

FINANCIAL SERVICES ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Measures to protect consumers

Section 14: Consumer redress schemes

172. The existing section 404 of FSMA enables the Treasury, subject to Parliamentary approval, to authorise the FSA to require firms to conduct a review of past business and, if liable, to pay compensation to consumers. Section 14 replaces section 404 with new sections 404 and 404A to 404G, conferring new powers for the FSA to make rules requiring firms to establish and operate consumer redress schemes.

New section 404: Consumer redress schemes

173. *Subsections (1) and (3)* provide that the FSA may make section 404 rules if it appears to it that (a) there may have been a widespread or regular failure by a relevant firm (defined in *subsection (2)* as an authorised person or payment service provider) to comply with the requirements for carrying on an activity; (b) as a result, consumers have suffered or may suffer loss for which redress would be available in legal proceedings; and (c) it is desirable to establish a scheme to secure redress for consumers.
174. ‘Consumers’ is defined in new section 404E.
175. New section 404F(5) provides that references to a relevant firm include a person who was, but is no longer, an authorised person or payment service provider and a person who has assumed a liability incurred by a relevant firm.
176. *Subsections (4) to (7)* of new section 404 define ‘consumer redress scheme’ as one in which a firm is required to take one or more of the following steps:
- investigate whether it has failed to comply with its obligations in carrying out a specified activity;
 - if it determines that it has failed to comply with an obligation, determine the nature and extent of the failure, and whether the failure has caused or may cause any loss to consumers;
 - if it determines that consumers have suffered loss, to make appropriate redress.

New section 404A: Rules under section 404: supplementary

177. Section 404A sets out matters for which section 404 rules may make provision. This includes requiring firms to provide the FSA with information about their investigation and the matters under investigation, and for the FSA (or a competent person appointed by it) to conduct the investigation and other relevant steps instead of the firm, including determining its liability and the redress the firm should make to consumers. Where the rules provide for a scheme to be conducted by someone other than the firm itself, they

must also include provision for warning and decision notices and a right of referral to the Tribunal (*subsection (8)*).

178. *Subsection (2)* limits the FSA's power in *subsection (1)(b)* to define by way of example what amounts to a failure to comply with a requirement to that which a court has found or would find constitutes a failure. *Subsection (3)* similarly limits the FSA's power in *subsection (1)(c)* to set out matters which should be taken into account by firms in assessing evidence or determining causation to those matters which a court has taken, or would take, into account. *Subsection (4)* provides that the FSA may require firms to make such redress as is just in relation to that description of case, having regard (among other things) to the nature and extent of the losses in question. It is not limited to the remedy or relief which would be available in legal proceedings.

New section 404B: Complaints to the ombudsman scheme

179. This section enables a consumer who is not satisfied with any determination by a firm under a scheme to make a complaint to the Financial Ombudsman Service (FOS). It requires the FOS to assess such a complaint (or a complaint about an underlying act or omission which falls to be dealt with by a consumer redress scheme) in accordance with the terms of the consumer redress scheme rather than its 'fair and reasonable' jurisdiction under section 226(8) of FSMA. Complaints under this section will form part of the FOS' compulsory jurisdiction set out in Schedule 17 to FSMA.

New section 404C: Enforcement

180. This section provides that the FSA's disciplinary powers in Part 14 of FSMA (public censure or financial penalty) will apply to relevant firms which are not (or no longer) authorised persons. This ensures that the scheme can be enforced against payment service providers or firms which are no longer authorised.

New section 404D: Applications to Tribunal to quash rules or provision of rules

181. This section enables a person to apply to the Tribunal for a review of any rules made by the FSA under section 404. The general rule is that the Tribunal is to apply judicial review principles to such applications. On an application relating to an example set out in the rules of things done or omitted which firms are to regard as constituting a failure to comply with a requirement (under section 404A(1)(b)) the Tribunal may determine whether the example does in fact constitute a failure. On an application relating to matters the FSA requires firms to take into account for the purpose of assessing evidence or determining causation under section 404A(1)(c), the Tribunal may determine whether, in its view, these are matters that firms should be required to take into account. The section gives the Tribunal jurisdiction to quash any rules made under section 404 or any provision of those rules.

New section 404G: Power to widen the scope of consumer redress schemes

182. This section gives the Treasury a power to widen the scope of the FSA's power to establish a consumer redress scheme by amending the definition of relevant firms or consumers.