

2001 No. 1534

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Rules) Order 2001

Made - - - - - 23rd April 2001

Laid before Parliament 24th April 2001

Coming into force in accordance with article 1

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The Treasury in exercise of their powers under sections 426 to 428 of the Financial Services and Markets Act 2000() hereby make the following Order—

PART I GENERAL

Citation and commencement

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Rules) Order 2001.

(2) This Order comes into force on the day on which section 138 comes into force.

Definitions

2.—(1) In this Order—

“the Act” means the Financial Services and Markets Act 2000;

“commencement” means the beginning of the day on which section 19 comes into force;

“continued rule” means any pre-commencement provision designated in accordance with article 4 as it has effect after commencement by virtue of this Order;

“designation instrument” means an instrument made under article 4;

“pre-commencement provision” means any (or any part of any) enactment, subordinate legislation or other instrument or provision (including guidance in writing or other legible form) which, at the time when it is designated in accordance with article 4, applies to all persons who on commencement will be authorised persons or to any class of such persons.

(2) Any reference in this Order to a section or Schedule is, unless the context otherwise requires, a reference to that section of or Schedule to the Act.

PART II

DESIGNATION OF PRE-COMMENCEMENT PROVISIONS

Designation of pre-commencement provisions to take effect as rules

3.—(1) This article applies to a pre-commencement provision which—

(a) has been designated by the Authority in accordance with article 4;

(b) could, with the modifications (if any) made to it under article 5, be made in whole or in part under a provision of the Act conferring power on the Authority to make rules; and

(c) has not been amended or revoked at any time between its designation and commencement.

(2) Where a pre-commencement provision—

(a) has been designated by the Authority in accordance with article 4; and

(b) has been amended at any time between its designation and commencement by a further such provision which has itself been so designated,

this article applies to the original provision, subject to that amendment.

(3) A pre-commencement provision to which this article applies has effect after commencement—

(a) with such modifications (if any) as may be made under article 5; and

(a) 2000 c. 8.

(b) to the extent that (with those modifications) it could have been made under a provision of or under the Act conferring power on the Authority to make rules, as if it were a rule made under that provision.

(4) Paragraph (3) applies in spite of any repeal, revocation or other lapsing of the pre-commencement provision which occurs on commencement.

Designation of pre-commencement provisions

4.—(1) The Authority may, before commencement, designate such pre-commencement provisions as appear to it to be necessary or expedient.

(2) To designate a pre-commencement provision, the Authority must—

- (a) make an instrument in writing identifying the provision in the manner required by paragraph (3);
- (b) specify in the instrument the provision of or under the Act under which the pre-commencement provision will be treated as having effect;
- (c) specify any modification to be made to the provision pursuant to article 5;
- (d) identify the class of persons to whom the continued rule will apply;
- (e) include in the instrument an explanation of the purposes of the pre-commencement provision being designated;
- (f) include in the instrument an explanation of the Authority's reasons for believing that designating the pre-commencement provision is compatible with its general duties under section 2;
- (g) publish the instrument in the way appearing to the Authority to be best calculated to bring it to the attention of the public;
- (h) have in place arrangements whereby a copy of the continued rule (incorporating any modifications made under article 5) may be made available to any person on request.

(3) In order to identify the pre-commencement provision for the purposes of paragraph (2) the Authority must give sufficient information about—

- (a) the date, title, author and source of the enactment, subordinate legislation or other instrument in which the provision is found;
- (b) whether the provision comprises the whole of that enactment, subordinate legislation or other instrument or only a part of it (in which case identifying which part);
- (c) whether the provision has been amended or whether its meaning has been affected by any subsequent provision,

to ensure that a person can ascertain with certainty the content of the provision being designated.

(4) To the extent that the instrument does not comply with paragraph 2(b), it is void.

(5) The Authority may charge a reasonable fee for providing a person with a copy of an instrument made under this article or of the continued rule made available under paragraph (2)(h).

(6) The Authority must give a copy of any designation instrument to the Treasury without delay.

(7) The making of an instrument under this article is a legislative function for the purposes of Schedule 1.

(8) A person is not to be taken to have contravened any continued rule if he shows that at the time of the alleged contravention the designation instrument concerned had not been published in accordance with paragraph (2)(g).

Modification of pre-commencement provisions

5.—(1) When designating a pre-commencement provision, the Authority must make such modifications to it (if any) as appear to the Authority necessary to ensure—

- (a) that, so far as possible, the pre-commencement provision has the same effect after commencement as it did immediately before commencement; and

- (b) in particular, that the class of persons to whom the continued rule applies at any time after commencement consists of persons of the same description as the class of persons to whom it would have applied at that time if the Act had not been passed and the provision had remained as it had effect immediately before commencement.

(2) When designating a pre-commencement provision, the Authority may make such modifications to it as have the effect of limiting its application to a class of persons narrower than the class to which it applied immediately before commencement; and paragraph (1) is not to be taken—

- (a) as preventing any modification under this paragraph; or
- (b) as requiring any modification which is inconsistent with a modification that has been made under this paragraph.

(3) The modifications authorised by paragraph (1)(a) include the addition of such transitional provisions as are necessary to ensure the result there mentioned.

(4) If a pre-commencement provision designated under this Part purports to include a modification which is not authorised by this Order and would alter the effect or application of the provision, to the extent that it is not so authorised, the modification is void.

Consequences of contravention of continued rules

6.—(1) If a designation instrument provides, in relation to any of the continued rules identified in it, as mentioned in subsection (1) of section 149 (evidential provisions), then that subsection applies as it applies where a particular rule so provides.

(2) Subsections (2) and (3) of section 149 apply for the purposes of this article as if the references to a rule (other than the references in paragraphs (a) and (b) of subsection (2)) were references to a designation instrument.

(3) Unless a designation instrument provides, in relation to a specified provision of any of the pre-commencement provisions designated in it, as mentioned in subsection (2) of section 150 (actions for damages), then that section applies as it applies to a rule not falling within subsection (4) of that section.

Verification of continued rules

7.—(1) This article applies to continued rules instead of section 154 (verification of rules).

(2) The production of a printed copy of a designation instrument or a continued rule purporting to be made by the Authority on which is endorsed a certificate which—

- (a) is signed by a member of the Authority's staff authorised by it for that purpose; and
- (b) contains the required statement or statements,

is evidence (or in Scotland sufficient evidence) of the facts stated in the certificate.

(3) The required statements in relation to a copy of a designation instrument are—

- (a) that the instrument was made by the Authority;
- (b) that the copy is a true copy of the instrument; and
- (c) that on a specified date the instrument was published in accordance with article 4.

(4) The required statement in relation to a copy of a continued rule is that the text set out in the document is a continued rule within the meaning of article 2.

(5) A certificate purporting to be signed as mentioned in paragraph (2) is to be taken to have been properly signed unless the contrary is shown.

(6) A person who wishes in any legal proceedings to rely on a designation instrument or on a continued rule may require the Authority to endorse a copy of that instrument or rule with a certificate of the kind mentioned in paragraph (2).

Waiver or modification as respects particular persons

8.—(1) This article applies where—

- (a) immediately before commencement a waiver or modification of a pre-commencement provision is in operation as respects a person;
- (b) the pre-commencement provision to which the waiver or modification relates is designated in accordance with article 4; and

- (c) the person to whom the waiver or modification has been granted would, but for this article, be subject to the continued rule resulting from that designation.
- (2) In a case where this article applies, the waiver or modification has effect after commencement as if it were a direction under subsection (2) of section 148—
 - (a) that the continued rule is not to apply to the person; or
 - (b) as the case may be, that the continued rule is to apply to him with the modification in question.
- (3) Any condition subject to which the waiver or modification was granted has effect after commencement as if imposed under section 148(5).
- (4) Section 148(6) does not apply to a direction having effect by virtue of this article.
- (5) Section 148(9) applies to a direction having effect by virtue of this article as it applies to a direction given after commencement.
- (6) In this article references to a waiver or modification—
 - (a) are to a waiver or modification granted in writing;
 - (b) include references to any partial disapplication of the provision or rule, however described.

Statements of principle requiring compliance with code etc.

- 9.—(1) This article applies where the Authority designates under article 4 a statement of principle made under the Financial Services Act 1986() which requires compliance with a code or rules mentioned in section 143(1) (endorsement of codes etc. issued by other bodies) or with any provision of such a code or rules.
- (2) Article 5(1)(a) is to be read as authorising the Authority to make such modification of the statement as is necessary to ensure that, on and after commencement, the effect of the statement is to endorse the code, rules or provision concerned as mentioned in that section.

Revocation and alteration

- 10. Nothing in this Order is to be taken as implying a contrary intention for the purposes of section 14 of the Interpretation Act 1978() in relation to continued rules and, accordingly, such rules may, after commencement, be revoked or altered in accordance with the provision of the Act under which the continued rules have effect as made.

Guidance

- 11.—(1) This article applies where the Authority proposes to give any guidance under section 157 in relation to any continued rules and, apart from this paragraph, subsection (3) of that section would apply.
- (2) “Guidance” includes any such recommendation as is mentioned in section 157(5).
- (3) To the extent that the guidance—
 - (a) states that any pre-commencement guidance will still apply (or states that it will still apply but with such necessary modifications as are specified); or
 - (b) reproduces any pre-commencement guidance (with any necessary modifications),any procedure which by reason of section 157(3) must be complied with in relation to the guidance is to be treated as having been so complied with.
- (4) In paragraph (3)—
 - (a) “pre-commencement guidance” means any guidance in writing or other legible form which was given, by the Authority or otherwise, before commencement; and
 - (b) “necessary modifications” means such modifications as appear to the Authority necessary to ensure that, so far as possible, the pre-commencement guidance has the same effect after commencement as it did immediately before it.

(a) 1986 c. 60.
(b) 1978 c. 30.

PART III

CONSULTATION UNDERTAKEN BEFORE COMMENCEMENT

Interpretation

12.—(1) This Part applies to an instrument which contains—

- (a) a statement or code which the Authority proposes to make under section 64 (conduct expected of approved persons);
- (b) a statement of policy which the Authority proposes to issue under section 69 (penalties for misconduct of approved persons);
- (c) a statement of policy which the Authority (in its capacity as the competent authority) proposes to issue under section 93 (penalties for breach of listing rules);
- (d) a code which the Authority proposes to issue under section 119 (guidance on market abuse);
- (e) a statement of policy which the Authority proposes to issue under section 124 (penalties for market abuse);
- (f) rules or guidance which the Authority proposes to make or issue to which the procedure set out in section 155 would otherwise apply;
- (g) a statement of policy which the Authority proposes to issue under section 210 (penalties imposed under Part XIV);
- (h) a direction which the Authority proposes to give under section 316 or 318 (Lloyd's);
- (i) a direction which the Authority proposes to give under section 328(1) (members of the professions);
- (j) a statement of procedure which the Authority proposes to issue under section 395 (giving of notices);
- (k) a complaints scheme which the Authority proposes to make under paragraph 7 of Schedule 1.

(2) In this Part, the “relevant consultation requirements” in relation to an instrument are the procedural requirements set out in the Act with regard to—

- (a) the publication of the provisions which it is proposed to include in the instrument; and
- (b) the necessary items which must accompany any such publication,

which the Authority must satisfy if it proposes to make the instrument in question.

(3) A “necessary item” is one or more of the following, if required to be published by the relevant consultation requirements—

- (a) a cost benefit analysis;
- (b) an explanation of the purpose of the provisions;
- (c) an explanation of the Authority's reasons for believing that making the instrument is compatible with its general duties under section 2;
- (d) details of the expected expenditure by reference to which the proposal is made.

Consultation on new rules etc. before Royal Assent

13.—(1) This article applies to a consultation which—

- (a) took place at any time before 14th June 2000 (being the date on which the Act received Royal Assent);
- (b) was undertaken in relation to provisions proposed to be included in an instrument to which this Part applies;
- (c) included the publication of those provisions in the manner which appeared to the Authority to be best calculated to bring it to the attention of the public; and
- (d) invited representations about the provisions to be made to the Authority within a specified time; but
- (e) was not accompanied by a necessary item.

(2) Where the Authority makes, issues or gives an instrument containing provisions which have been the subject of consultation to which this article applies then, provided the requirements of paragraph (3) are met, the Authority is to be treated as having satisfied the relevant consultation requirements in respect of that instrument in so far as it contains those provisions.

(3) The requirements of this paragraph are that—

- (a) the Authority must, before making, issuing or giving the instrument, publish any necessary item in the form required by the relevant consultation requirements;
- (b) the necessary item must be accompanied by a notice that representations about the matters contained in it may be made to the Authority within the period specified in the notice;
- (c) before making the instrument to which the necessary item relates, the Authority must have regard to any representations made to it either in response to the invitation referred to in paragraph (1)(d) or in accordance with sub-paragraph (b).

(4) If the Authority makes an instrument containing the provisions which have been the subject of consultation to which this article applies then—

- (a) the Authority must publish an account, in general terms, of the representations made to it either in response to the invitation referred to in paragraph (1)(d) or in accordance with paragraph (3)(b) and its response to them;
- (b) if the instrument made differs from the provisions published in a way which is, in the opinion of the Authority, significant the Authority must comply with any requirement imposed by the Act in a case when such a difference arises between what is published for consultation and what is contained in an instrument of that kind.

Anticipatory consultation

14.—(1) If, before this Order comes into force, the Authority takes steps in relation to an instrument to which this Part applies and those steps would, if they had been taken after that date, satisfy the requirements of paragraph (3) or (4) of article 13, then article 13 applies to that instrument as if those steps had been taken after this Order comes into force.

(2) If, before the relevant consultation requirements in relation to an instrument come into force, any steps were undertaken in relation to provisions contained in a draft instrument to which this Part applies, then, if those steps, had they been undertaken after commencement, would to any extent have satisfied any requirements laid down in or under the Act for the making of that instrument, those requirements are to that extent to be treated as having been satisfied on the date when the last such requirement was satisfied.

Appropriate comparison for cost benefit analysis

15. Where, pursuant to this Order or to a relevant consultation requirement, the Authority publishes a cost benefit analysis which involves comparison with the overall position if the instrument in question was not made, the Authority may disregard, in making that comparison, the repeal, revocation or lapsing at commencement of any enactment, subordinate legislation or other instrument or provision (including guidance in writing or other legible form).

23rd April 2001

Jim Dowd
Clive Betts,
Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note does not form part of the Order)

This Order makes transitional provision in relation to the rule making powers conferred on the Financial Services Authority under the Financial Services and Markets Act 2000 (c. 8) (“FSMA”). The Order is divided into three Parts.

Part I contains the commencement and interpretation provisions. The Order comes into force on the same date as the main rule making power conferred by FSMA, section 138. This will be before the date of commencement of the main provisions of FSMA, including the general prohibition in section 19.

Part II concerns the power of the Authority to designate existing rules and legislative provisions which will be repealed or will lapse at commencement so that they continue in effect after commencement as if they were rules made by the Authority. This is an alternative to the Authority making new rules under its FSMA powers. Provisions can only be designated before commencement where it is necessary or expedient to do so. The Order sets out the requirements to be satisfied by the designation instrument and provides for how continued rules can be verified for the purposes of legal proceedings. Article 8 carries forward any waiver or modification of the pre-commencement provision that was granted before commencement.

Part III of the Order concerns consultation which the Authority has carried out in anticipation of the powers to be conferred on it by FSMA. Where consultations about rules, codes, statements of policy etc. to be made under the Act was carried out before FSMA received Royal Assent, the procedure adopted may not have been fully compliant with the requirements laid down in the Act. Where this is the case, the Order enables the Authority to complete the consultation exercise by issuing any items required such as a cost benefit analysis. Article 14 provides that where the Authority has taken steps in anticipation of its rule making powers in FSMA or of the powers in this Order, those steps can be treated as having been taken in accordance with the requirements for exercising those powers. Article 15 clarifies that where the Authority is required, in undertaking a cost benefit analysis, to compare the position if proposed rules are made with the position in the absence of those rules then the correct comparison is with the position before the repeal of the legislation replaced by FSMA.

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