

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Control over authorised persons

321. Part 12 of FSMA is primarily designed to implement European requirements in respect of acquisitions or increases of control over certain types of firm such as credit institutions, investment firms and insurance undertakings. In summary, Part 12 requires a person (the “section 178 notice-giver”) who decides to acquire or increase control over a UK authorised person to give notice to the FSA before making the acquisition (the “section 178 notice”) (section 178(1) (obligation to notify the Authority: acquisitions of control)).
322. “Acquiring control” is defined in section 181 of FSMA and includes cases in which the notice-giver intends to hold 10% or more of the shares of an authorised person or 10% or more of the shares in the parent undertaking of the authorised person. “Increasing control” is defined in section 182 of FSMA as a circumstance in which a person increases the percentage of shares or voting power in the authorised person above certain thresholds (for example, a person who decides to move from a shareholding of 19% to 22 % is required to give a section 178 notice). A notice is also required to be submitted where a person reduces control (as defined in section 183 of FSMA) or ceases to have control (section 191D(1)). Part 12 also confers certain powers to take action where, for example, a person breaches the requirement to give a section 178 notice.

Section 26: Control over authorised persons

323. *Section 26(2)* amends the references in Part 12 to the “Authority” to references to the “appropriate regulator”. *Subsection (3)* inserts into section 178 a *new subsection (2A)* which provides that the PRA, as the prudential regulator of a PRA-authorised persons, is the “appropriate regulator” in cases concerning the change of control over PRA-authorised persons. The FCA is the “appropriate regulator” in other cases. Therefore, in the case of a person who wishes to acquire control in a PRA-authorised person, that person would need to submit a section 178 notice to the PRA.
324. *Subsection (4)* amends section 179 (requirements for section 178 notices) with the effect of imposing on the PRA and the FCA a requirement to publish a list of requirements as to the form, information and accompanying documents for a section 178 notice.
325. *Subsection (5)* amends section 187 (approval with conditions) by inserting a *new subsection (2)*. *Paragraph (a) of new subsection (2)* replicates the effect of the existing subsection (2) which specifies that a regulator may grant approval of a change of control subject to conditions where, if it were not to impose those conditions, it would propose to object to the application (on the grounds specified in section 185 (assessment: general)). *Paragraph (b)* is new and provides that the appropriate regulator may grant conditional approval where it is required to do so by virtue of a direction issued by the

other regulator under *new section 187A(3)(b)* or the *new section 187B(3)* (as the case may be).

326. *Subsection (6)* inserts *new sections 187A to 187C* into FSMA.
327. *New section 187A(1)* requires the PRA to consult the FCA before approving or objecting to an acquisition of control over a PRA-authorized person and to supply to the FCA relevant information. These requirements ensure that the FCA can consider and, if necessary, make representations to the PRA concerning the acquisition of control over a firm regulated by the FCA on a conduct of business basis. *Subsection (3)* confers a power on the FCA, where it considers there are reasonable grounds for objecting to the acquisition on the basis of the assessment criteria specified in section 186(f) (this provision concerns the risk of money laundering or terrorist financing being committed or attempted), to direct the PRA (a) to object to the acquisition; or (b) to grant approval subject to any conditions specified by the FCA. The FCA, in its capacity as the conduct of business regulator, will be best placed to make this assessment. If the PRA is subject to a direction from the FCA under *subsection (3)* the PRA must indicate to the notice-giver any representations received from the FCA. The effect of *subsection (7)* is that the PRA could exercise its power under *new section 3I* or *new section 3J* to prevent the FCA from giving a direction under *subsection (3)*.
328. *New section 187B(1)* requires the FCA to consult with the PRA before approving or objecting to an acquisition of control where (a) the firm to which the section 178 notice relates has a PRA-authorized person as a member of its “immediate group” (defined in *section 421ZA* (inserted by *section 48(2)*)) or (b) the section 178 notice-giver is a PRA-authorized person. *Subsection (2)* enables the PRA to make representations to the FCA on any of the matters set out in section 185(2) and section 186 (the criteria against which a notice must be assessed). *Subsection (3)* confers on the PRA a power (a) to direct the FCA to object to the acquisition; or (b) to direct the FCA to grant approval subject to any conditions specified by the PRA. This power is available where the PRA considers that, on the basis of “relevant matters” (defined in *subsection (4)* and including the ability of the firm to meet its prudential requirement following the acquisition) there are reasonable grounds to object to the acquisition.
329. *New section 187C* provides that where one regulator has directed the other to impose conditions, it may direct the variation or cancellation of those conditions; and the other regulator may not vary or cancel conditions other than in accordance with the direction without first consulting the regulator which gave the direction.
330. *Subsection (7)* inserts a *new subsection (4A) and (4B)* into section 191A which require the PRA and FCA to consult with one another before giving a warning notice objecting to the acquisition of control in certain cases. *Subsections (8) and (9)* make similar amendments in relation to sections 191B and 191C, which deal with restriction notices and applications to court for orders for the sale of shares.
331. *Subsection (10)* requires the PRA and the FCA to provide each other with a copy of a notice received under section 191D (regarding a disposition of control) in certain cases.
332. *Subsections (11) and (12)* make minor amendments to section 191E and 191G.

Section 27: Powers of regulators in relation to parent undertakings

333. *Section 27* confers powers on the regulators in relation to unregulated parent undertakings. It inserts a new Part 12A comprising of sections 192A to 192N into FSMA.
334. *New section 192A* defines a “qualifying authorised person” as a body corporate incorporated in the UK, which is a PRA-authorized person or an investment firm. *Subsections (4) to (9)* make provision for the Treasury to amend aspects of this definition by order.

*These notes refer to the Financial Services Act 2012
(c.21) which received Royal Assent on 19 December 2012*

335. *New section 192B* defines “qualifying parent undertaking” for the purposes of new Part 12A. To be a qualifying parent undertaking, the person must be the parent undertaking of a qualifying authorised person or recognised investment exchange (which is not an overseas investment exchange as defined by section 313(1) of FSMA (interpretation of Part 18)); must be incorporated in the UK or have a place of business in the UK; must not be an authorised person, recognised investment exchange or recognised clearing house (see section 286 of FSMA); and must be a financial institution of a kind prescribed by the Treasury by order.
336. *New section 192C* provides that the FCA or PRA may give a direction to a qualifying parent undertaking if one of two conditions are satisfied. The first condition, set out in *subsection (2)*, is that the regulator considers that it is desirable to give the direction to advance, in the case of the FCA, one or more of its operational objectives and in the case of the PRA, any of its objectives. The second condition, set out in *subsection (3)*, is that the regulator concerned is under EU law responsible for consolidated supervision of the members of a group which contains a qualifying authorised person and the regulator considers that giving the direction is desirable for the purpose of the effective consolidated supervision of the group. This condition might be met where, for example, the acts of the qualifying parent undertaking are having an adverse effect on the ability of the regulator to carry out effectively consolidated supervision of persons who are not authorised persons (for example, subsidiaries established in other Member States). *Subsection (5)* requires the regulator to consider whether it could use powers in relation to authorised persons or recognised investment exchanges rather than this power, and to have regard to the principle that a burden or restriction which is imposed should be proportionate to the benefits, considered in general terms, that are expected to result.
337. *New section 192D* gives more detail as to the requirements that may be imposed under section 192C.
338. *New section 192E* sets out the procedural requirements relating to the giving of directions. If the regulator proposes to give a direction, it must first issue a written notice to the qualifying parent undertaking and to any authorised person or recognised investment exchange it thinks will be significantly affected, giving the details set out at *subsection (5)*. The direction may take effect immediately or on a specified date if the regulator considers it necessary for it to do so. If no date is specified in this way, the direction will take effect only after the time for referring the matter to the Tribunal has expired and any reference and further appeal has been finally determined (see the definition of “open to review” in section 391(8)). *Subsections (7) and (8)* require the regulator to give further written notice of its response to any representations which are made to the proposed direction. The regulator can decide not to give the direction (or to cancel it if it has already taken effect), to propose a different direction (in which case the original notice procedure must be repeated), or to proceed with the direction (in which case the person concerned has a further right to refer the matter to the Tribunal). *New section 192F* also requires consultation between the regulators (and the Bank of England where the direction is to be given to a person who is also a parent undertaking of a recognised clearing house) before the issuing of notices under *new section 192E*.
339. *New section 192G* confers a right to refer to the Tribunal an exercise of a regulator’s powers in relation to the issuing of directions.
340. *New section 192H* requires each regulator to publish a statement of policy on the exercise of its powers to issue directions, and to give a copy of the statement to the Treasury. Under *new section 192I*, before publishing a statement of policy, the regulators must first consult each other and the Bank of England and publish a draft for public consultation; they must also publish an account of what representations they received and their response to them.
341. *New section 192J* enables the FCA and PRA to make rules requiring qualifying parent undertakings (as defined by new section 192B) to provide information or documents to the regulator.

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342. *New section 192K* enables the FCA and PRA to impose penalties on, or publish a statement of censure in relation to, a qualifying parent undertaking who has breached a direction given under new section 192C or rules made under new section 192J. Such action may not be taken outside the limitation period (as defined in *subsection (5)*).
343. *New section 192L* sets out the procedure the FCA and PRA must follow before taking action under section 192K. *Subsection (7)* provides that a person who has received a penalty or been the subject of a statement of censure may refer the matter to the Tribunal.
344. *New section 192M* requires a regulator to provide a copy of any statement of censure to certain persons (including the person in respect to whom it is made).
345. *New section 192N* requires the FCA and PRA to prepare a statement of policy with respect to the imposition of, and amount of, penalties under new section 192K. The regulator must have regard to any such statement when exercising its power to impose a penalty. The procedural requirements set out in section 192I (including the requirement to consult on a draft of the policy) apply.