



Association of
Mortgage Intermediaries

Association of Mortgage Intermediaries' response to FCA CP21/25 Issuing statutory notices – a new approach to decision makers

This response is submitted on behalf of the Association of Mortgage Intermediaries (AMI) and the Association of Finance Brokers (AFB). AMI is the trade association representing over 80% of UK mortgage intermediaries. AFB sits within AMI and represents second charge (formerly secured loan) brokers.

Intermediaries active in this market act on behalf of the consumer in selecting an appropriate lender and product to meet the individual consumer's mortgage requirements. AMI members also provide access to associated protection products. AFB members also provide access to unsecured products.

Our members are authorised and regulated by the Financial Conduct Authority (FCA) to carry out mortgage, insurance mediation and consumer credit activities. Firms range from sole traders through to national firms and networks, with thousands of advisers.

Response

Q1: Do you agree with the proposal to move some statutory notice decisions from the RDC to the Executive? Please give reasons for your answer.

We agree with the need for the FCA to be able to make fast, effective and efficient decisions and we do not feel that this is currently the case. However, we do not feel that this consultation paper has explained the business case for these proposals, nor presented any evidence that these proposals will have the desired effect. It is important that the impartiality of decision making is not sacrificed for the speed of the process as the decisions in question are fundamental to people's livelihoods. It is, therefore, vital that the decisions process is clear and transparent and that the firm or individual concerned is able to make representations to an impartial committee or individual before any final decision is made.

We are concerned that decisions made under Executive Procedures may involve the FCA staff member who has been directly involved in gathering the evidence. We feel that, as a minimum, where the firm or individual in question objects to the decision made the case should be referred to the Regulatory Decisions Committee (RDC), to maintain the degree of separation currently in place from the FCA staff member who gathered the evidence and the legal advisers who advised the staff member recommending the action.

Whilst we note that the FCA has stated that it will remain transparent and accountable for all the decisions made in either process, we do not feel that these assurances are sufficient and require a framework that supports this statement. The RDC is operationally independent from the FCA with its own team of support staff and legal advisers. This separation ensures that the decisions are not made nor unfairly influenced by FCA staff who are recommending the action against a firm or individual.

Once a statutory notice has been issued, the RDC will not discuss a case with the FCA staff who are recommending the action while the case is ongoing, unless a representative for the individual/firm is present or given an opportunity to respond. The RDC will always consider any written or oral representations that a firm, individual and/or their representatives may wish to make on the action proposed or taken. All of this helps to ensure that decisions are made fairly, an aspect of the process that it is essential to maintain.

The FCA's webpage on the RDC¹ states, "The representations [made to the RDC] may not change the decision but in many cases the RDC panel has altered a decision as a result of representations and, in some cases, has decided to take no further action." We would like to know how often the RDC intervenes, reverses decisions and asks for further clarity before issuing a decision. This data should have been published as part of the consultation. The lack of data and business case attached to these proposals mean it is impossible for us to judge whether consideration of cases by Executive Procedures will facilitate the same opportunity to firms and individuals and whether the referral of certain decisions to the RDC creates an unnecessarily elongated process that makes no difference to the outcomes of cases.

We are concerned that these proposals reduce both the transparency of the decisions and the impartiality of the decision makers, particularly as the FCA staff responsible for taking the statutory notice decision may be advised by the same legal advisers who also advised the FCA staff recommending action by the FCA. We would welcome clarification as to how the regulator will demonstrate that these decisions have been taken independently of the initial investigation.

If these changes are to proceed then the appeals process needs to be efficient and simple to undertake. It is important that this remains separate from the FCA. We also believe that the regulator would benefit from giving more weight to the recommendations of its panels and suggest that, if some of the decision making power is removed from the RDC, that the panels should be given more power to readdress the balance and to maintain transparency and integrity.

Q2: Do you agree with the categories of decision that we suggest? If not, which statutory notice decisions do you consider the RDC should keep? And which statutory notice decisions should be made under Executive Procedures?

Where the firm or individual in question objects to the decision, we believe that the case should continue to be referred to the Regulatory Decisions Committee to maintain the degree of separation currently in place from the FCA staff member who gathered the evidence and the legal advisers who advised the staff member recommending the action.

Q3: Do you agree with the proposed changes to the definition of Senior Staff Committee meeting under Executive Procedures? Please give reasons for your answer

Notwithstanding our comments elsewhere, we do not have any further objections to these changes.

Q4: Do you agree with the proposal that oral representations may only be made to Executive decision makers in exceptional circumstances? If not, please give reasons for your answer.

No, we do not agree with this proposal and feel that firms should be able to choose whether they would prefer to make oral or written representations. We do not believe that it is sufficient to state that oral representations may only be made in exceptional circumstances as the view of whether circumstances are 'exceptional' will be subjective.

¹ <https://www.fca.org.uk/about/committees/regulatory-decisions-committee-rdc>

We believe that this proposal has the potential to be discriminatory and the effect that this could have on small firms and business owners should be carefully considered by the regulator before it is implemented.

Q5: Do you agree with the proposed definition of exceptional circumstances? If not, please explain how you would define exceptional circumstances.

We do not feel that the consultation has defined exceptional circumstances, it has simply presented one example which is 'where the subject of the notice is not reasonably able to make written representations due to personal circumstances'. There is no indication of a situation that might mean that someone is not 'reasonably able' to make written representations and we are concerned that this decision will be subjective and open to interpretation, perhaps to the detriment of the individual in the investigation.

We believe that verbal representation should be facilitated upon request.

Q6: Do you agree with the proposed modifications to our Executive Procedures framework?

We do not agree with the proposal that the FCA staff responsible for taking the statutory notice decision may be advised by the same legal advisers who also advised the FCA staff recommending action by the FCA. We believe that a separate team of unconnected advisers should be used to maintain the important degree of separation that these cases should benefit from.

We are pleased that the RDC's approach to communications is not proposed to change and we believe that it is important that such a commitment also applies for decisions taken under Executive Procedures to maintain the integrity and transparency of the decision process and to ensure that all decisions are given full and fair consideration.