

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Xi: Information Gathering & Investigations

311. This Part sets out the powers of the Authority to require the production of information and documents, to require reports to be compiled, to conduct investigations and to obtain access to premises. Many of these powers are also held concurrently by the Secretary of State in recognition of his wider responsibilities in relation to company law.
312. The powers provided for in this Part are in addition to the specific powers conferred on the Authority by other provisions of the Act to request information from unauthorised persons in particular circumstances, such as in connection with an application for authorisation or recognition. They enable the Authority to require information on an ad hoc basis and therefore supplement the Authority's ability to make rules requiring authorised persons to provide it with information on a routine basis under its general rule-making power (section 138).
313. Under section 177, failure to comply with any requirement imposed using any of the powers in this Part can be certified to the court and dealt with by the court as if the defaulter were in contempt.
314. None of the powers in this Part may be used to require the disclosure of material which is protected by section 413.

Section 165: Authority's power to require information

315. This section gives the Authority a general power to require information or documents which may reasonably be required in connection with the discharge of its functions under the Act. The information or documents may be required from any person, including a legal person, who is any of the following:
- an authorised person;
 - a formerly authorised person;
 - a person connected with an authorised person, as defined in *subsection (11)*;
 - an operator, trustee or depository of an open-ended investment company;
 - a recognised investment exchange;
 - a recognised clearing house.
316. Either the Authority can write to the person asking for the production of the information or documents within a reasonable timescale, or it can send an officer to whom it has given written authorisation. The person is required to provide the information or

documents without delay, and he may also be required to take any reasonable steps the Authority may specify to verify the information provided.

Section 166: Reports by skilled persons

317. This gives the Authority the power to require an authorised person or a formerly authorised person to commission and provide the Authority with a report into any relevant matter the Authority may specify. This must be a matter about which the Authority could require information under section 165, so the report must reasonably be required in connection with the discharge of the Authority's functions.
318. The power also enables the Authority to require such reports from other persons carrying on a business who are, or were, connected to the authorised or formerly authorised person in the ways specified in *subsection (2)*. Essentially, these are members of the same group of companies, or companies closely linked through a common shareholder, or any partnership of which the authorised or formerly authorised person is or was a member. This is a more limited set of persons than under section 165 and Schedule 13.
319. The person making the report must be nominated by the Authority, or his appointment must be approved by it. The Authority has to be satisfied that he has the relevant skills to report on the matter concerned. In many cases this person may be an accountant, or they may be a person with some other suitable professional qualification, such as a lawyer or an actuary, or they may be a person with particular commercial or professional experience, such as a banker. The Authority may also specify the form of the report.
320. *Subsection (5)* imposes an obligation on any in-house expert working for the authorised or connected person to co-operate with the person appointed to produce the report. Thus, if the report is to be produced by an actuary then the in-house actuary who works for the firm is obliged to co-operate in the production of the report. This duty is enforceable by the Authority through an injunction, or a comparable order in Scotland.

Section 167: Appointment of persons to carry out general investigations

321. Under this section, either the Authority or the Secretary of State (the "investigating authority") may, where it appears that there are good reasons for doing so, appoint competent persons to conduct an investigation on their behalf into the business of an authorised person or appointed representative, or into the ownership or control of an authorised person. An "appointed representative" is a person who is exempt from the general prohibition in relation to particular regulated activities by virtue of a contract with an authorised person as described under section 39. An appointed representative and the authorised person who is the principal of that representative as a result of the contract may be investigated at the same time. An investigation may also be made into a formerly authorised person or a former appointed representative, although the scope of such investigations is limited by *subsection (4)* to the business they conducted while they were authorised or appointed or under the control or ownership of the former authorised person at that time. Written notice must be given to the person under investigation under section 170(2).
322. The people appointed to conduct the investigation may be employees of the investigating authority (under section 170(5)), or other people engaged specifically for the purpose. If they judge it necessary for the purposes of the investigation, they may also inquire into the business of other connected companies or partnerships, including those which were connected at some relevant time in the past (this extends to the same classes of connected company or partnership as section 166). The investigator(s) must give written notice to any other company or partnership whose business they intend to inquire into in this way.

Section 168: Appointment of persons to carry out investigations in particular cases

323. In addition to the general power under section 167 to investigate the business of authorised persons and appointed representatives where there is “good reason” to do so, this section gives the Authority or the Secretary of State (“the investigating authority”) the power to appoint competent persons (who can be employees of the investigating authority) to conduct investigations where it appears that there are circumstances suggesting that some specific contravention or offence may have taken place. The more specific grounds for the exercise of the powers under this section are reflected in the wider powers of the investigators (see notes on sections 171 to 173 below).
324. Among the contraventions that may be investigated by either the Authority or the Secretary of State under this section are a breach by an unauthorised person of the general prohibition, the commission of the misleading statements and practices offence under section 397, market abuse under section 118, or insider dealing under Part V of the Criminal Justice Act 1993. The Authority, but not the Secretary of State, may also launch an investigation under this section where a person is suspected of having committed an offence under prescribed money laundering regulations.
325. The Authority may also appoint investigators under this section to look into suspected contraventions of rules or regulations made under the Act, failures to comply with statements of principle made under section 64, or to investigate the fitness and properness of approved persons under Part V of the Act. The fitness and properness of authorised persons may be investigated under section 167.

Section 169: Investigations etc in support of overseas regulator

326. This section gives the Authority new powers comparable to those held concurrently by the Treasury and the Secretary of State under section 82 of the Companies Act 1989 to investigate matters on behalf of an overseas regulator. In deciding whether it is appropriate to exercise this power to require information or to appoint investigators on behalf of an overseas authority, the Authority is directed to take account of the factors listed in *subsection (4)*, which include the seriousness of the case and the wider public interest in providing the assistance.
327. When the request comes from another competent authority under any of the single market directives (see the notes on Schedule 3 for a brief explanation), the Authority is also required to consider whether the assistance must be given in order to fulfil the obligations to co-operate imposed by those directives. If it decides that it is, the other factors fall away.
328. The Authority may make the exercise of the power conditional on the overseas authority making an appropriate contribution towards the cost of doing so, except where it considers that exercise is necessary in order to fulfil the obligations to co-operate under the directives.
329. Under *subsection (7)*, the Authority may decide to permit representatives to attend and participate in any interview to be conducted by the investigators it has appointed. But in order to permit this, the Authority is required to be satisfied that the information thus obtained by the overseas regulator will be subject to equivalent safeguards on its subsequent use and disclosure as are contained in Part XXIII of the Act. The Authority must also prepare a statement of its policy on the exercise of this discretion, which must be approved by the Treasury and, if approved, published. The discretion may not be exercised until this statement has been approved and published.

Section 170: Investigations: general

330. Where an investigation has been launched into a person under section 167 or 168, the Authority or the Secretary of State (whichever is the investigating authority) must notify that person that the investigator has been appointed.. They must also inform the person

under investigation of the reason for the appointment, and the particular provisions of the Act under which the appointment has been made.

331. However no notification is needed for investigations under section 168 into possible insider dealing, market abuse or misleading statements and practices, or into contraventions of the general prohibition under section 19, the financial promotion prohibition under section 21 or the prohibition on promoting collective investment schemes under section 238, since in those cases the investigator may not know the identity of the perpetrator or may be looking into market circumstances at the outset of the investigation rather than investigating a particular person. Nor is notification required if the investigating authority believes that it would be likely to result in the investigation being frustrated.
332. *Subsection (5)* allows employees of the investigating authority to act as investigators under this Part of the Act.
333. *Subsections (7) and (8)* allow the investigating authority to control the scope, timetable and form of the investigation by issuing directions to the investigator(s). Any directions must be notified to the person under investigation under *subsection (9)* except for those types of investigation where initial notice is not required, or where the investigating authority believes that notification would be likely to result in the investigation being frustrated.

Section 171: Powers of persons appointed under section 167

334. This section establishes the powers of investigators appointed under the general investigations power to require people to attend before them and answer questions, and to provide information or documents. The investigators may only impose these requirements where they reasonably consider that the questions, information or documents in question are relevant to the investigation. And they may only impose them on the person under investigation, or any other “connected person” as defined in *subsection (4)*. These limitations reflect the broad grounds on which the general investigatory power is exercisable.

Section 172: Additional power of persons appointed under section 168(1) or (4)

335. This section establishes wider powers for investigators appointed under section 168(1) or (4), the power to investigate particular suspected contraventions or offences. It does not, therefore, apply to investigations into possible insider dealing, market abuse, misleading statements and practices or a breach of the general prohibition or the promotional prohibitions. Because the grounds required under section 168 are more specific, the powers available to the investigator are wider in terms of who may be required to give information. A person who is not the person under investigation or connected to that person may only be asked questions so long as the investigator is satisfied that it is necessary or expedient to do so. The term “connected” attracts the same meaning as under section 171.

Section 173: Powers of persons appointed as a result of section 168(2)

336. This section establishes wider powers for investigators appointed to investigate possible insider dealing, market abuse, misleading statements and practices or a breach of the general or the promotional prohibitions under sections 19, 21 or 238. Because these are liable to focus, at least initially, on market circumstances rather than the conduct or circumstances of any particular person, or the activities of persons unknown, there is no requirement to notify a particular person as the subject of the investigation. So the concept of connectedness does not apply. The investigator can require any person to attend and answer questions, or to supply information or documents, so long as the investigator considers that they may be able to give information relevant to the investigation.

Section 174: Admissibility of statements made to investigators

337. A statement made by a person in compliance with a requirement imposed by an investigator under this Part is generally admissible in any proceedings. But it may not be adduced against the person who made the statement, or questions relating to it asked, by the prosecution in criminal proceedings other than for the charges listed in *subsection (3)*, nor by the Authority in proceedings before the Tribunal to determine whether a penalty should be imposed for, or a public statement made in respect of, market abuse. It may, however, be adduced, or a question relating to it may be asked, by the person himself, or by those acting on his behalf. It can be used by the prosecution or the Authority in cases against another person, or in cases against that person where the charge is one of those listed in *subsection (3)*. All of the charges mentioned in that subsection relate to the provision of false information.
338. The section is necessary to take into account the judgment by the European Court of Human Rights in the Saunders case ((1997) 23 E.H.H.R. 313).

Section 175: Information and documents: supplemental provisions

339. This section enables the Authority or an investigator appointed by either the Authority or the Secretary of State under this Part to compel the production of a document by a person who is holding a document on behalf of another person if they would have the power to compel the latter to produce the document if they held it. If any person required to produce a document fails to do so, they may be compelled to state where, to the best of their knowledge, the document is.
340. A document once obtained may be copied or have extracts taken from it, and the person producing the document, or any other relevant person, may be required to explain it. But the production of a document does not affect any rights a third party may have over it.
341. Documents subject to banking confidentiality may also be withheld unless the person holding the information, or the person to whom the duty of confidence is owed, is the person under investigation or a related company, or the person to whom the duty is owed consents to its disclosure, or the requirement to disclose has been specifically authorised by the Authority or the Secretary of State.

Section 176: Entry of premises under warrant

342. An investigator appointed by the Authority or the Secretary of State may obtain a warrant for entry to any premises from a justice of the peace, or in Scotland from a justice of the peace or a sheriff. Such a warrant can then be executed by a police constable (*subsection (5)* sets out what the constable may do in the exercise of the warrant).
343. To issue the warrant the justice of the peace or sheriff must be satisfied that there are reasonable grounds for believing:
- a request for information under this Part has not been wholly complied with, and that the documents or information may be found on the premises concerned; or
 - the premises are the business premises of an authorised person or appointed representative, that information or documents on those premises could be required by the Authority or the investigator, but that a request for that information or those documents would not be complied with, or would result in the information or documents being removed, tampered with or destroyed; or
 - a serious offence has or is in the process of being committed, and that there is information or are documents on those premises which are relevant to that offence, which could be required by the Authority or the investigator, but which would not be produced, or which might be removed, tampered with or destroyed.

*These notes refer to the Financial Services and Markets Act
2000 (c.8) which received Royal Assent on 14 June 2000*

344. *Subsections (6) and (7)* apply to these warrants certain safeguards and other protections that apply to warrants issued under the Police and Criminal Evidence Act 1984 and the equivalent order in Northern Ireland. This includes giving the constable the right to employ reasonable force to gain entry.
345. *Subsection (8)* provides for documents seized under a warrant to be held for up to 3 months, or for longer if relevant proceedings are instituted during that period.

Section 177: Offences

346. If a person fails to comply with a requirement imposed under this Part without a reasonable excuse, the Authority or the Secretary of State may certify the fact to a court and the court may then deal with the person as if he were in contempt. A person who intentionally obstructs the exercise of any rights conferred by a warrant under the preceding section is guilty of a criminal offence and liable on summary conviction to a prison term of up to 3 months, or a fine up to level 5 on the standard scale (£5,000), or both.
347. A person who knowingly or recklessly provides false or misleading information in response to a requirement under this Part also commits an offence. On summary conviction he would be liable to a prison term of up to 6 months, or a fine up to the statutory maximum (£5,000), or both. On indictment he would be liable to a prison term of up to 2 years, or a fine, or both.
348. The same penalties would be available against anyone who knows or suspects that an investigation is likely to be conducted and falsifies, conceals, destroys or disposes of any document he knows or suspects to be relevant, or causes such a document to be falsified, concealed, destroyed or disposed of.