to an agreed settlement ~~break-down~~) in certain disciplinary cases.