



# Financial Services and Markets Act 2000

## 2000 CHAPTER 8

### [<sup>F1</sup>PART 9A

#### RULES AND GUIDANCE

##### Textual Amendments

- F1** Pt. 9A substituted for ss. 138-164 (24.1.2013 for specified purposes, 1.4.2013 in so far as not already in force) by [Financial Services Act 2012 \(c. 21\)](#), ss. [24\(1\)](#), [122\(3\)](#) (with [Sch. 20](#)); [S.I. 2013/113](#), art. [2\(1\)\(c\)](#), [Sch. Pt. 3](#); [S.I. 2013/423](#), art. [3](#), [Sch.](#)

## CHAPTER 1

### RULE-MAKING POWERS

#### *General rule-making powers of the FCA and the PRA*

#### **137A The FCA's general rules**

- (1) The FCA may make such rules applying to authorised persons—
  - (a) with respect to the carrying on by them of regulated activities, or
  - (b) with respect to the carrying on by them of activities which are not regulated activities,as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives.
- (2) Rules made under this section are referred to in this Act as the FCA's general rules.
- (3) The FCA's general rules may make provision applying to authorised persons even though there is no relationship between the authorised persons to whom the rules will apply and the persons whose interests will be protected by the rules.

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- (4) The FCA's general rules may contain requirements which take into account, in the case of an authorised person who is a member of a group, any activity of another member of the group.
- (5) The FCA's general rules may not—
  - (a) make provision prohibiting an EEA firm from carrying on, or holding itself out as carrying on, any activity which it has permission conferred by Part 2 of Schedule 3 to carry on in the United Kingdom;
  - (b) make provision, as respects an EEA firm, about any matter for which responsibility is, under any of the single market directives or the emission allowance auctioning regulation, reserved to the firm's home state regulator.

**Modifications etc. (not altering text)**

- C1** S. 137A modified by S.I. 2008/2674, art. 29(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 149\(b\)\(i\)](#))
- C2** S. 137A modified by S.I. 2008/2644, art. 27(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 147\(b\)\(i\)](#))
- C3** S. 137A modified by S.I. 2008/432, art. 15(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 136\(d\)\(i\)](#))
- C4** S. 137A modified by S.I. 2008/2546, art. 37(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 146\(c\)\(i\)](#))
- C5** S. 137A modified by S.I. 2008/2666, art. 18(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 148\(b\)\(i\)](#))
- C6** S. 137A power to make rules modified by S.I. 2002/1775, [reg. 3\(1\)\(4\)](#) (as amended (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 77\(4\)\(a\)](#))
- C7** S. 137A(1) modified by S.I. 2009/3226, art. 20(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 182\(a\)\(i\)](#))
- C8** S. 137A(1) modified by S.I. 2009/814, art. 9(1) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 167\(b\)\(i\)](#))
- C9** S. 137A(3)(4) modified by S.I. 2002/1775, [reg. 3\(2\)\(a\)](#) (as amended (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 77\(4\)\(b\)](#))

**137B FCA general rules: clients' money, right to rescind etc.**

- (1) Rules relating to the handling of money held by an authorised person in specified circumstances (“clients' money”) may—
  - (a) make provision which results in that clients' money being held on trust in accordance with the rules,
  - (b) treat 2 or more accounts as a single account for specified purposes (which may include the distribution of money held in the accounts),

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- (c) authorise the retention by the authorised person of interest accruing on the clients' money, and
  - (d) make provision as to the distribution of such interest which is not to be retained by the authorised person.
- (2) An institution with which an account is kept in pursuance of rules relating to the handling of clients' money does not incur any liability as constructive trustee if the money is wrongfully paid from the account, unless the institution permits the payment—
- (a) with knowledge that it is wrongful, or
  - (b) having deliberately failed to make enquiries in circumstances in which a reasonable and honest person would have done so.
- (3) Rules may—
- (a) confer rights on persons to rescind agreements with, or withdraw offers to, authorised persons within a specified period, and
  - (b) make provision, in respect of authorised persons and persons exercising those rights, for the restitution of property and the making or recovery of payments where those rights are exercised.
- (4) “Rules” means general rules of the FCA.
- (5) “Specified” means specified in the rules.

### **137C FCA general rules: cost of credit and duration of credit agreements**

- (1) The power of the FCA to make general rules includes power to make rules prohibiting authorised persons from—
- (a) entering into a regulated credit agreement that provides for—
    - (i) the payment by the borrower of charges of a specified description, or
    - (ii) the payment by the borrower over the duration of the agreement of charges that, taken with the charges paid under one or more other agreements which are treated by the rules as being connected with it, exceed, or are capable of exceeding, a specified amount;
  - (b) imposing charges of a specified description or exceeding a specified amount on a person who is the borrower under a regulated credit agreement;
  - (c) entering into a regulated credit agreement that—
    - (i) is capable of remaining in force after the end of a specified period,
    - (ii) when taken with one or more other regulated credit agreements which are treated by the rules as being connected with it, would be capable of remaining in force after the end of a specified period, or
    - (iii) is treated by the rules as being connected with a number of previous regulated credit agreements that exceeds a specified maximum;
  - (d) exercising the rights of the lender under a regulated credit agreement (as a person for the time being entitled to exercise them) in a way that enables the agreement to remain in force after the end of a specified period or enables the imposition on the borrower of charges within paragraph (a)(i) or (ii).
- (2) “Charges” means charges payable, by way of interest or otherwise, in connection with the provision of credit under the regulated credit agreement, whether or not the agreement itself makes provision for them and whether or not the person to whom they are payable is a party to the regulated credit agreement or an authorised person.

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- (3) “The borrower” includes—
- (a) any person providing a guarantee or indemnity under the regulated credit agreement, and
  - (b) a person to whom the rights and duties of the borrower under the regulated credit agreement or a person falling within paragraph (a) have passed by assignment or operation of law.
- (4) In relation to an agreement entered into or obligation imposed in contravention of the rules, the rules may—
- (a) provide for the agreement or obligation to be unenforceable against any person or specified person;
  - (b) provide for the recovery of any money or other property paid or transferred under the agreement or other obligation by any person or specified person;
  - (c) provide for the payment of compensation for any loss sustained by any person or specified person as a result of paying or transferring any money or other property under the agreement or obligation.
- (5) The provision that may be made as a result of subsection (4) includes provision corresponding to that made by section 30 (enforceability of agreements resulting from unlawful communications).
- (6) A credit agreement is a contract of the kind mentioned in paragraph 23 of Schedule 2, other than one under which the obligation of the borrower to repay is secured on land: and a credit agreement is a “regulated credit agreement” if any of the following is a regulated activity—
- (a) entering into or administering the agreement;
  - (b) exercising or being able to exercise the rights of the lender under the agreement.
- (7) In this section—
- (a) “specified amount” means an amount specified in or determined in accordance with the rules;
  - (b) “specified period” means a period of a duration specified in or determined in accordance with the rules;
  - (c) “specified person” means a person of a description specified in the rules;
  - (d) subject to that, “specified” means specified in the rules.

### **137D FCA general rules: product intervention**

- (1) The power of the FCA to make general rules includes power to make such rules (“product intervention rules”) prohibiting authorised persons from doing anything mentioned in subsection (2) as appear to it to be necessary or expedient for the purpose of advancing—
- (a) the consumer protection objective or the competition objective, or
  - (b) if the Treasury by order provide for this paragraph to apply, the integrity objective.
- (2) Those prohibited things are—
- (a) entering into specified agreements with any person or specified person;
  - (b) entering into specified agreements with any person or specified person unless requirements specified in the rules have been satisfied;

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- (c) doing anything that would or might result in the entering into of specified agreements by persons or specified persons, or the holding by them of a beneficial or other kind of economic interest in specified agreements;
  - (d) doing anything within paragraph (c) unless requirements specified in the rules have been satisfied.
- (3) “Specified agreements” means agreements of a description specified in general rules made by the FCA.
- (4) “Specified persons” means persons of a description specified in general rules made by the FCA.
- (5) It is of no relevance—
  - (a) whether the entering into of a specified agreement itself constitutes the carrying on of a regulated activity, or
  - (b) whether, in a case within subsection (2)(c) or (d), the specified agreements are with the authorised persons concerned or anyone else.
- (6) The requirements that may be specified under subsection (2)(b) or (d) include in particular—
  - (a) requirements as to the terms and conditions that are to be, or are not to be, included in specified or other agreements, and
  - (b) requirements limiting invitations or inducements to enter into specified or other agreements to those made to specified persons.
- (7) In relation to contraventions of product intervention rules, the rules may—
  - (a) provide for a relevant agreement or obligation to be unenforceable against any person or specified person;
  - (b) provide for the recovery of any money or other property paid or transferred under a relevant agreement or obligation by any person or specified person;
  - (c) provide for the payment of compensation for any loss sustained by any person or specified person as a result of paying or transferring any money or other property under a relevant agreement or obligation.
- (8) “A relevant agreement or obligation” means—
  - (a) a specified agreement;
  - (b) an agreement entered into in contravention of any rule made as a result of subsection (2)(c) or (d);
  - (c) an obligation to which a person is subject as a result of exercising a right conferred by an agreement within paragraph (a) or (b) of this subsection.
- (9) The provision that may be made as a result of subsection (7) includes provision corresponding to that made by section 30 (enforceability of agreements resulting from unlawful communications).
- (10) In this section—
  - (a) any reference to entering into an agreement includes inviting or inducing persons to enter into an agreement, and
  - (b) any reference to an agreement includes an arrangement.

### **137E Orders under s.137D(1)(b)**

- (1) No order may be made under section 137D(1)(b) unless—

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- (a) a draft of the order has been laid before Parliament and approved by a resolution of each House, or
  - (b) subsection (3) applies.
- (2) Subsection (3) applies if an order under section 137D(1)(b) contains a statement that the Treasury are of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved.
- (3) Where this subsection applies the order—
- (a) must be laid before Parliament after being made, and
  - (b) ceases to have effect at the end of the relevant period unless before the end of that period the order is approved by a resolution of each House of Parliament (but without that affecting anything done under the order or the power to make a new order).
- (4) The “relevant period” is a period of 28 days beginning with the day on which the order is made.
- (5) In calculating the relevant period no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

#### **137F Rules requiring participation in benchmark**

- (1) The power of the FCA to make general rules includes power to make rules requiring authorised persons to take specified steps in connection with the setting by a specified person of a specified benchmark.
- (2) The rules may in particular—
- (a) require authorised persons to whom the rules apply to provide information of a specified kind, or expressions of opinion as to specified matters, to persons determined in accordance with the rules;
  - (b) make provision about the form in which and the time by which any information or expression of opinion is to be provided;
  - (c) make provision by reference to any code or other document published by the person responsible for the setting of the benchmark or by any other person determined in accordance with the rules, as the code or other document has effect from time to time.
- (3) Rules making provision of the kind mentioned in subsection (2)(c) may provide that the code or other document is to be capable of affecting obligations imposed by the rules only if specified requirements are met in relation to it.
- (4) In this section—
- “benchmark” has the meaning given in section 22(6);
  - “specified” means specified in or determined in accordance with the rules.

#### **137G The PRA's general rules**

- (1) The PRA may make such rules applying to PRA-authorised persons—
- (a) with respect to the carrying on by them of regulated activities, or
  - (b) with respect to the carrying on by them of activities which are not regulated activities,

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as appear to the PRA to be necessary or expedient for the purpose of advancing any of its objectives.

- (2) Rules made under this section are referred to in this Act as the PRA's general rules.
- (3) The PRA's general rules may make provision applying to PRA-authorised persons even though there is no relationship between the PRA-authorised persons to whom the rules will apply and the persons whose interests will be protected by the rules.
- (4) The PRA's general rules may contain requirements which take into account, in the case of a PRA-authorised person who is a member of a group, any activity of another member of the group.
- (5) The PRA's general rules may not—
  - (a) make provision prohibiting an EEA firm from carrying on, or holding itself out as carrying on, any activity which it has permission conferred by Part 2 of Schedule 3 to carry on in the United Kingdom;
  - (b) make provision, as respects an EEA firm, about any matter for which responsibility is, under any of the single market directives or the emission allowance auctioning regulation, reserved to the firm's home state regulator.

#### **Modifications etc. (not altering text)**

- C10** S. 137G modified by S.I. 2008/2644, art. 27(1A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 147\(b\)\(i\)](#))
- C11** S. 137G modified by S.I. 2008/2546, art. 37(1A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 146\(c\)\(i\)](#))
- C12** S. 137G modified by S.I. 2008/2666, art. 18(1A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 148\(b\)\(i\)](#))
- C13** S. 137G modified by S.I. 2008/2674, art. 29(1A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 149\(b\)\(i\)](#))
- C14** S. 137G modified by S.I. 2008/432, art. 15(1A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 136\(d\)\(i\)](#))
- C15** S. 137G(1) modified by S.I. 2009/3226, [art. 20\(1A\)](#) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 182\(a\)\(i\)](#))
- C16** S. 137G(1) modified by S.I. 2009/814, [art. 9\(1A\)](#) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 167\(b\)\(i\)](#))

### **137H General rules about remuneration**

- (1) This section applies where either regulator exercises its power to make general rules so as to make rules prohibiting persons, or persons of a specified description, from being remunerated in a specified way.
- (2) The rules may—

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- (a) provide that any provision of an agreement that contravenes such a prohibition is void, and
  - (b) provide for the recovery of any payment made, or other property transferred, in pursuance of a provision that is void by virtue of paragraph (a).
- (3) A provision that, at the time the rules are made, is contained in an agreement made before that time may not be rendered void under subsection (2)(a) unless it is subsequently amended so as to contravene a prohibition referred to in that subsection.

### **137I Remuneration policies: Treasury direction to consider compliance**

- (1) This section applies where either regulator exercises its power to make general rules so as to make rules requiring authorised persons, or authorised persons of a description specified in the rules, to act in accordance with a remuneration policy.
- (2) A “remuneration policy” is a policy about the remuneration by an authorised person of—
  - (a) officers,
  - (b) employees, or
  - (c) other persons,
 of a description specified in the rules.
- (3) The Treasury may direct the regulator to consider whether the remuneration policies of authorised persons specified in the direction (or of authorised persons of a description so specified) comply with requirements imposed by rules made by that regulator as to the contents of the policies.
- (4) Before giving a direction under subsection (3), the Treasury must consult the regulator concerned.
- (5) If the regulator considers that a remuneration policy of an authorised person fails to make provision which complies with the requirements mentioned in subsection (3), the regulator must take such steps as it considers appropriate to deal with the failure.
- (6) The steps that the regulator may take include requiring the remuneration policy to be revised.
- (7) “Authorised person”, in relation to the PRA, means PRA-authorised person.

### **137J Rules about recovery plans: duty to consult**

- (1) Before either regulator prepares a draft of any general rules that require each relevant person (or each relevant person of a specified description) to prepare a recovery plan, the regulator must consult—
  - (a) the Treasury, and
  - (b) the Bank of England.
- (2) A “relevant person” is an authorised person in relation to whom any power under Part 1 of the Banking Act 2009 (special resolution regime) is exercisable.
- (3) A “recovery plan” is a document containing information within subsection (4) or (5).



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- (4) Information is within this subsection if it relates to action to be taken to secure that, in the event of specified circumstances affecting the carrying on of the business (or any part of the business) of an authorised person—
  - (a) the business of the authorised person, or
  - (b) a specified part of that business,is capable of being carried on (whether or not by the authorised person and whether or not in the same way as previously).
- (5) Information is within this subsection if it would facilitate the carrying on of the business (or any part of the business) of an authorised person by any other person.
- (6) In this section—
  - “authorised person”, in relation to the PRA, means PRA-authorised person;
  - “specified” means specified in the rules.

### **137K PRA rules about resolution plans: duty to consult**

- (1) Before the PRA prepares a draft of any general rules that require each relevant person (or each relevant person of a specified description) to prepare a resolution plan, the PRA must consult—
  - (a) the Treasury, and
  - (b) the Bank of England.
- (2) A “relevant person” is a PRA-authorised person in relation to whom any power under Part 1 of the Banking Act 2009 (special resolution regime) is exercisable.
- (3) A “resolution plan” is a document containing information within subsection (4) or (5).
- (4) Information is within this subsection if it relates to action to be taken in the event of—
  - (a) circumstances arising in which it is likely that the business (or any part of the business) of an authorised person will fail, or
  - (b) the failure of the business (or any part of the business) of an authorised person.
- (5) Information is within this subsection if it would facilitate anything falling to be done by any person in consequence of that failure.
- (6) An example of information within subsection (5) is information that, in the event of that failure, would facilitate—
  - (a) planning by the Treasury in relation to the possible exercise of any of its powers under Part 1 of the Banking Act 2009, or
  - (b) planning by the Bank of England in relation to the possible exercise of any of its powers under Part 1, 2 or 3 of that Act.

### **137L Interpretation of sections 137J and 137K**

- (1) This section has effect for the interpretation of sections 137J and 137K.
- (2) References to the taking of action include the taking of action by—
  - (a) the authorised person,
  - (b) any other person in the same group as the authorised person, or
  - (c) a partnership of which the authorised person is a member.

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- (3) In subsection (2)(b) the definition of “group” in section 421 applies with the omission of subsection (1)(e) and (f) of that section.
- (4) References to the business of an authorised person include the business of—
  - (a) any person in the same group as the authorised person, and
  - (b) a partnership of which the authorised person is a member.
- (5) For the purposes of section 137K the cases in which the business (or any part of the business) of the authorised person (“A”) is to be regarded as having failed include those where—
  - (a) A enters insolvency,
  - (b) any of the stabilisation options in Part 1 of the Banking Act 2009 is achieved in relation to A, or
  - (c) A falls to be taken for the purposes of the compensation scheme to be unable, or likely to be unable, to satisfy claims against A.
- (6) In subsection (5)(a) “insolvency” includes—
  - (a) bankruptcy,
  - (b) liquidation,
  - (c) bank insolvency,
  - (d) administration,
  - (e) bank administration,
  - (f) receivership,
  - (g) a composition between A and A's creditors, and
  - (h) a scheme of arrangement of A's affairs.

### **137M Special provision relating to adequacy of resolution plans**

- (1) This section applies where the PRA has exercised its power to make general rules so as to make rules requiring PRA-authorised persons, or PRA-authorised persons of a specified description, to prepare a resolution plan.
- (2) The PRA must consult the Treasury and the Bank of England (“the Bank”) about the adequacy of resolution plans required to be prepared by those rules, so far as relating to any matter which may be relevant to the exercise by the Treasury or the Bank of any power under Part 1, 2 or 3 of the Banking Act 2009.
- (3) After being consulted under subsection (2)—
  - (a) the Treasury or the Bank may notify the PRA that, in the opinion of the Treasury or the Bank, a resolution plan fails to make satisfactory provision in relation to any such matter, and
  - (b) if the Treasury or the Bank give a notification under paragraph (a), the Treasury or the Bank must give reasons for being of that opinion to the PRA.
- (4) The PRA must have regard to any notification given under subsection (3)(a) before considering whether any resolution plan makes satisfactory provision in relation to any such matter.
- (5) If—
  - (a) a notification is given under subsection (3)(a), but

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(b) the PRA is nonetheless of the opinion that the resolution plan makes satisfactory provision in relation to any such matter,  
the PRA must give reasons for being of that opinion to the person who gave the notification.

(6) In this section—

“resolution plan” has the same meaning as in section 137K;

“specified” means specified in the rules.

### **137N Recovery plans and resolution plans: restriction on duty of confidence**

(1) A contractual or other requirement imposed on a person (“P”) to keep information in confidence does not apply if—

(a) the information is or may be relevant to anything required to be done as a result of a requirement imposed by general rules made by either regulator to prepare a recovery plan or a resolution plan,

(b) an authorised person or a skilled person requests or requires P to provide the information for the purpose of securing that those things are done, and

(c) the regulator in question has approved the making of the request or the imposition of the requirement before it is made or imposed.

(2) An authorised person may provide information (whether received under subsection (1) or otherwise) that would otherwise be subject to a contractual or other requirement to keep it in confidence if it is provided for the purposes of anything required to be done as a result of a requirement imposed by general rules to prepare a recovery plan or a resolution plan.

(3) In this section, references to preparing a recovery plan or a resolution plan include—

(a) keeping that plan up to date, and

(b) collecting specified information for the purposes of that plan.

(4) In this section, references to a skilled person are to a person appointed in accordance with section 166A.

(5) In this section—

“authorised person”, in relation to rules of the PRA, means a PRA-authorised person;

“specified” means specified in the rules.

### *Specific rule-making powers*

### **137O Threshold condition code**

(1) Either regulator may make rules supplementing any of the conditions for the time being set out in or specified under Schedule 6 that is expressed to be relevant to the discharge of that regulator's functions.

(2) Rules made under this section by a regulator are referred to as that regulator's “threshold condition code”.

(3) A threshold condition code may in particular—

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- (a) specify requirements which a person must satisfy in order to be regarded as satisfying a particular condition in relation to any regulated activities;
  - (b) specify matters which are, or may be, or are not, relevant in determining whether a person satisfies a particular condition in relation to any regulated activities.
- (4) Except where a regulator's threshold condition code so provides, it is not to be regarded as limiting the matters that are, or may be, relevant in determining whether a person satisfies a particular condition in relation to any regulated activities.
- (5) A threshold condition code cannot impose obligations that are enforceable against authorised persons otherwise than through the threshold conditions.

### **137P Control of information rules**

- (1) Either regulator may make rules (“control of information rules”) about the disclosure and use of information held by an authorised person (“A”).
- (2) Control of information rules may—
- (a) require the withholding of information which A would otherwise be required to disclose to a person (“B”) for or with whom A does business in the course of carrying on any regulated or other activity;
  - (b) specify circumstances in which A may withhold information which A would otherwise be required to disclose to B;
  - (c) require A not to use for the benefit of B information—
    - (i) which is held by A, and
    - (ii) which A would otherwise be required to use for the benefit of B;
  - (d) specify circumstances in which A may decide not to use for the benefit of B information within paragraph (c).

### **137Q Price stabilising rules**

- (1) The FCA may make rules (“price stabilising rules”) as to—
- (a) the circumstances and manner in which,
  - (b) the conditions subject to which, and
  - (c) the time when or the period during which,
- action may be taken for the purpose of stabilising the price of investments of specified kinds.
- (2) Price stabilising rules—
- (a) are to be made so as to apply only to authorised persons;
  - (b) may make different provision in relation to different kinds of investment.
- (3) The FCA may make rules which, for the purposes of the relevant exemption provisions, treat a person who acts or engages in conduct—
- (a) for the purpose of stabilising the price of investments, and
  - (b) in conformity with such provisions corresponding to price stabilising rules and made by a body or authority outside the United Kingdom as may be specified in rules made by the FCA,
- as acting, or engaging in that conduct, for that purpose and in conformity with price stabilising rules.

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- (4) “The relevant exemption provisions” are the following provisions of the Financial Services Act 2012—
- (a) section 90(9)(b);
  - (b) section 91(4)(a).

### **137R Financial promotion rules**

- (1) The FCA may make rules applying to authorised persons about the communication by them, or their approval of the communication by others, of invitations or inducements—
- (a) to engage in investment activity, or
  - (b) to participate in a collective investment scheme.
- (2) Rules under this section may, in particular, make provision about the form and content of communications.
- (3) Subsection (1) applies only to communications which—
- (a) if made by a person other than an authorised person, without the approval of an authorised person, would contravene section 21(1), and
  - (b) may be made by an authorised person without contravening section 238(1).
- (4) But subsection (3) does not prevent the FCA from making rules under subsection (1) in relation to a communication that would not contravene section 21(1) if made by a person other than an authorised person, without the approval of an authorised person, if the conditions set out in subsection (5) are satisfied.
- (5) Those conditions are—
- (a) that the communication would not contravene subsection (1) of section 21 because it is a communication to which that subsection does not apply as a result of an order under subsection (5) of that section,
  - (b) that the FCA considers that any of the requirements of—
    - (i) paragraphs 1 to 8 of Article 19 of the markets in financial instruments directive,
    - (ii) any implementing measure made under paragraph 10 of that Article, or
    - (iii) Article 77 of the UCITS directive,apply to the communication, and
  - (c) that the FCA considers that the rules are necessary to secure that the communication satisfies such of the requirements mentioned in paragraph (b) as the FCA considers apply to the communication.
- (6) “Engage in investment activity” has the same meaning as in section 21.
- (7) The Treasury may by order impose limitations on the power to make rules under this section.

### **137S Financial promotion rules: directions given by FCA**

- (1) The FCA may give a direction under this section if—
- (a) an authorised person has made, or proposes to make, a communication or has approved, or proposes to approve, another person's communication, and

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- (b) the FCA considers that there has been, or is likely to be, a contravention of financial promotion rules in respect of the communication or approval.
- (2) A direction under this section may require the authorised person—
- (a) to withdraw the communication or approval;
  - (b) to refrain from making the communication or giving the approval (whether or not it has previously been made or given);
  - (c) to publish details of the direction;
  - (d) to do anything else specified in the direction in relation to the communication or approval.
- (3) A requirement in a direction under this section to refrain from making or approving a communication includes a requirement to refrain from making or approving another communication where—
- (a) the other communication is in all material respects the same as, or substantially the same as, the communication to which the direction relates, and
  - (b) in all the circumstances a reasonable person would think that another direction would be given under this section in relation to the other communication.
- (4) The requirements contained in a direction under this section have effect as follows—
- (a) a requirement to publish details of the direction has effect at such time (if any) as the FCA gives a notice under subsection (8)(a);
  - (b) any other requirement takes effect immediately.
- (5) If the FCA gives a direction under this section to an authorised person—
- (a) it must give written notice to the authorised person, and
  - (b) if the direction relates to the approval by the authorised person of another person's communication, it must also give written notice to that other person.
- (6) The notice must—
- (a) give details of the direction,
  - (b) inform the person to whom the notice is given that the direction takes effect immediately,
  - (c) state the FCA's reasons for giving the direction, and
  - (d) inform the person to whom the notice is given that the person may make representations to the FCA within such period as may be specified in the notice (which may be extended by the FCA).
- (7) The FCA may amend the direction if, having considered any representations made by a person to whom notice is given under subsection (5), it considers it appropriate to do so.
- (8) If, having considered any such representations, the FCA decides not to revoke the direction—
- (a) the FCA must give separate written notice to the persons mentioned in subsection (5)(a) or (b), and
  - (b) any such person may refer the matter to the Tribunal.
- (9) A notice under subsection (8)(a) must—
- (a) give details of the direction and of any amendment of it,
  - (b) state the FCA's reasons for deciding not to revoke the direction and, if relevant, for amending it,

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- (c) inform the person to whom the notice is given of the person's right to refer the matter to the Tribunal, and
  - (d) give an indication of the procedure on such a reference.
- (10) If, having considered any representations made by a person to whom notice is given under subsection (5), the FCA decides to revoke the direction, it must give separate written notice to those persons.
- (11) After the period for making representations in relation to a direction given under this section has ended, the FCA may publish such information about the direction as it considers appropriate (even if the direction is revoked).
- (12) Nothing in this section requires a notice to be given to a person mentioned in subsection (5)(b) if the FCA considers it impracticable to do so.

### *Supplementary powers*

#### **137T General supplementary powers**

Rules made by either regulator—

- (a) may make different provision for different cases and may, in particular, make different provision in respect of different descriptions of authorised persons, activity or investment,
- (b) may make provision by reference to rules made by the other regulator, as those rules have effect from time to time, and
- (c) may contain such incidental, supplemental, consequential and transitional provision as the regulator making the rule considers appropriate.

#### **Modifications etc. (not altering text)**

**C17** S. 137T modified by S.I. 2002/1775, reg. 3(2)(a) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 77\(4\)\(b\)](#)

## **CHAPTER 2**

RULES: MODIFICATION, WAIVER, CONTRAVENTION AND PROCEDURAL PROVISIONS

### *Modification or waiver of rules*

#### **138A Modification or waiver of rules**

- (1) Either regulator may, on the application or with the consent of a person who is subject to rules made by that regulator, direct that all or any of those rules—
- (a) are not to apply to that person, or
  - (b) are to apply to that person with such modifications as may be specified in the direction.
- (2) Subsection (1) does not apply to—
- (a) rules made by either regulator under section 137O (threshold condition code);

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- (b) rules made by the FCA under section 247 (trust scheme rules) [<sup>F2</sup>, section 248 (scheme particulars rules), section 261I (contractual scheme rules) or section 261J (contractual scheme particulars rules)].
- (3) An application must be made in such manner as the regulator may direct.
- (4) A regulator may not give a direction unless it is satisfied that—
  - (a) compliance by the person with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the rules were made, and
  - (b) the direction would not adversely affect the advancement of any of the regulator's objectives.
- (5) In subsection (4)(b) “objectives”, in relation to the FCA, means operational objectives.
- (6) A direction may be given subject to conditions.
- (7) The regulator may—
  - (a) revoke a direction, or
  - (b) vary it on the application, or with the consent, of the person to whom it relates.
- (8) “Direction” means a direction under this section.

#### Textual Amendments

- F2** Words in s. 138A(2)(b) substituted (6.6.2013) by [The Collective Investment in Transferable Securities \(Contractual Scheme\) Regulations 2013 \(S.I. 2013/1388\)](#), regs. 1, **3(4)** (with reg. 24)

#### Modifications etc. (not altering text)

- C18** S. 138A applied by S.I. 2008/2674, art. 29(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 149(b)(aa)(ii)**
- C19** S. 138A modified by S.I. 2002/1775, reg. 3(2)(a) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 77(4)(b)**
- C20** S. 138A applied by S.I. 2009/3226, art. 20(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 182(a)(aa)(ii)**
- C21** S. 138A applied (with modifications) by S.I. 2008/432, art. 15(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 136(d)(aa)(ii)**
- C22** S. 138A applied by S.I. 2008/2644, art. 27(2) (as substituted) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 147(b)(aa)(ii)**
- C23** S. 138A applied by S.I. 2008/2666, art. 18(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 148(b)(aa)(ii)**
- C24** S. 138A applied by S.I. 2008/2546, art. 37(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 146(c)(aa)(ii)**
- C25** S. 138A(1) modified by S.I. 2009/814, art. 9(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 167(b)(ii)**



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- C26** S. 138A(1)(6)(7) excluded by S.I. 2006/3221, reg. 8(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 118(h)(iii)** (with Sch. 2 para. 119)
- C27** Ss. 138A(3)-(7) modified by S.I. 2001/1228, reg. 7(3)(4) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 41(4)**
- C28** Ss. 138A(3)-(7) applied (with modifications) by S.R. 2004/335, reg. 7(3)(4) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 87(4)**
- C29** S. 138A(4) restricted by S.I. 2009/3226, art. 20(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 182(a)(aa)(iii)**
- C30** S. 138A(4) restricted by S.I. 2008/432, art. 15(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 136(d)(aa)(iii)**
- C31** S. 138A(4) restricted by S.I. 2008/2666, art. 18(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 148(b)(aa)(iii)**
- C32** S. 138A(4) restricted by S.I. 2008/2546, art. 37(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 146(c)(aa)(iii)**
- C33** S. 138A(4) excluded by S.I. 2006/3221, reg. 8(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 118(h)(iii)** (with Sch. 2 para. 119)
- C34** S. 138A(4) restricted by S.I. 2008/2644, art. 27(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 147(b)(aa)(ii)**
- C35** S. 138A(4) modified by S.I. 2009/814, art. 9(3)-(5) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 167(b)(iii)(iv)**
- C36** S. 138A(4) restricted by S.I. 2008/2674, art. 29(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 149(b)(aa)(iii)**

### **138B Publication of directions under section 138A**

- (1) Subject to subsection (2), a direction must be published by the regulator concerned in the way appearing to the regulator to be best calculated for bringing it to the attention of—
- (a) persons likely to be affected by it, and
  - (b) persons who are, in the opinion of the regulator, likely to make an application for a similar direction.
- (2) Subsection (1) does not apply if the regulator is satisfied that it is inappropriate or unnecessary to publish the direction.
- (3) In deciding whether it is satisfied as mentioned in subsection (2), the regulator must—
- (a) consider whether the publication of the direction would be detrimental to the stability of the UK financial system,
  - (b) take into account whether the direction relates to a rule contravention of which is actionable in accordance with section 138D,

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- (c) consider whether publication of the direction would prejudice, to an unreasonable degree, the commercial interests of the person concerned or any other member of the person's immediate group, and
  - (d) consider whether its publication would be contrary to an international obligation of the United Kingdom.
- (4) The FCA must consult the PRA before publishing or deciding not to publish a direction which relates to—
- (a) a PRA-authorised person, or
  - (b) an authorised person who has as a member of its immediate group a PRA-authorised person.
- (5) For the purposes of paragraphs (c) and (d) of subsection (3), the regulator must consider whether it would be possible to publish the direction without either of the consequences mentioned in those paragraphs by publishing it without disclosing the identity of the person concerned.
- (6) “Direction” means a direction under section 138A.

**Modifications etc. (not altering text)**

- C37** S. 138B modified (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **9(3)(4)**
- C38** S. 138B applied (with modifications) by S.R. 2004/335, reg. 7(3)(4) (as amended (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 87(4)**)

*Contravention of rules*

**138C Evidential provisions**

- (1) If a particular rule made by either regulator so provides, contravention of the rule does not give rise to any of the consequences provided for by other provisions of this Act.
- (2) A rule made by a regulator which so provides must also provide—
- (a) that contravention may be relied on as tending to establish contravention of such other rule made by that regulator as may be specified, or
  - (b) that compliance may be relied on as tending to establish compliance with such other rule made by that regulator as may be specified.
- (3) A rule may include the provision mentioned in subsection (1) only if the regulator making the rule considers that it is appropriate for it also to include the provision required by subsection (2).
- (4) In this section “rule” does not include a rule made under—
- (a) section 137O (threshold condition code);
  - (b) section 192J (provision of information by parent undertakings).

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### 138D Actions for damages

- (1) A rule made by the PRA may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (2) A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.
- (4) In prescribed cases, a contravention of a rule which by virtue of subsection (1) or (2) would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (5) In subsections (1), (2) and (3) “rule” does not include—
  - (a) Part 6 rules;
  - (b) rules under section 137O (threshold condition code);
  - (c) rules under section 192J (provision of information by parent undertakings);
  - (d) a rule requiring an authorised person to have or maintain financial resources.
- (6) “Private person” has such meaning as may be prescribed.

#### Modifications etc. (not altering text)

- C39** S. 138D applied by S.R. 2004/335, reg. 25(6) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 87(6)**
- C40** S. 138D modified by S.I. 2002/1775, reg. 3(2)(a) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 77(4)(b)**

### 138E Limits on effect of contravening rules

- (1) A person is not guilty of an offence by reason of a contravention of a rule made by either regulator.
- (2) No such contravention makes any transaction void or unenforceable.
- (3) Subsection (2) does not apply in relation to—
  - (a) rules made by the FCA under section 137C, or
  - (b) product intervention rules made by the FCA under section 137D.

#### *Procedural provisions*

### 138F Notification of rules

If either regulator makes, alters or revokes any rules, that regulator must without delay give written notice—

- (a) to the Treasury, and

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(b) to the Bank of England.

### 138G Rule-making instruments

- (1) Any power conferred on either regulator to make rules is exercisable in writing.
- (2) An instrument by which rules are made by either regulator (“a rule-making instrument”) must specify the provision under which the rules are made.
- (3) To the extent that a rule-making instrument does not comply with subsection (2), it is void.
- (4) A rule-making instrument must be published by the regulator making the rule in the way appearing to that regulator to be best calculated to bring it to the attention of the public.
- (5) The regulator making the rule may charge a reasonable fee for providing a person with a copy of a rule-making instrument.
- (6) A person is not to be taken to have contravened any rule made by a regulator if the person shows that at the time of the alleged contravention the rule-making instrument concerned had not been made available in accordance with this section.

### 138H Verification of rules

- (1) The production of a printed copy of a rule-making instrument purporting to be made by a regulator—
  - (a) on which is endorsed a certificate signed by a member of staff of that regulator who is authorised by the regulator for that purpose, and
  - (b) which contains the required statements,
 is evidence (or in Scotland sufficient evidence) of the facts stated in the certificate.
- (2) The required statements are—
  - (a) that the instrument was made by the FCA or the PRA (as the case may be),
  - (b) that the copy is a true copy of the instrument, and
  - (c) that on a specified date the instrument was made available to the public in accordance with section 138G(4).
- (3) A certificate purporting to be signed as mentioned in subsection (1) is to be taken to have been properly signed unless the contrary is shown.
- (4) A person who wishes in any legal proceedings to rely on a rule-making instrument may require the regulator that made the rule to endorse a copy of the instrument with a certificate of the kind mentioned in subsection (1).

#### Modifications etc. (not altering text)

**C41** S. 138H modified (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **3(6)**

**C42** S. 138H excluded by S.I. 2002/1501, art. 12(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 76(c)(i)**

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### **138I Consultation by the FCA**

- (1) Before making any rules, the FCA must—
  - (a) consult the PRA, and
  - (b) after doing so, publish a draft of the proposed rules in the way appearing to the FCA to be best calculated to bring them to the attention of the public.
- (2) The draft must be accompanied by—
  - (a) a cost benefit analysis,
  - (b) an explanation of the purpose of the proposed rules,
  - (c) any statement prepared under section 138K(2),
  - (d) an explanation of the FCA's reasons for believing that making the proposed rules is compatible with its duties under section 1B(1) and (5)(a), and
  - (e) notice that representations about the proposals may be made to the FCA within a specified time.
- (3) Before making the proposed rules, the FCA must have regard to any representations made to it in accordance with subsection (2)(e).
- (4) If the FCA makes the proposed rules, it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2)(e), and
  - (b) its response to them.
- (5) If the rules differ from the draft published under subsection (1)(b) in a way which is, in the opinion of the FCA, significant the FCA must publish—
  - (a) details of the difference (in addition to complying with subsection (4)) together with a cost benefit analysis, and
  - (b) any statement prepared under section 138K(4).
- (6) The requirements to carry out a cost benefit analysis under this section do not apply in relation to rules made under—
  - (a) section 136(2);
  - (b) subsection (1) of section 213 as a result of subsection (4) of that section;
  - (c) section 234;
  - (d) paragraph 23 of Schedule 1ZA;
  - (e) paragraph 12 of Schedule 1A.
- (7) “Cost benefit analysis” means—
  - (a) an analysis of the costs together with an analysis of the benefits that will arise—
    - (i) if the proposed rules are made, or
    - (ii) if subsection (5) applies, from the rules that have been made, and
  - (b) subject to subsection (8), an estimate of those costs and of those benefits.
- (8) If, in the opinion of the FCA—
  - (a) the costs or benefits referred to in subsection (7) cannot reasonably be estimated, or
  - (b) it is not reasonably practicable to produce an estimate,the cost benefit analysis need not estimate them, but must include a statement of the FCA's opinion and an explanation of it.

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- (9) The FCA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1)(b).
- (10) Subsection (1)(a) does not apply to rules made by the FCA in relation to recognised investment exchanges under Part 18.
- (11) This section is subject to section 138L.

#### **Modifications etc. (not altering text)**

- C43** S. 138I excluded (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **8(2)**
- C44** S. 138I excluded by S.I. 2004/454, art. 12(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 89(b)**
- C45** S. 138I excluded by S.I. 2006/3259, reg. 4 (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 120(b)(ii)**
- C46** S. 138I excluded (2.4.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2013 \(S.I. 2013/655\)](#), arts. 1, **9(2)**
- C47** S. 138I(1)(b)(2)(e)(3) applied by S.I. 2008/346, reg. 42(4)(4A) (as substituted) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 134(d)**
- C48** S. 138I(2)(d) excluded (1.4.2013) by [The Financial Services Act 2012 \(Mutual Societies\) Order 2013 \(S.I. 2013/496\)](#), art. 1(1), Sch. 1 para. 6(2), **(3)(a)** (with Sch. 12)

### **138J Consultation by the PRA**

- (1) Before making any rules, the PRA must—
  - (a) consult the FCA, and
  - (b) after doing so, publish a draft of the proposed rules in the way appearing to the PRA to be best calculated to bring them to the attention of the public.
- (2) The draft must be accompanied by—
  - (a) a cost benefit analysis,
  - (b) an explanation of the purpose of the proposed rules,
  - (c) any statement prepared under section 138K(2),
  - (d) an explanation of the PRA's reasons for believing that making the proposed rules is compatible with its duties under—
    - (i) section 2B(1) or, as the case requires, section 2C(1) or 2D(3), and
    - (ii) section 2H, and
  - (e) notice that representations about the proposals may be made to the PRA within a specified time.
- (3) Before making the proposed rules, the PRA must have regard to any representations made to it in accordance with subsection (2)(e).
- (4) If the PRA makes the proposed rules, it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2)(e), and
  - (b) its response to them.

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- (5) If the rules differ from the draft published under subsection (1)(b) in a way which is, in the opinion of the PRA, significant the PRA must publish—
- (a) details of the difference (in addition to complying with subsection (4)) together with a cost benefit analysis, and
  - (b) any statement prepared under section 138K(4).
- (6) The requirements to carry out a cost benefit analysis under this section do not apply in relation to rules made under—
- (a) section 136(2);
  - (b) subsection (1) of section 213 as a result of subsection (4) of that section;
  - (c) section 234;
  - (d) paragraph 31 of Schedule 1ZB;
  - (e) paragraph 12 of Schedule 1A.
- (7) “Cost benefit analysis” means—
- (a) an analysis of the costs together with an analysis of the benefits that will arise—
    - (i) if the proposed rules are made, or
    - (ii) if subsection (5) applies, from the rules that have been made, and
  - (b) subject to subsection (8), an estimate of those costs and of those benefits.
- (8) If, in the opinion of the PRA—
- (a) the costs or benefits referred to in subsection (7) cannot reasonably be estimated, or
  - (b) it is not reasonably practicable to produce an estimate,
- the cost benefit analysis need not estimate them, but must include a statement of the PRA's opinion and an explanation of it.
- (9) The PRA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1)(b).
- (10) This section is subject to section 138L.

**Modifications etc. (not altering text)**

**C49** S. 138J(2)(a) excluded (1.4.2013) by [The Bank of England Act 1998 \(Macro-prudential Measures\) Order 2013 \(S.I. 2013/644\)](#), arts. 1(1), **3(2)**

**C50** S. 138J(5)(a) restricted (25.3.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Miscellaneous Provisions\) Order 2013 \(S.I. 2013/442\)](#), arts. 1(2), **70(3)**

**138K Consultation: mutual societies**

- (1) Subsection (2) applies where a regulator proposes to make a rule (“the proposed rule”) which would apply both to—
- (a) authorised persons which are mutual societies, and
  - (b) other authorised persons.
- (2) The regulator must prepare a statement setting out—

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- (a) its opinion whether or not the impact of the proposed rule on persons within subsection (1)(a) will be significantly different from its impact on persons within subsection (1)(b), and
  - (b) if so, details of the difference.
- (3) Subsection (4) applies where a regulator makes a rule which—
- (a) applies both to—
    - (i) authorised persons which are mutual societies, and
    - (ii) other authorised persons, and
  - (b) differs from the draft of the proposed rule published under section 138I(1)(b) or section 138J(1)(b) (as the case may be).
- (4) The regulator must prepare a statement setting out—
- (a) its opinion whether or not the impact of the rule is significantly different from the impact of the proposed rule on—
    - (i) the persons within subsection (3)(a)(i), and
    - (ii) those persons as compared with persons within subsection (3)(a)(ii), and
  - (b) if so, details of the difference.
- (5) A “mutual society” is—
- (a) a building society within the meaning of the Building Societies Act 1986;
  - (b) a friendly society within the meaning of the Friendly Societies Act 1992;
  - (c) a registered society within the meaning of the Industrial and Provident Societies Act 1965;
  - (d) an EEA mutual society.
- (6) An “EEA mutual society” is—
- (a) a body which is a European Cooperative Society for the purposes of Council Regulation (EC) No 1435/2003 (statute for a European Cooperative Society);
  - (b) a body which is established as a cooperative under the law of an EEA state as mentioned in that Regulation;
  - (c) a body which is a cooperative or mutual undertaking of such description as the Treasury specify by order and which is established or operates in accordance with the laws of an EEA state.

**Modifications etc. (not altering text)**

**C51** S. 138K excluded (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **8(2)**

**138L Consultation: general exemptions**

- (1) Sections 138I(1)(b) and (2) to (5) and 138K do not apply in relation to rules made by the FCA if the FCA considers that the delay involved in complying with them would be prejudicial to the interests of consumers, as defined in section 425A.
- (2) Sections 138J(1)(b) and (2) to (5) and 138K do not apply in relation to rules made by the PRA if the PRA considers that the delay involved in complying with them would—
  - (a) be prejudicial to the safety and soundness of PRA-authorised persons, or



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- (b) in a case where section 2C applies, be prejudicial to securing the appropriate degree of protection for policyholders.
- (3) The provisions listed in subsection (4) do not apply if the regulator concerned considers that, making the appropriate comparison—
  - (a) there will be no increase in costs, or
  - (b) there will be an increase in costs but that increase will be of minimal significance.
- (4) Those provisions are—
  - (a) subsections (2)(a) and (5)(a) of section 138I;
  - (b) subsections (2)(a) and (5)(a) of section 138J.
- (5) The “appropriate comparison” means—
  - (a) in relation to section 138I(2)(a) or 138J(2)(a), a comparison between the overall position if the rules are made and the overall position if the rules are not made;
  - (b) in relation to section 138I(5)(a) or 138J(5)(a), a comparison between the overall position after the making of the rules and the overall position before they were made.

#### **Modifications etc. (not altering text)**

- C52** S. 138L(1)(2) modified by S.I. 2008/2666, art. 19(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 148\(c\)\(i\)](#)
- C53** S. 138L(1)(2) modified by S.I. 2009/3226, art. 21(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 182\(b\)\(i\)](#)
- C54** S. 138L(1)(2) modified by S.I. 2008/2674, art. 30(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 149\(c\)\(i\)](#)
- C55** S. 138L(1)(2) modified by S.I. 2008/2546, art. 38(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 146\(d\)\(i\)](#)
- C56** S. 138L(1)(2) modified by S.I. 2008/2644, art. 28(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 147\(c\)\(i\)](#)
- C57** S. 138L(1)(2) modified by S.I. 2008/432, art. 16(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 136\(e\)\(aa\)\(i\)](#)
- C58** S. 138L(1)(2) modified by S.I. 2009/814, art. 10(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 167\(c\)\(i\)](#)

#### **138M Consultation: exemptions for temporary product intervention rules**

- (1) Sections 138I(1)(b) and (2) to (5) and 138K do not apply in relation to product intervention rules made by the FCA if it considers that it is necessary or expedient not to comply with them for the purpose of advancing—
  - (a) the consumer protection objective or the competition objective, or

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- (b) if an order under section 137D(1)(b) is in force, the integrity objective.
- (2) Any rules made as a result of subsection (1) (“temporary product intervention rules”) are to cease to have effect at the end of the period specified in the rules.
- (3) The longest period that may be specified is the period of 12 months beginning with the day on which the rules come into force.
- (4) Nothing in subsection (2) prevents the FCA from revoking temporary product intervention rules before the end of the period mentioned there.
- (5) If the FCA has made temporary product intervention rules (“the initial rules”), it may not make further temporary product intervention rules containing the same, or substantially the same, provision as that contained in the initial rules until the prohibited period has ended.
- (6) “The prohibited period” means the period of 12 months beginning with the day on which the period mentioned in subsection (2) ends (whether or not the initial rules have been revoked before the end of the period mentioned there).

### **138N Temporary product intervention rules: statement of policy**

- (1) The FCA must prepare and issue a statement of its policy with respect to the making of temporary product intervention rules.
- (2) The FCA may at any time alter or replace a statement issued under this section.
- (3) If a statement issued under this section is altered or replaced, the FCA must issue the altered or replacement statement.
- (4) The FCA must, without delay, give the Treasury a copy of any statement which it publishes under this section.
- (5) A statement issued under this section must be published by the FCA in the way appearing to the FCA to be best calculated to bring it to the attention of the public.
- (6) The FCA may charge a reasonable fee for providing a person with a copy of the statement.

### **138O Statement of policy under section 138N: procedure**

- (1) Before issuing a statement under section 138N, the FCA must publish a draft of the proposed statement in the way appearing to the FCA to be best calculated to bring it to the attention of the public.
- (2) The draft must be accompanied by notice that representations about the proposal may be made to the FCA within a specified time.
- (3) Before issuing the proposed statement, the FCA must have regard to any representations made to it in accordance with subsection (2).
- (4) If the FCA issues the proposed statement it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2), and
  - (b) its response to them.

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- (5) If the statement differs from the draft published under subsection (1) in a way which is, in the opinion of the FCA, significant, the FCA must (in addition to complying with subsection (4)) publish details of the difference.
- (6) The FCA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1).
- (7) This section also applies to a proposal to alter or replace a statement.

## CHAPTER 3

### GUIDANCE

#### 139A Power of the FCA to give guidance

- (1) The FCA may give guidance consisting of such information and advice as it considers appropriate—
  - (a) with respect to the operation of specified parts of this Act and of any rules made by the FCA;
  - (b) with respect to any other matter relating to functions of the FCA;
  - (c) with respect to any other matters about which it appears to the FCA to be desirable to give information or advice.
- (2) The FCA may give financial or other assistance to persons giving information or advice of a kind which the FCA could give under this section.
- (3) Subsection (5) applies where the FCA proposes to give guidance to FCA-regulated persons generally, or to a class of FCA-regulated persons, in relation to rules to which those persons are subject.
- (4) Subsection (5) also applies in relation to guidance which the FCA proposes to give to persons generally, or to a class of person, in relation to its functions under the short selling regulation.
- (5) Where this subsection applies, subsections (1), (2)(e) and (3) of section 138I (consultation) apply to the proposed guidance as they apply to proposed rules, unless the FCA considers that the delay in complying with those provisions would be prejudicial to the interests of consumers.
- (6) The FCA may—
  - (a) publish its guidance,
  - (b) offer copies of its published guidance for sale at a reasonable price, and
  - (c) if it gives guidance in response to a request made by any person, make a reasonable charge for that guidance.
- (7) In this Chapter, references to guidance given by the FCA include references to any recommendations made by the FCA to FCA-regulated persons generally, or to any class of FCA-regulated person.
- (8) “Consumers” has the meaning given in section 1G.
- (9) “FCA-regulated person” means—
  - (a) an authorised person, or

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- (b) any person who is otherwise subject to rules made by the FCA.

#### **Modifications etc. (not altering text)**

- C59** S. 139A modified by S.I. 2008/432, art. 16(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 136\(e\)\(aa\)\(ii\)](#)
- C60** S. 139A modified by S.I. 2008/2644, art. 28(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 147\(c\)\(aa\)\(ii\)](#)
- C61** S. 139A modified by S.I. 2009/3226, art. 21(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 182\(b\)\(ii\)](#)
- C62** S. 139A modified by S.I. 2008/2666, art. 19(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 148\(c\)\(aa\)\(ii\)](#)
- C63** S. 139A modified by S.I. 2008/2674, art. 30(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 149\(c\)\(aa\)\(ii\)](#)
- C64** S. 139A modified by S.I. 2009/814, art. 10(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 167\(c\)\(ii\)](#)
- C65** S. 139A modified by S.I. 2008/2546, art. 38(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 146\(d\)\(ii\)](#)
- C66** S. 139A(3) applied (1.4.2013) by [The Financial Services Act 2012 \(Mutual Societies\) Order 2013 \(S.I. 2013/496\)](#), art. 1(1), [Sch. 1 para. 8](#) (with Sch. 12)
- C67** S. 139A(3) excluded (2.4.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2013 \(S.I. 2013/655\)](#), arts. 1, [9\(2\)](#)
- C68** S. 139A(5) excluded by S.I. 2004/454, art. 12(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 89\(b\)](#)
- C69** S. 139A(5) excluded by S.I. 2006/3259, reg. 4 (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 120\(b\)\(ii\)](#)

### **139B Notification of FCA guidance to the Treasury**

- (1) On giving any general guidance, the FCA must give written notice to the Treasury without delay.
- (2) If the FCA alters any of its guidance, it must give written notice to the Treasury without delay.
- (3) The notice under subsection (2) must include details of the alteration.
- (4) If the FCA revokes any of its general guidance, it must give written notice to the Treasury without delay.
- (5) “General guidance” means guidance given by the FCA under section 139A which is—
  - (a) given to persons generally, to FCA-regulated persons generally or to a class of FCA-regulated person,
  - (b) intended to have continuing effect, and

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- (c) given in writing or other legible form.
- (6) “FCA-regulated person” has the same meaning as in section 139A.

**Modifications etc. (not altering text)**

**C70** S. 139B(5) applied (1.4.2013) by [The Financial Services Act 2012 \(Mutual Societies\) Order 2013 \(S.I. 2013/496\)](#), art. 1(1), [Sch. 1 para. 8](#) (with [Sch. 12](#))

## CHAPTER 4

### COMPETITION SCRUTINY

#### 140A Interpretation

- (1) In this Chapter—
  - “market in the United Kingdom” includes—
    - (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory, and
    - (b) any market which operates only in a part of the United Kingdom;
  - “the OFT” means the Office of Fair Trading;
  - “practices”, in relation to each regulator, means practices adopted by that regulator in the exercise of functions under this Act;
  - “regulating provisions” means—
    - (a) in relation to the FCA, any—
      - (i) rules of the FCA;
      - (ii) general guidance (as defined by section 139B(5));
      - (iii) statement issued by the FCA under section 64;
      - (iv) code issued by the FCA under section 64 or 119;
    - (b) in relation to the PRA, any—
      - (i) rules of the PRA;
      - (ii) statement issued by the PRA under section 64;
      - (iii) code issued by the PRA under section 64.
- (2) In this Chapter each of the Competition Commission and the OFT is “a competition authority”.
- (3) For the purposes of this Chapter, any reference to a feature of a market in the United Kingdom for goods or services is to be read as a reference to—
  - (a) the structure of the market concerned or any aspect of that structure,
  - (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned, or
  - (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
- (4) In subsection (3) “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.

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## **140B Advice about effect of regulating provision or practice**

- (1) In this Chapter, any reference to the giving of “section 140B advice” to a regulator is to be read in accordance with this section.
- (2) The OFT gives “section 140B advice” to a regulator if—
  - (a) it gives advice to the regulator under section 7 of the Enterprise Act 2002 (provision of competition advice to Ministers etc.), and
  - (b) the advice states that in the opinion of the OFT one or more of the things mentioned in subsection (4) may cause, or contribute to, the effect mentioned in subsection (5), or might be expected to do so in the future.
- (3) The Competition Commission gives “section 140B advice” to a regulator if a report published by it under section 136 of the Enterprise Act 2002 (investigations and reports on market investigation reference) contains—
  - (a) a decision that one or more of the things mentioned in subsection (4) may cause, or contribute to, the effect mentioned in subsection (5), and
  - (b) a recommendation that any action should be taken by that regulator.
- (4) Those things are—
  - (a) a regulating provision or practice of the regulator,
  - (b) two or more regulating provisions or practices (of that regulator or of both regulators) taken together,
  - (c) a particular combination of regulating provision or practices (of that regulator or of both regulators), or
  - (d) a feature, or combination of features, of a market in the United Kingdom that could be dealt with by regulating provision or practices (of that regulator or of both regulators).
- (5) That effect is the prevention, restriction or distortion of competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.

## **140C Consultation with regulator**

Before giving section 140B advice, a competition authority must consult the regulator to which the advice is to be given.

## **140D Investigation powers of OFT**

Where the OFT is deciding whether to exercise its power under section 7 of the Enterprise Act 2002 to give advice which, if given, would be section 140B advice, section 174 of that Act has effect as if—

- (a) in subsection (1), for the words from “make a reference” to the end there were substituted “give advice which would for the purposes of Chapter 4 of Part 9A of the Financial Services and Markets Act 2000 be section 140B advice”, and
- (b) in subsection (2), for “make such a reference” there were substituted “give such advice”.

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#### **140E Publication by OFT of section 140B advice**

The OFT must publish in such manner as it thinks fit any section 140B advice given by it to either regulator.

#### **140F Duty of Competition Commission to send report to regulator**

- (1) Where the publication of a report of the Competition Commission under section 142 of the Enterprise Act 2002 constitutes the giving of section 140B advice to either regulator, the Commission must give a copy of the report to that regulator.
- (2) The day on which the copy is given is the day on which the regulator is to be taken to receive the section 140B advice.

#### **140G Duty of regulator to publish response**

- (1) A regulator must, within 90 days after the day on which it receives section 140B advice, publish a response stating how it proposes to deal with the advice and in particular—
  - (a) whether it has decided to take any action, or to take no action, in response to the advice,
  - (b) if it has decided to take action, what action it proposes to take, and
  - (c) its reasons for its proposals.
- (2) Publication is to be in such manner as the regulator thinks fit.

#### **140H Role of the Treasury**

- (1) This section applies where—
  - (a) a competition authority has given section 140B advice and the regulator has published a response under section 140G, and
  - (b) the competition authority remains of the opinion that one or more of the things mentioned in section 140B(4) may cause or contribute to, the effect mentioned in section 140B(5).
- (2) The competition authority may refer the section 140B advice to the Treasury by sending the Treasury—
  - (a) a copy of the section 140B advice and of the response, and
  - (b) a request to consider the advice and the response.
- (3) In referring the section 140B advice, the competition authority may give advice to the Treasury as to what action, if any, ought to be taken by the regulator.
- (4) If section 140B advice is referred to them, the Treasury may give a direction to the regulator to which the advice was given requiring the regulator to take such action as may be specified in the direction.
- (5) In considering whether to give a direction and, if so, what action to specify, the Treasury must have regard to—
  - (a) any advice the competition authority has given under subsection (3),
  - (b) any action which the section 140B advice suggests that the regulator should take, and
  - (c) the response of the regulator to the section 140B advice.

*Status: Point in time view as at 06/06/2013.*

*Changes to legislation: Financial Services and Markets Act 2000, PART 9A is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)*

- (6) The direction may not require the regulator to do anything that it has no power to do, but the existence of the direction is relevant to the exercise of any discretion conferred on the regulator.
- (7) Before giving a direction under this section, the Treasury must consult the regulator to which it is to be given.
- (8) If the Treasury give a direction under this section they must—
  - (a) publish in such manner as they think fit a statement giving details of the direction and of their reasons for giving it, and
  - (b) lay a copy of the statement before Parliament.

## CHAPTER 5

### POWER TO MAKE CONSEQUENTIAL AMENDMENTS

#### **141A Power to make consequential amendments of references to rules etc.**

- (1) This section applies if—
  - (a) a provision of primary or subordinate legislation (whenever passed or made) contains a reference (however expressed) to rules of either regulator or to guidance of the FCA,
  - (b) it appears to the Treasury or the Secretary of State that the reference requires amendment in consequence of the exercise by that regulator of its power under this Part to make, alter or revoke its rules or the exercise by the FCA of its power to make, alter or revoke its guidance.
- (2) The Treasury or the Secretary of State may by order make such amendment of the legislation referred to in subsection (1)(a) as appears to them to be necessary or expedient in consequence of the exercise by the regulator of the power mentioned in subsection (1)(b).
- (3) The power conferred by subsection (2) includes power—
  - (a) to replace a reference to the rules of one regulator with a reference to the rules of the other regulator or to the rules of both regulators;
  - (b) to replace a reference to the rules of both regulators with a reference to the rules of one regulator.
- (4) In subsection (1)(a) “subordinate legislation” does not include rules of either regulator.]



**Status:**

Point in time view as at 06/06/2013.

**Changes to legislation:**

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