



Guernsey Financial
Services Commission

GUERNSEY FINANCIAL SERVICES COMMISSION

DECISION-MAKING PROCESS RELATING TO THE USE OF ENFORCEMENT POWERS

This Guidance Note is intended as a general guide to the way in which the Guernsey Financial Services Commission (the “Commission”) approaches the exercise of its statutory powers that involve the exercise of the Commission’s Enforcement Powers.

The Guidance Note does not hold force of law and is not prescriptive of a process that will always be followed: each case will be considered on its own merits and, as it deems appropriate, the Commission may depart from the process described in this document.

The objective of the guidance is to enable those affected to understand where they are in the process. To that end, as far as possible, the Commission will endeavour to inform those affected when the process described here is being applied, and when significant departures from it occur.

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DISCLAIMER

This document is intended as a general guide and does not constitute the provision of legal advice.

Whilst the Commission has taken all reasonable steps to ensure that any statements as to law contained in this Guidance Note are accurate, the Commission does not accept any responsibility for errors made.

The Commission makes no warranties, representations or undertakings, whether express or implied, about any of the information contained in this Guidance Note, including, without limitation, any as to the quality, accuracy, completeness, timeliness or fitness for any particular purpose of the information.

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PART A – GENERAL INFORMATION

1. INTRODUCTION

- 1.1 This document is intended as a guide to the way in which the Commission will approach the exercise of its statutory powers when making decisions that involve the use of Enforcement Powers.
- 1.2 The Commission’s role is to enquire into and investigate matters that come to its attention, decide whether breaches of any of the Regulatory Laws have occurred and if so, what the regulatory response will be.
- 1.3 The Commission is not a judicial body. However it does undertake quasi-judicial functions. So, whilst the Commission is not bound to follow fixed rules of procedure in reaching decisions, it must follow principles of natural justice and fairness. In doing this, the Commission is the master of its own procedure. For the avoidance of doubt the standard of proof applicable in these proceedings is the balance of probabilities.
- 1.4 This Guidance Note does not hold the force of law and is not prescriptive of a process that will always be followed. Each case will be considered on its merits and the Commission may deviate from the process described in this document where it determines that it is necessary or appropriate to do so.
- 1.5 As an alternative to Commissioners sitting as a Commissioners’ Decisions Committee (or “**CDC**”)¹, the Commission may, when it considers it appropriate to do so, appoint as an officer of the Commission a Senior Decision-Maker (or “**SDM**”). The SDM will be chosen from a panel of SDMs that have been selected to exercise the Commission’s powers of consideration, determination and sanction in respect of Enforcement Powers under the Regulatory Laws (the “**SDM Panel**”). The SDM will have all applicable Enforcement Powers with the exception of any powers to revoke, cancel, suspend, or withdraw a licence, authorisation, registration, permission or consent or to make an application for the winding-up of a body corporate².
- 1.6 A decision is taken in stages which are described in Part B of this Guidance Note. Each stage includes a number of distinct steps, which are collectively designed to ensure that the final decision taken:
 - 1.6.1 has been arrived at in accordance with principles of natural justice; and
 - 1.6.2 is proportionate and reasonable based on all relevant information before the Executive Officers, SDM or CDC (“**the decision-maker**”) at the time.

¹ A Commissioners’ Decisions Committee or CDC means an ad-hoc committee comprising not less than three Commissioners.

² Delegation of these powers to a SDM is currently prohibited by section 19 of the *Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (as amended)* (the “**FSC Law**”).

- 1.7 In taking a decision, the Commission is mindful that all those that require a licence under the Regulatory Laws must meet (and continue to meet) the minimum criteria for licensing.
- 1.8 The Appendix contains a flow chart of the possible paths which may be followed in the decision making process.
- 1.9 In this Guidance Note:
- 1.9.1 please refer to the Glossary of Terms for the list of terms and their meanings which apply unless the context otherwise requires;
- 1.9.2 the singular includes the plural and vice versa; and
- 1.9.3 words denoting one gender include all genders.

2. OVERRIDING OBJECTIVE

- 2.1 The Commission adopts the following as its “*overriding objective*” to enable the relevant decision-maker to deal with matters in a fair and reasonable manner:
- 2.1.1 To deal with matters justly, including (so far as is practicable):
- (a) ensuring that the parties are on an equal footing;
 - (b) dealing with the matter in ways that are proportionate to the:
 - (i) amount of money involved;
 - (ii) importance of the matter;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party; and
 - (c) ensuring that the matter is dealt with expeditiously and fairly.
- 2.2 The decision-maker must seek to give effect to the overriding objective when it:
- 2.2.1 exercises any Enforcement Powers; or
- 2.2.2 considers or applies the guidance in this note.
- 2.3 The parties are required to help the decision-maker to further the overriding objective, and are reminded of article 10 of the *Principles of Conduct of Finance Business*³ in this regard.

³ Principle 10 states: “A financial institution should deal with the Commission in an open and co-operative manner and keep the Commission promptly informed of anything concerning the financial institution which might reasonably be expected to be disclosed to [the Commission]”.

3. WHEN THIS GUIDANCE NOTE WILL NOT APPLY

- 3.1 Administrative decisions taken as part of normal or enhanced supervision will not follow the approach set out in this Guidance Note.
- 3.2 This Guidance Note will also not apply to decisions made in the course of the Commission carrying out its investigatory or information-gathering functions; such as, among others, decisions to carry out site visits, request or compel production of documents or attendance for interviews, require an independent third party review or appoint inspectors.
- 3.3 The process described by this Guidance Note will also not apply where:
 - 3.3.1 legislation provides that a decision will have immediate effect;
 - 3.3.2 the circumstances require and the law enables urgent action to be taken⁴; or
 - 3.3.3 an application is to be made by the Commission to the Royal Court.
- 3.4 At any stage, the decision-making process will be terminated if it is determined that no further action is required, or that the matter should be addressed through normal or enhanced supervision.
- 3.5 In addition, the decision-making process may be temporarily suspended where a member of the Executive or a decision-maker takes a decision to do something that is not covered by this Guidance Note.
- 3.6 For the avoidance of doubt, the decision-making process in this Guidance Note does not include any decision that may be taken under the *Companies (Guernsey) Law, 2008 (as amended)* or the *Companies (Alderney) Law, 1994 (as amended)*.

4. EXECUTIVE REVIEW

- 4.1 The Executive Review is the point at which the appropriate member, or members, of the relevant Supervisory Division select what appears, from the information presented to them to be the most appropriate way forward in dealing with a matter. The selection will be made from a range of options, and will depend on the nature and severity of the conduct presented.
- 4.2 The Executive Review will be conducted by the Director or a Deputy Director of the relevant Division. In the event that they cannot act for any reason, alternative arrangements will be made for another Executive Officer, other than the Commission Secretary, Director of Enforcement, Deputy Director of Enforcement or General Counsel, to conduct the review.

⁴ For example: to safeguard the assets of investors; in the best interests of the public or a portion of the public; where the financial resources of a licensed, authorised or registered person do not comply with regulatory requirements; or where statute vests in the Commission the right to apply to Court for relief.

- 4.3 The Executive Review involves considering information presented by the staff member investigating the matter (the “**case officer**”), with particular attention given to:
 - 4.3.1 the relevant Regulatory Laws;
 - 4.3.2 matters indicating non-compliance;
 - 4.3.3 any known mitigating factors;
 - 4.3.4 the degree of confidence that the Commission may have in the reliability of the information; and
 - 4.3.5 any recommendations of the case officer as to the action that may be taken.
- 4.4 If it appears to those conducting the review that the information presented indicates a reasonable probability that non-compliance has occurred in relation to which the Commission may wish to exercise an Enforcement Power, they may:
 - 4.4.1 refer the matter to the Enforcement Division for further investigation;
 - 4.4.2 determine that this matter should be dealt with as a supervisory matter; or
 - 4.4.3 direct any other action they deem to be appropriate that is within the Commission’s powers.

PART B – THE DECISION-MAKING PROCESS

5. OVERVIEW OF THE DECISION-MAKING PROCESS

- 5.1 Where a matter has been referred to the Enforcement Division, that division will undertake an initial review to establish whether or not any further action is appropriate. (See more detail in section 6 below).
- 5.2 Where the Commission determines to seek the use of Enforcement Powers against a party or parties, the choice of sanctions being considered will determine who fulfils the role of decision-maker. (Selection of the decision-maker is addressed in section 10 below). In any event the decision-maker will be a person or persons unconnected to the investigation of the matter.
- 5.3 In most circumstances the decision-maker will follow the process described in this Guidance Note, but will otherwise conduct itself in the manner that it considers suitable in order to enable it to determine the matter fairly and expeditiously. Throughout the process all decisions made by the decision-maker shall be made in accordance with the overriding objective of ensuring that the final decision is fair, reasonable and proportionate.
- 5.4 Subject to statutory confidentiality obligations that are imposed on the Commission⁵ the decision-maker will endeavour to advise the party and the Commission where a material deviation from the process set out in this Guidance Note occurs.
- 5.5 The Commission’s decision-making process generally divides into a number of key stages, and is preceded by the Executive Review stage:
 - 5.5.1 Initial review by Enforcement Division (see section 6);
 - 5.5.2 Consideration by a Case Review Panel (“CRP”) (see section 7);
 - 5.5.3 Disclosure of the case by provision of case material, draft Enforcement Report and unused materials (see section 8);
 - 5.5.4 Appointment of a decision-maker (see section 10);
 - 5.5.5 Consideration by the decision-maker and service of a notice detailing any sanctions that the decision-maker may be minded to impose (see section 11);
 - 5.5.6 The opportunity for a party to make written and/or oral representations in respect of any sanctions that the decision-maker has proposed (see section 12);
 - 5.5.7 A decision is taken by the decision-maker and notice of the decision is given (see section 14).

⁵ For example, s21 FSC Law, s43 Banking Supervision Law, s79 Insurance Business Law, s56 IMII Law, s34A POI Law, s43 Fiduciaries Law, s20 Prescribed Businesses Law and s28 Registered Businesses Law.

6. INITIAL REVIEW BY ENFORCEMENT DIVISION

- 6.1 Once a matter has been referred to the Enforcement Division an assessment will take place on the merits of the referral. If the referral is accepted then at the appropriate time the Enforcement Division will make contact with the party and provide them with a copy of this *Guidance Note on the Decision-Making Process Relating to the Use of Enforcement Powers*. The Enforcement Division will highlight the process that will now be adopted and point out the stage that they are now at in respect of the matter.
- 6.2 If a matter referred is not accepted by the Enforcement Division, for whatever reason, this will be relayed back to the referring Division with an explanation on why and with any recommendation the Enforcement Division may consider appropriate.
- 6.3 Once accepted there are a number of options available to the Enforcement Division to obtain information from parties. This could include the appointment of inspectors with a specific scope and timeframe to report back to the Commission on their findings. Generally the Commission will use the information seeking powers under the appropriate Regulatory Laws, which may also include compulsory interviews to take place with relevant parties.
- 6.4 Once all information has been gathered an assessment will then take place on the information provided. Just because a matter has been referred to Enforcement it does not mean that there will necessarily be sanctions imposed at the end of this process.
- 6.5 For the avoidance of doubt, the decision-making process set out in this Guidance Note does not apply to this part of the process.

7. CASE REVIEW PANEL

- 7.1 The Case Review Panel (CRP) is a committee convened on a “case by case” basis, with membership dependent upon the matter under consideration. It will normally include the following members:
 - 7.1.1 the Director General or a senior Executive Officer who is sufficiently independent from the matter under consideration (who will chair the CRP);
 - 7.1.2 an Executive Officer from the Enforcement Division (likely to be the Principal Executive Officer⁶);
 - 7.1.3 another Relevant Executive Officer⁷; and
 - 7.1.4 at least one other Executive Officer other than the Deputy Director of Intelligence or the General Counsel, who is *not* connected with the case.

⁶ A “*Principal*” Executive Officer is the Relevant Executive Officer with responsibility for oversight of a particular matter throughout the enforcement process.

⁷ An Executive Officer will be a “*Relevant*” Executive Officer where the case involves a person that is connected to the Division for which they have responsibility in the Commission. This will include Executive Officers from the Enforcement and relevant Supervisory Divisions.

- 7.2 The case officer(s) will attend the meeting to present the facts and to answer any questions or clarify issues raised.
- 7.3 The CRP will review the matter before it, consider the proposed recommendations for further action and decide how the Commission should deal with the matter from this point forward.

8. PROVISION OF CASE MATERIAL, DRAFT REPORT AND UNUSED MATERIALS

- 8.1 This stage involves the disclosure to the party of the draft Enforcement Report and all of the relevant information on which the Commission proposes to rely in asking the decision-maker to act.⁸ It will be carried out by the Enforcement Division, who will be responsible for the investigation and findings.
- 8.2 The party will be asked to consider the information that has been provided and respond to the Enforcement Division, in writing by a specified date:
 - 8.2.1 confirming that the facts as presented are correct or, if not, suggesting what changes might be made so that they are correct;
 - 8.2.2 providing any additional information they consider to be material or relevant to the matter; and
 - 8.2.3 including any comments they may wish to make in relation to the recommendations contained in the draft Enforcement Report.
- 8.3 In determining the date by which the response should be provided, the Commission will take account of the nature and volume of information, and the extent to which individual items have been previously available to the party for review and comment.
- 8.4 All comments and material received will be considered and evaluated prior to a revised Enforcement Report being produced by the Enforcement Division. This will be marked as the “*Final Enforcement Report*”.
- 8.5 The Final Enforcement Report will be re-presented to the CRP, together with any representations received from the party. The CRP will review the matter and decide whether the initial proposed sanctions should be varied, and whether referral to a decision-maker remains appropriate. If the CRP decides that the matter should proceed to a decision-maker the Final Enforcement Report will be provided to the party.

Disclosure of Additional Material Held (Unused Material)

- 8.6 The Commission will adopt an approach similar to that of “standard disclosure” as per Rule 65(4) of the *Royal Court Civil Rules, 2007*.
- 8.7 Subject to the Commission’s statutory confidentiality obligations and issues of privilege, the Commission will disclose to a party a schedule of all additional relevant documents

⁸ Statutory powers exist throughout the Regulatory Laws in terms similar to sections 11G(2) and 21 of the FSC Law, which allows the Commission to withhold certain confidential information in limited circumstances.

that it has generated or uplifted from third parties. The schedule of documents provided by the Commission will include relevant documents which:

8.7.1 adversely affect the Commission's case;

8.7.2 support the party's case; and

8.7.3 adversely affect the party's case.

Electronic copies of the documents on the list will be made available for inspection upon request.

8.8 The Commission will continue to monitor its disclosure obligations throughout the enforcement process and make any further disclosures that are appropriate as a case develops and/or new material is uncovered.

9. SETTLEMENT

9.1 Where it is consistent with the Commission discharging its statutory functions in accordance with its guiding principles, the Commission may enter into discussions ("settlement discussions") with a party, with a view to entering into a settlement agreement concerning the nature of non-compliance by the party and the action to be taken by the Commission. Any settlement agreement is a regulatory decision to which the party has consented.

9.2 Early settlement is generally desirable, however the Commission reserves the right not to enter into settlement negotiations or to settle where settlement would not be consistent with the Commission's regulatory objectives or in the public interest.

9.3 Settlement discussions will only be held once the Commission has a sufficient understanding of the nature and gravity of the misconduct, and this is accepted by the party. The Commission reserves the right to withdraw from discussions. All settlement discussions will be conducted on a *without prejudice* basis and take place between the parties and the Enforcement Division only. No correspondence with any decision-maker shall reference any without prejudice discussions. In the event that settlement discussions are commenced, but cannot be concluded with a settlement agreement within a reasonable time, the matter will continue to be dealt with in accordance with this Guidance Note.

9.4 Commission approval to any settlement agreement will be given by either:

9.4.1 at least two Executive Officers not involved in the case; or

9.4.2 a CRP; or

9.4.3 a sub-group of Commissioners not otherwise previously involved with the matter.

9.5 The Commission operates a discount scheme for discretionary financial penalties and/or periods of prohibition on early settlement. In outline, this operates as follows:

9.5.1 the Commission and the party will agree in principle the amount of the financial penalty and/or period of prohibition, taking into account all the factors as set out in the case;

9.5.2 A discount will be applied depending upon when settlement is reached:

- (a) Stage 1: Prior to the matter being referred to a decision-maker (as referred to in section 10) - 30%;
- (b) Stage 2: After the matter has been referred to a decision-maker, but before the decision-maker has issued a draft notice that it is minded to impose a sanction (as referred to in section 11) -15%;
- (c) Stage 3: After a draft “*minded to*” notice has been issued, but before three days prior to the expiry of any Representation Period (as explained in paragraph 11.8)⁹ – 10%

9.6 If a party chooses not to accept the opportunity to engage in settlement discussions when first offered by the Commission, the Commission may decline to do so at a later stage. If the Commission does later agree to negotiate, the terms offered may be varied.

9.7 A party is encouraged to bring a legal advisor to any settlement meeting, or to obtain legal advice beforehand. Further, a party is recommended to take legal advice before entering into a settlement agreement.

9.8 Until any settlement agreement has been executed the terms of that agreement (including any attachments such as a direction or public statement) will not be in effect. The agreement will remain a working draft document that is *without prejudice* to the rights of any party concerned. Once the settlement agreement has been executed the *without prejudice* nature of the settlement agreement and any attachments will fall away, but will continue to apply to the discussions and correspondence that led to the agreement.

10. SELECTION AND APPOINTMENT OF A DECISION-MAKER

10.1 If one of the proposed Enforcement Powers is to revoke, cancel, suspend, or withdraw a licence, authorisation, registration, permission or consent, or to make an application for the winding-up of a body corporate, this must be considered by a Commissioners Decision Committee (CDC)¹⁰. All other cases may be heard by a Senior Decision-Maker (SDM).

10.2 Whatever type of decision-maker is chosen, checks will be carried out to ensure that there are no conflicts of interest in relation to the parties identified in the referral. These checks

⁹ Please note that this discount will not apply where the Representation Period is reduced to three days or less, or dispensed with altogether (see paragraph 11.9).

¹⁰ Section 19(5), FSC Law.

will extend to potential conflicts involving the Commission Secretary. If the Commission Secretary is un-conflicted he will assume the role of secretary to the decision-maker (the “**Secretary**”). If the Commission Secretary has a conflict of interest the Executive will appoint another un-conflicted Executive Officer to assume the responsibilities of the Secretary for the remainder of the relevant matter.

- 10.3 Where a matter is to be heard by a SDM from the SDM Panel, the Secretary shall inform the President of the Panel of the nature of a particular matter, and request that he advise which member of the SDM Panel should be appointed. The President’s choice will be based on availability and subject to conflicts checks being cleared, and whether any specialist area of expertise is required.
- 10.4 Once the appropriate decision-maker has been identified, the Secretary will appoint the decision-maker and provide him with, among other things, a copy of the Commission’s *Guidance Note on the Decision-Making Process Relating to the Use of Enforcement Powers*, the final Enforcement Report and evidence or supporting documents referred to in the Enforcement Report.
- 10.5 The Secretary will also notify the party and the Principal Executive Officer of the appointment of a decision-maker and provide the party (or its legal adviser) with an electronic version of all information that the Secretary has provided to the decision-maker. The party will be advised that the decision-maker is considering the Enforcement Division’s recommendations and may, in due course, take the matter forward.

11. CONSIDERATION BY DECISION-MAKER

- 11.1 Within 10 working days of receiving the referral the decision-maker should consider the Enforcement Report and evidential documents presented to it, and decide whether it is necessary to request further information on specific issues:
 - 11.1.1 from the Enforcement Division; or
 - 11.1.2 from the parties, via the Enforcement Division.
- 11.2 Where information is provided to the decision-maker under paragraph 11.1.1 a copy of that information must be made available by the provider to the parties as soon as the process of requesting and obtaining information from that provider has been completed. This requirement is subject to the right of the Commission to withhold information from a party in limited circumstances, for example where the information is not relevant to the allegations against them. The decision-maker should be informed of the fact and date of compliance with this paragraph.
- 11.3 After considering the Enforcement Report, the evidential documents provided and any further information provided pursuant to paragraph 11.1.1 or 11.1.2, the decision-maker may:
 - 11.3.1 decide that it is minded to take the recommended enforcement action;

- 11.3.2 decide that it is minded to take some other enforcement action;
 - 11.3.3 decide to take no further enforcement action; or
 - 11.3.4 refer the matter to a person with the authority to take the appropriate enforcement action.
- 11.4 Within 28 days of receiving the referral (the “**initial consideration period**”) the decision-maker should:
- 11.4.1 make a decision as to which of the courses referred to in paragraph 11.3 it wishes to adopt; or
 - 11.4.2 provide a realistic estimate of by when it expects to be in a position to make such a decision, taking into account the overriding objective set out in paragraph 2.1.
- The decision-maker will notify the party and the Principal Executive Officer in writing (via the Secretary) of how it has decided to proceed at, or before, the end of the initial consideration period.
- 11.5 A decision-maker has a right to seek further information and/or clarification at any stage. Where a SDM wishes further information to be provided, requests will be sent via the Secretary who will seek the information from the relevant party or from the Commission, and revert to the SDM.
- 11.6 Where the decision-maker decides that it is minded to take some form of enforcement action (in accordance with options 11.3.1 or 11.3.2 above), the draft “*minded to*” notice referred to in paragraph 11.11 should be issued.

The “*Minded to*” Notice and the Representation Period

- 11.7 Some of the Regulatory Laws provide that before certain decisions are made, a decision-maker must serve a notice advising the party that it is “*minded to*” make this decision and, among other things, that the party may make representations. The decision-maker is then obliged to take those representations into account before making its final decision. Although this statutory requirement is not consistent for the same decisions across the different Regulatory Laws, the Commission’s practice is to apply it in respect of all matters referred to a decision-maker involving potential use of an Enforcement Power or sanction under any of the Regulatory Laws. This notice is colloquially referred to as a “*minded to*” notice.
- 11.8 The statutory terms of the “*minded to*” notices that are required under some of the Regulatory Laws include that within a period of 28 days beginning on the date of the notice (the “**Representation Period**”) the party may make written *or* oral representations to the decision-maker in respect of the recommended measure or sanction, in such a manner as the Commission may from time to time determine. The Commission considers 28 days to be a reasonable period for representations in most cases, and subject to

paragraph 11.9 will apply it as the Representation Period in respect of all matters where “*minded to*” notices are served. The Commission will also permit parties to make written *and/or* oral representations to the decision-maker.

11.9 A decision-maker may reduce the Representation Period where it determines that to do so would be in the interests of any person, the public, a portion of the public, or the reputation of the Bailiwick as a finance centre. If by reason of those interests a decision-maker considers that a decision must be taken immediately as a matter of urgency, then a decision-maker may decide, at its sole discretion, to dispense with the Representation Period altogether.

11.10 Under those Regulatory Laws that prescribe the Representation Period, the Commission does not currently have the power to extend the Representation Period beyond 28 days.

Delivery of Draft “*Minded to*” Notice

11.11 A decision-maker will issue a “*minded to*” notice in draft 10 working days before it intends to issue the notice in final form. In complex cases the decision-maker may extend the period of 10 working days, but not beyond 6 weeks.

11.12 The Secretary will be responsible for ensuring the delivery of the draft “*minded to*” notice to the Enforcement Division and to the parties.

11.13 The purpose of issuing a draft “*minded to*” notice (as provided for in 11.11) is to allow the Enforcement Division and the parties:

11.13.1 To indicate if a meeting is required for oral representations to be made, and if so to agree its date and duration;

11.13.2 To agree whether any identified additional documents should now be disclosed;

11.13.3 Where a financial penalty is proposed to be imposed on any party, for that party to provide a statement of means to the decision-maker; and

11.13.4 For the Enforcement Division to prepare a draft public statement where one is proposed, in accordance with paragraph 11.16.

11.14 Oral evidence may be given, and cross examination will be permitted only where the decision-maker considers that the interests of justice so require. This is not expected to be a frequent event since the parties and potential witnesses will normally have been interviewed by the Enforcement Division, and will have had an opportunity to comment on the transcript of the interview:

11.14.1 Where the Principal Executive Officer or a party proposes to call a witness, a request must be submitted to the decision-maker in writing, identifying the name of the witness(es) and a summary of the evidence to be adduced. The request must be made within 7 days of the draft “*minded to*” notice being sent and must be copied to the other parties and the Enforcement Division.

11.14.2 The decision-maker will then decide whether to permit the witness(es) to give evidence in person. Witnesses proposed to be called during a meeting must be available on the scheduled meeting date. The unavailability of a witness on the scheduled meeting date may not constitute sufficient grounds upon which to adjourn the meeting.

11.14.3 Exceptionally the decision-maker may decide it needs to hear from an individual as a witness.

11.15 Where agreement under paragraphs 11.13.1 or 11.13.2 cannot be reached within 10 working days or where a witness is to be called under paragraph 11.14 then the decision-maker may, in the furtherance of the overriding objective, issue a procedural ruling on those aspects on the basis of the documentary and written material provided to him.

11.16 The Enforcement Division will produce to the decision-maker, through the Secretary, the text for any proposed public statement within 10 working days of receipt of the draft “*minded to*” notice.

11.17 Upon expiry of 10 working days from the issue of the draft notice, or such further period as may be determined by the decision-maker under paragraph 11.11, the decision-maker will issue a final “*minded to*” notice together with the proposed text of any Public Statement (which may or may not be the same as the version proposed by the Enforcement Division). The Secretary will by letter send both documents to the Enforcement Division and all parties and confirm that the period of 28 days for representations has commenced (the Representation Period).

11.18 No meeting shall be held before the letter referred to in paragraph 11.17 has been sent.

11.19 A decision-maker may decide¹¹ to reduce the Representation Period where it determines that to do so would be in the interests of any person, the public, a portion of the public, or the reputation of the Bailiwick as a finance centre. If by reason of those interests a decision-maker considers that a decision must be taken immediately as a matter of urgency, then a decision-maker may decide, at its sole discretion, to dispense with the Representation Period altogether. In the circumstances a decision may be taken not to use the process for issuing a “*minded to*” decision, or such a decision in draft.

12. REPRESENTATIONS

12.1 As stated previously, those Regulatory Laws that prescribe the “*minded to*” notice provide that the party may make written or oral representations to the decision-maker. The Commission is content to treat this as permitting written or oral representations or both whenever a Representation Period applies, generally in accordance with the

¹¹ The Banking Supervision Law, section 17C(3)
The FSC Law, section 11E(3)
The Insurance Business Law, section 28C(3)
The IMII Law, section 18C(3)
The POI Law, section 34G(3) and 35(5)
The Fiduciaries Law, section 17C(3)

procedures below (see paragraph 12.4 in respect of written representations and paragraph 12.5 in respect of oral representations).

- 12.2 If the decision-maker receives no response or representations from the party, the decision-maker may regard the allegations or matters outlined in the Commission's submissions and the "*minded to*" notice as undisputed.
- 12.3 Any unused material that the parties indicate that they wish to rely on or have taken into consideration shall be provided to the decision-maker and the Enforcement Division at the earliest opportunity.

Written Representations to the Decision-Maker

- 12.4 The decision-maker will be responsible for determining the procedure that will be followed where written submissions are made, but in general, the following guidelines will apply:
- 12.4.1 Written representations must be made and received by the decision-maker before the expiry of the Representation Period.
- 12.4.2 The Secretary shall be responsible for ensuring that a copy of any written submission is provided to the decision-maker, the Principal Executive Officer and any other parties to the matter.
- 12.4.3 The Principal Executive Officer may respond to the written submissions. The Secretary will provide these responses to the decision-maker, with a copy to the party and any other parties to the matter.

Oral Representations to the Decision-Maker (the Meeting)

- 12.5 The decision-maker will be responsible for determining the procedure that will be followed where oral submissions are made, but in general, the following guidelines will apply:
- 12.5.1 All decision-maker meetings will be conducted in private.
- 12.5.2 Whilst the decision-maker may determine the order in which people speak, he does so as the Chair of the meeting.
- 12.5.3 Oral representations must be made before the expiry of the Representation Period (see paragraph 11.8 above), and where possible at a time and place agreed by all parties and the Relevant Executive Officer, or determined by the decision-maker.
- 12.5.4 The oral submission by, or on behalf of, the party should explain why the party thinks that the proposed decision, including any sanction is inappropriate or not justified.

- 12.5.5 Following the oral submission, the party may be required to answer questions from the decision-maker and clarify issues that may arise.
- 12.5.6 Members of the Executive may be invited to comment on matters raised by the party, to answer questions posed by the decision-maker or clarify issues.
- 12.5.7 The Executive can make submissions on the proposed public statement and respond on any matters raised within any statement of means.
- 12.5.8 In exceptional circumstances, if information is introduced by the party during the oral submission that has not previously been made available to the Commission, the decision-maker may decide to allow more time for the Principal Executive Officer to comment on the information and to disclose any such comments to the party.
- 12.5.9 If a party fails to attend the meeting, the decision-maker may proceed in its absence, provided that the decision-maker is satisfied that the party has been given sufficient notice of the meeting and it is reasonable to do so.
- 12.5.10 The meeting will be recorded through the use of audio equipment: one of the audio copies made at the meeting will be provided to the party.
- 12.5.11 The decision-maker may also ask for assistance from anyone else that it considers will assist it in its deliberations, such as the decision-maker's legal adviser.
- 12.5.12 Procedural matters relating to the conduct of the meeting, evidence, or the process will be addressed in the first instance at the start of the meeting by the decision-maker.
- 12.5.13 The giving of oral evidence and cross-examination will only be permitted where the decision-maker has permitted it under paragraph 11.14.
- 12.5.14 Where the decision-maker has permitted a witness to give evidence then they must attend the meeting in person on the scheduled date. The unavailability of a witness on the scheduled meeting date may not constitute sufficient grounds upon which to adjourn the meeting.
- 12.5.15 The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply. Whilst a party may instruct a lawyer to assist them this does not make the process of the meeting judicial.
- 12.5.16 The decision-maker may, at its sole discretion, adjourn the meeting. This may occur where the decision-maker requests that the Principal Executive Officer or the party provide further material or attend a subsequent meeting, or to assist the decision-maker in obtaining information it requires in order to make a final decision, though where strict statutory provisions exist the decision-maker is

unable to adjourn a meeting scheduled to hear oral representations beyond the Representation Period.

12.6 The decision-maker will close the meeting when it is satisfied that it has received complete representations.

13. DELIBERATIONS OF THE DECISION-MAKER

13.1 The decision-maker must consider any representations made in response to a “*minded to*” notice before giving further consideration to the decision that has been proposed.

13.2 The party and the Principal Executive Officer will be given an opportunity to comment on any new information or matters that emerge during the decision-maker’s deliberations. In such a case, the decision-maker will delay taking its final decision for a reasonable period to allow the person(s) concerned to make comments.

14. DECISION

14.1 In deciding any matter of disputed fact or whether any of the allegations have been proved, the standard of proof to be applied by the decision-maker will be the balance of probabilities.

14.2 In reaching its decision, the decision-maker will have regard to the written and oral representations received and all other information in the documents before it. It is for the decision-maker to decide which of the matters it accepts, and which it does not.

14.3 The decision-maker, through the Secretary, will notify the Principal Executive Officer and the party in writing of its decision. If the decision is adverse to any party, the written notice will contain:

14.3.1 the terms and grounds of any enforcement measure or sanction imposed;

14.3.2 a copy of any public statement;

14.3.3 a written statement of the reasons for the decision-maker’s decision; and

14.3.4 the particulars of the applicable right of appeal.

14.4 Where, in relation to any fact or matter, the decision-maker is aware, or has been informed by the Commission at any time prior to the finalisation of his decision, that its decision may not, pursuant to any Regulatory Law, specify any reason¹² which would involve the disclosure of confidential information the disclosure of which would be prejudicial to:

14.4.1 a criminal or regulatory investigation (whether in the Bailiwick or elsewhere);
or

¹² Where the power exists under the relevant Regulatory Law or where the Commission is not required under a Regulatory Law to provide reasons for a decision.

14.4.2 co-operation or relations with investigatory, regulatory or prosecuting authorities in any other place;

the statement of reasons must respect that obligation. If, in consequence, anything is omitted from the statement the decision-maker must notify the Commission in writing of the fact that there has been such an omission.

14.5 Where under paragraph 14.4 the decision-maker omits any matter from a statement of reasons, and where the party has a right of appeal with respect to the omission, the Commission must inform that party of the fact that there has been an omission and give particulars of that right of appeal¹³.

14.6 Where a ground for a decision is that any of the applicable minimum criteria for licensing is not, has not been, may not, or may not have been, fulfilled in the case of any person other than a party (“**person A**”), person A should also be served with a copy of the written decision. The copy of the decision served on person A may omit any matter that does not relate to him, and should give particulars of any right of appeal that may be exercisable by person A.

15. DISCONTINUANCE OF ENFORCEMENT PROCEEDINGS

15.1 The Principal Executive Officer will continually assess the appropriateness of the relevant Division’s recommendation in the light of any new information or representations received and any material change in the relevant facts or circumstances. As a result, in some cases the Commission may decide to withdraw its recommendation and discontinue the matter. If this happens the Principal Executive Officer will inform the decision-maker and the party accordingly.

¹³ The right of appeal, and therefore this provision, will not apply where the Commission is not required to provide reasons for its decision under a Regulatory Law.

PART C – APPEALS

16. APPEALS

16.1 Many of the Commission’s decisions relating to the potential use of Enforcement Powers give rise to rights of appeal for parties aggrieved or affected by the Commission’s decision. The specific rights of appeal are detailed in each of the Regulatory Laws, but in most cases the grounds of appeal are that:

16.1.1 the decision was *ultra vires* or there was some other error of law;

16.1.2 the decision was unreasonable;

16.1.3 the decision was made in bad faith;

16.1.4 there was a lack of proportionality; or

16.1.5 there was a material error as to the facts or as to the procedure,

and any appeal must be instituted within 28 days of the Commission’s decision (the “**appeal period**”).

16.2 There is no requirement for the Commission to stay the exercise of its decision until conclusion of the appeal period. In some circumstances (specified in the relevant Laws) a party may apply to the Court for an order suspending or modifying the operation of the Commission’s decision pending the determination of an appeal.

16.3 On appeal the relevant Court may:

16.3.1 dismiss the appeal, in whole or in part;

16.3.2 confirm the Commission’s decision, in whole or in part;

16.3.3 set the decision of the Commission aside; and/or

16.3.4 if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit.

16.4 Where the Court has remitted a decision to the decision-maker, the exact process to be followed will depend upon any directions given by the Court. In some instances, remittal will involve the decision-maker issuing a further “*minded to*” notice reflecting the decision that it proposes to make following the Court’s decision, and any directions or guidance that may have been given¹⁴. Where a “*minded to*” notice is issued after a remittal, the party will have an opportunity to make additional representations in respect of the decision that has been remitted, in accordance with the procedure set out in section 12 above.

¹⁴ See sections 11.7 to 11.17 above in respect to the “*minded to*” notice procedure.

PART D – GLOSSARY OF TERMS

For the purposes of this Guidance Note, the following terms should be understood to have the meanings shown below. The terms and their meanings apply unless the context otherwise requires, are intended only to aid clarity to the Guidance Note, and are not formal definitions. Words denoting one gender include all genders and the singular includes the plural and vice versa.

“**appeal period**” has the meaning ascribed to it in paragraph 16.1 of this Guidance Note,

“**Banking Supervision Law**” means *The Banking Supervision (Bailiwick of Guernsey) Law, 1994 (as amended)*,

“**Commission**” means the Guernsey Financial Services Commission,

“**Commissioner**” means a person appointed by the States of Guernsey to be a member of the Commission pursuant to the FSC Law,

“**Commissioners’ Decisions Committee**” or “**CDC**” means an ad-hoc committee comprising not less than three Commissioners,

“**Commission Secretary**” means the Secretary of the Commission,

“**decision-maker**” means all or any of the Executive Officers, a SDM, and a Commissioners’ Decisions Committee,

“**Enforcement Powers**” means the Commission’s powers of enforcement and sanction, which are derived principally from the Regulatory Laws, although they may also derive from any other Bailiwick legislation that confers prescribed regulatory functions upon the Commission¹⁵. Decisions as to information gathering, licensing, registration, authorisation and other matters that are part of normal or enhanced supervision will not ordinarily involve the exercise of Enforcement Powers,

“**Executive**” means, collectively, those individuals for the time being appointed or employed as officers of the Commission in the following positions:

- a) Director General;
- b) Chief Operating Officer and Deputy Director of Authorisations;
- c) Director and Deputy Directors of Banking and Insurance Supervision and Policy;

¹⁵ *The Protection of Depositors, Companies and Prevention of Fraud (Bailiwick of Guernsey) Law, 1969, The Road traffic (Compulsory Third-Party Insurance) (Guernsey) Law, 1936, The Surf-Riding (Long Boards) (Compulsory Third-Party Insurance) (Guernsey) Law, 1969, The Vessels and Speedboats (Compulsory Third-Party Insurance, Mooring Charges and Removal of Boats) (Guernsey) Law, 1972, The Companies (Guernsey) Law, 2008, The Companies (Alderney) Law, 1994, The Control of Borrowing (Bailiwick of Guernsey) Ordinance 1959, and The Limited Partnerships (Guernsey) Law, 1995.*

- d) Director and Deputy Director of Fiduciary Supervision Policy and Innovations;
- e) Director and Deputy Director of Investment Supervision and Policy;
- f) Director and Deputy Director of Financial Crime Supervision and Policy;
- g) Director and Deputy Director of Enforcement;
- h) Deputy Director of Intelligence Services;
- i) General Counsel;
- j) Chief Risk Officer; and
- k) Director of Financial Stability,

“**Executive Review**” means a review by an Executive Officer undertaken as set out in section 4 of this Guidance Note,

“**Executive Officer**” means an individual for the time being holding any of the above Executive positions,

“**Fiduciaries Law**” means *The Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2000 (as amended)*,

“**FSC Law**” means *The Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (as amended)*,

“**initial consideration period**” has the meaning ascribed to it in paragraph 11.4 of this Guidance Note,

“**Insurance Business Law**” means *The Insurance Business (Bailiwick of Guernsey) Law, 2002 (as amended)*,

“**IMII Law**” means *The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (as amended)*,

“**participant**” means the Enforcement Division and any person who is the subject of the proposed Enforcement Power (a party),

“**party**” means any person who is the subject of the proposed Enforcement Power,

“**POI Law**” means *The Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended)*,

“**Prescribed Businesses Law**” means *The Prescribed Businesses (Bailiwick of Guernsey) Law, 2008, as amended*,

“**President of the Panel**” means the individual for the time being chosen to assume the role of president of the SDM Panel,

“Principal Executive Officer” means the Relevant Executive Officer with responsibility for oversight of a particular matter throughout the enforcement process or their delegate,

“Registered Businesses Law” means *The Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (as amended)*,

“Regulatory Laws” means the FSC Law, the Banking Supervision Law, the Fiduciaries Law, the Insurance Business Law, the IMII Law, the POI Law, the Prescribed Businesses Law, *The Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008*, *The Financial Services Commission (Site Visits) (Bailiwick of Guernsey) Ordinance, 2008*, *The Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008* and the Registered Businesses Law,

“Relevant Executive Officer” means an Executive Officer of the Division to which a matter is connected. A connection may exist due to, for example, supervisory or enforcement responsibility and/or the nature of allegations being made. There may be more than one Relevant Executive Officer in respect of a particular matter,

“Representation Period” has the meaning ascribed to it in paragraph 11.8 of this Guidance Note,

“SDM Panel” means the panel of SDMs that have been selected to fulfil the Commission’s powers of consideration, determination and sanction in respect of Enforcement Powers under the Regulatory Laws,

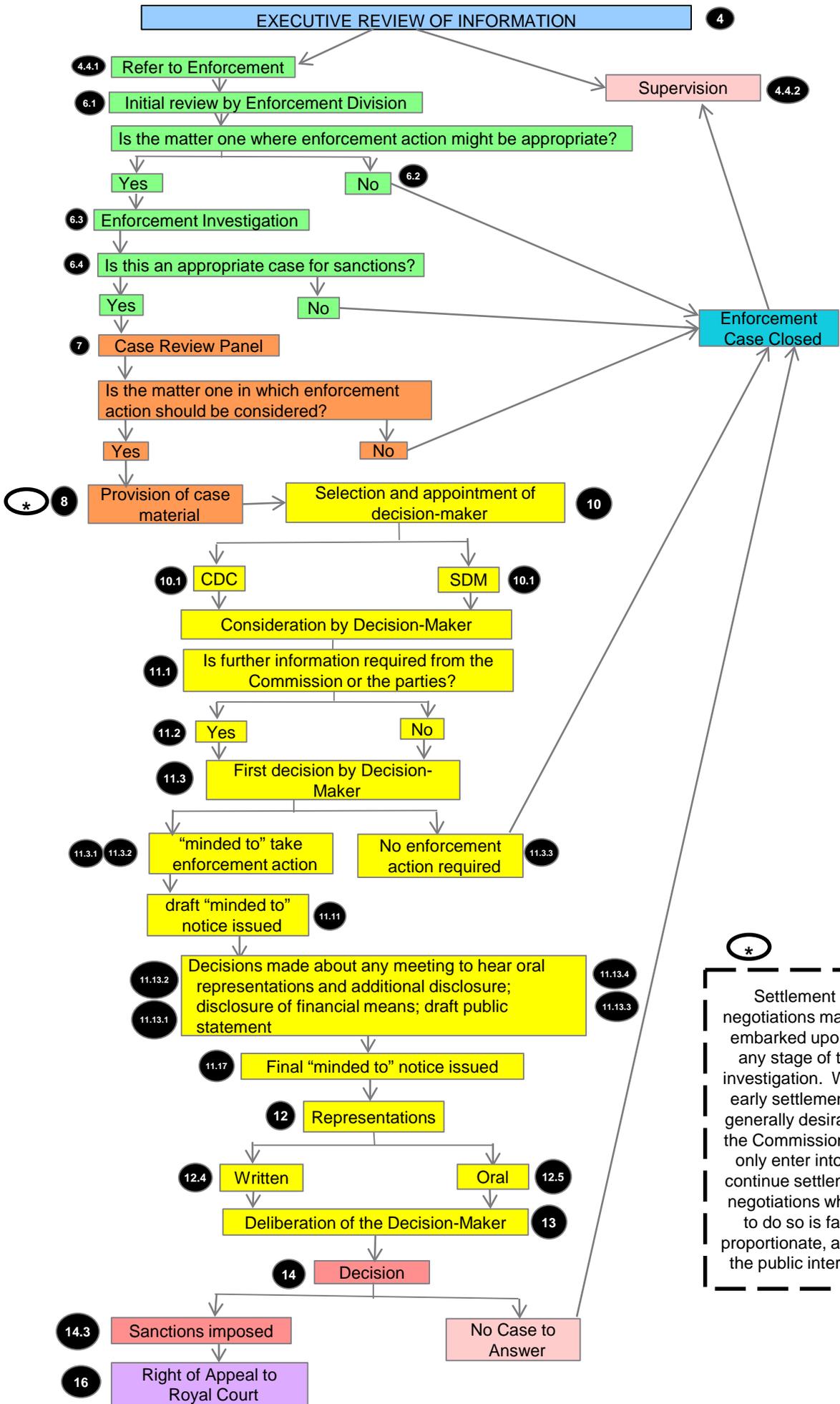
“Secretary” means the secretary to the decision-maker, who is ordinarily the Commission Secretary or, where the Commission Secretary is unable to act for some reason, the other member of the Executive who has been appointed to exercise these functions,

“Senior Decision-Maker” or **“SDM”** means an officer appointed as a SDM by the Commission, in accordance with the processes and procedures outlined in section 10 of this Guidance Note.

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday, or a day appointed as a public holiday by Ordinance of the States of Deliberation under section 1(1) of the *Bills of Exchange (Guernsey) Law, 1958*.

APPENDIX – FLOWCHART OF DECISION-MAKING PROCESS

See following page for flowchart.



*

Settlement negotiations may be embarked upon at any stage of the investigation. While early settlement is generally desirable, the Commission will only enter into or continue settlement negotiations where to do so is fair, proportionate, and in the public interest.