



# Financial Services and Markets Act 2000

## 2000 CHAPTER 8

### PART XXVIII

#### MISCELLANEOUS

##### *Schemes for reviewing past business*

#### **404 Schemes for reviewing past business.**

- (1) Subsection (2) applies if the Treasury are satisfied that there is evidence suggesting—
  - (a) that there has been a widespread or regular failure on the part of authorised persons to comply with rules relating to a particular kind of activity; and
  - (b) that, as a result, private persons have suffered (or will suffer) loss in respect of which authorised persons are (or will be) liable to make payments (“compensation payments”).
- (2) The Treasury may by order (“a scheme order”) authorise the Authority to establish and operate a scheme for—
  - (a) determining the nature and extent of the failure;
  - (b) establishing the liability of authorised persons to make compensation payments; and
  - (c) determining the amounts payable by way of compensation payments.
- (3) An authorised scheme must be made so as to comply with specified requirements.
- (4) A scheme order may be made only if—
  - (a) the Authority has given the Treasury a report about the alleged failure and asked them to make a scheme order;
  - (b) the report contains details of the scheme which the Authority propose to make; and
  - (c) the Treasury are satisfied that the proposed scheme is an appropriate way of dealing with the failure.

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- (5) A scheme order may provide for specified provisions of or made under this Act to apply in relation to any provision of, or determination made under, the resulting authorised scheme subject to such modifications (if any) as may be specified.
- (6) For the purposes of this Act, failure on the part of an authorised person to comply with any provision of an authorised scheme is to be treated (subject to any provision made by the scheme order concerned) as a failure on his part to comply with rules.
- (7) The Treasury may prescribe circumstances in which loss suffered by a person (“A”) acting in a fiduciary or other prescribed capacity is to be treated, for the purposes of an authorised scheme, as suffered by a private person in relation to whom A was acting in that capacity.
- (8) This section applies whenever the failure in question occurred.
- (9) “Authorised scheme” means a scheme authorised by a scheme order.
- (10) “Private person” has such meaning as may be prescribed.
- (11) “Specified” means specified in a scheme order.

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

C1 S. 404 modified (6.8.2001) by S.I. 2001/2512, arts. 1(1), 6(1)

VALID FROM 12/10/2010

**Rules under s.404: supplementary**

<sup>F1</sup>  
<sup>F1</sup> 404A

- (1) Rules under section 404 may make provision—
  - (a) specifying the activities and requirements in relation to which relevant firms are to carry out investigations under consumer redress schemes;
  - (b) setting out, in relation to any specified description of case, examples of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement;
  - (c) setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of—
    - (i) assessing evidence as to a failure to comply with a requirement; or
    - (ii) determining whether such a failure has caused (or may cause) loss or damage to consumers;
  - (d) as to the kinds of redress that are, or are not, to be made to consumers in specified descriptions of case and the way in which redress is to be determined in specified descriptions of case;
  - (e) as to the things that relevant firms are, or are not, to do in establishing and operating consumer redress schemes;
  - (f) securing that relevant firms are not required to investigate anything occurring after a specified date;
  - (g) specifying the times by which anything required to be done under any consumer redress scheme is to be done;
  - (h) requiring relevant firms to provide information to the Authority;

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- (i) authorising one or more competent persons to do anything for the purposes of, or in connection with, the establishment or operation of any consumer redress scheme;
  - (j) for the nomination or approval by the Authority of persons authorised under paragraph (i);
  - (k) as to the circumstances in which, instead of a relevant firm, the Authority (or one or more competent persons acting on the Authority's behalf) may carry out the investigation and take the other relevant steps under any consumer redress scheme;
  - (l) as to the powers to be available to those carrying out an investigation by virtue of paragraph (k);
  - (m) as to the enforcement of any redress (for example, in the case of a money award, as a debt owed by a relevant firm).
- (2) The only examples that may be set out in the rules as a result of subsection (1)(b) are examples of things done, or omitted to be done, that have been, or would be, held by a court or tribunal to constitute a failure to comply with a requirement.
- (3) Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there.
- (4) The Authority must exercise the power conferred as a result of subsection (1)(d) so as to secure that, in relation to any description of case, the only kinds of redress to be made are those which it considers to be just in relation to that description of case.
- (5) In acting under subsection (4), the Authority must have regard (among other things) to the nature and extent of the losses or damage in question.
- (6) The provision that may be made under subsection (1)(h) includes provision applying (with or without modifications)—
  - (a) any provision of section 165; or
  - (b) any provision of Part 11 relating to that section.
- (7) The reference in subsection (1)(k) to the other relevant steps under any consumer redress scheme is a reference to the Authority making the determinations mentioned in section 404(6) and (7) (with the firm still required to make the redress).
- (8) If the rules include provision under subsection (1)(k), they must also include provision for—
  - (a) giving warning and decision notices, and
  - (b) conferring rights on relevant firms to refer matters to the Tribunal,in relation to any determination mentioned in section 404(6) and (7) made by the Authority.
- (9) Nothing in this section is to be taken as limiting the power conferred by section 404.]

#### Textual Amendments

- F1** Ss. 404-404G and preceding cross-heading substituted (12.10.2010) for s. 404 and preceding cross-heading by [Financial Services Act 2010 \(c. 28\)](#), [ss. 14, 26\(3\)](#); [S.I. 2010/2480](#), [art. 2](#)

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VALID FROM 12/10/2010

#### **404B Complaints to the ombudsman scheme**

- (1) If—
  - (a) a consumer makes a complaint under the ombudsman scheme in respect of an act or omission of a relevant firm, and
  - (b) at the time the complaint is made, the subject-matter of the complaint falls to be dealt with (or has been dealt with) under a consumer redress scheme,
 the way in which the complaint is to be determined by the ombudsman is to be as mentioned in subsection (4).
- (2) If a consumer—
  - (a) is not satisfied with a determination made by a relevant firm under a consumer redress scheme, or
  - (b) considers that a relevant firm has failed to make a determination in accordance with a consumer redress scheme,
 the consumer may, in respect of that determination or failure, make a complaint under the ombudsman scheme.
- (3) A complaint mentioned in subsection (1) or (2) is referred to in the following provisions of this section as a “relevant complaint”.
- (4) A relevant complaint is to be determined by reference to what, in the opinion of the ombudsman, the determination under the consumer redress scheme should be or should have been (subject to subsection (5)).
- (5) If, in determining a relevant complaint, the ombudsman determines that the firm should make (or should have made) a payment of an amount to the consumer, the amount awarded by the ombudsman (a “money award”) must not exceed the monetary limit (within the meaning of section 229).
- (6) But the ombudsman may recommend that the firm pay a larger amount.
- (7) A money award—
  - (a) may specify the date by which the amount awarded is to be paid;
  - (b) may provide for interest to be payable, at a rate specified in the award, on any amount which is not paid by that date; and
  - (c) is enforceable by the consumer in accordance with Part 3 or 3A of Schedule 17 (as the case may be).
- (8) If, in determining a relevant complaint, the ombudsman determines that the firm should take (or should have taken) particular action in relation to the consumer, the ombudsman may direct the firm to take that action.
- (9) Compliance with a direction under subsection (8) is enforceable, on the application of the consumer, by an injunction or, in Scotland, by an order for specific performance under section 45 of the Court of Session Act 1988.
- (10) In consequence of the provision made by this section, sections 228(2) and 229 do not apply in relation to relevant complaints; but all other provision made by or under Part 16 applies in relation to those complaints.

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- (11) The compulsory jurisdiction of the ombudsman scheme is to include the jurisdiction resulting from this section.
- (12) Nothing in subsection (1) is to be taken as requiring the ombudsman to determine a complaint in any case where (apart from that subsection) the complaint would not fall to be determined (whether as a result of rules made under Schedule 17 or otherwise).
- (13) Nothing in subsection (2) is to be taken as conferring an entitlement on a person who, for the purposes of the ombudsman scheme, is not an eligible complainant in relation to the subject-matter of the determination mentioned there.

#### Textual Amendments

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VALID FROM 12/10/2010

#### 404C Enforcement

The following provisions—

- (a) Part 14 (disciplinary measures), and
  - (b) so much of this Act as relates to any provision of that Part,
- (which apply only in relation to authorised persons) are also to apply in relation to relevant firms which are not (or are no longer) authorised persons.

#### Textual Amendments

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VALID FROM 12/10/2010

#### 404D Applications to Tribunal to quash rules or provision of rules

- (1) Any person may apply to the Tribunal for a review of any rules made under section 404.
- (2) The Tribunal may—
  - (a) dismiss the application; or
  - (b) make an order (a “quashing order”) quashing any rules made under section 404 or any provision of those rules.
- (3) An application may be made only if permission to make it has first been obtained from the Tribunal.
- (4) The Tribunal may grant permission to make an application only if it considers that the applicant has a sufficient interest in the matter to which the application relates.

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- (5) The general rule is that, in determining an application, the Tribunal is to apply the principles applicable on an application for judicial review.
- (6) If (or so far as) an application relates to an example set out in the rules as a result of section 404A(1)(b), the Tribunal may determine whether the example constitutes a failure to comply with the requirement in question.
- (7) If (or so far as) an application relates to a matter set out in the rules as a result of section 404A(1)(c), the Tribunal may determine whether the matter should be taken into account as mentioned in that provision.
- (8) In the case of an application within subsection (6) or (7), the Tribunal's jurisdiction under that subsection is in addition to its jurisdiction under subsection (5).
- (9) A quashing order may be enforced as if it were an order made, on an application for judicial review, by the High Court or, in Scotland, the Court of Session.
- (10) The Tribunal may award damages to the applicant if—
  - (a) the application includes a claim for damages arising from any matter to which the application relates; and
  - (b) the Tribunal is satisfied that an award would have been made by the High Court or, in Scotland, the Court of Session if the claim had been made in an action begun in that court by the applicant when making the application.
- (11) An award of damages under subsection (10) may be enforced as if it were an award made by the High Court or, in Scotland, the Court of Session.
- (12) In the case of any proceedings under this section, the judge presiding at the proceedings must be—
  - (a) a judge of the High Court or the Court of Appeal or a judge of the Court of Session; or
  - (b) such other person as may be agreed from time to time by—
    - (i) the Lord Chief Justice, the Lord President or the Lord Chief Justice of Northern Ireland (as the case may be); and
    - (ii) the Senior President of Tribunals.
- (13) Section 133 does not apply in the case of an application under this section, but—
  - (a) Tribunal Procedure Rules may make provision for the suspension of rules made under section 404 or of any provision of those rules, pending determination of the application; and
  - (b) in the case of an application within subsection (6) or (7), the Tribunal may consider any evidence relating to the application's subject-matter, whether or not it was available at the time the rules were made.
- (14) If—
  - (a) the Tribunal refuses to grant permission to make an application under this section, and
  - (b) on an appeal by the applicant, the Court of Appeal grants the permission, the Court of Appeal may go on to decide the application under this section.

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### 404E Meaning of “consumers”

- (1) For the purposes of sections 404 to 404B “consumers” means persons who—
  - (a) have used, or may have contemplated using, any of the services within subsection (2); or
  - (b) have relevant rights or interests in relation to any of the services within that subsection.
- (2) The services within this subsection are services provided by—
  - (a) authorised persons in carrying on regulated activities;
  - (b) authorised persons in carrying on a consumer credit business in connection with the accepting of deposits;
  - (c) authorised persons in communicating, or approving the communication by others of, invitations or inducements to engage in investment activity;
  - (d) authorised persons who are investment firms, or credit institutions, in providing relevant ancillary services;
  - (e) persons acting as appointed representatives; or
  - (f) payment service providers in providing payment services.
- (3) A person (“P”) has a “relevant right or interest” in relation to any services within subsection (2) if P has a right or interest—
  - (a) which is derived from, or is otherwise attributable to, the use of the services by others; or
  - (b) which may be adversely affected by the use of the services by persons acting on P's behalf or in a fiduciary capacity in relation to P.
- (4) If a person is providing a service within subsection (2) as a trustee, the persons who have been, or may have been, beneficiaries of the trust are to be treated as persons who have used, or may have contemplated using, the service.
- (5) A person who deals with another person (“B”) in the course of B providing a service within subsection (2) is to be treated as using the service.
- (6) In this section—
  - “accepting”, in relation to deposits, includes agreeing to accept;
  - “consumer credit business” has the same meaning as in the Consumer Credit Act 1974 (see section 189(1));
  - “credit institution” has the meaning given by section 138(1B);
  - “engage in investment activity” has the meaning given by section 21;
  - “payment services” has the same meaning as in the Payment Services Regulations 2009;

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“payment service provider” means a person who is a payment service provider for the purposes of those regulations as a result of falling within any of paragraphs (a) to (e) of the definition in regulation 2(1);

“relevant ancillary services” has the meaning given by section 138(1C).

VALID FROM 12/10/2010

#### 404F Other definitions etc

- (1) For the purposes of sections 404 to 404B—
  - “redress” includes—
    - (a) interest; and
    - (b) a remedy or relief which could not be awarded in legal proceedings;
  - “specified” means specified in rules made under section 404.
- (2) In determining for the purposes of those sections whether an authorised person has failed to comply with a requirement, anything which an appointed representative has done or omitted as respects business for which the authorised person has accepted responsibility is to be treated as having been done or omitted by the authorised person.
- (3) References in those sections to the failure by a relevant firm to comply with a requirement applicable to the carrying on by it of any activity include anything done, or omitted to be done, by it in carrying on the activity—
  - (a) which is in breach of a duty or other obligation, prohibition or restriction; or
  - (b) which otherwise gives rise to the availability of a remedy or relief in legal proceedings.
- (4) It does not matter whether—
  - (a) the duty or other obligation, prohibition or restriction, or
  - (b) the remedy or relief,
 arises as a result of any provision made by or under this or any other Act, a rule of law or otherwise.
- (5) References in sections 404 to 404B to a relevant firm include—
  - (a) a person who was at any time a relevant firm but has subsequently ceased to be one; and
  - (b) a person who has assumed a liability (including a contingent one) incurred by a relevant firm in respect of a failure by the firm to comply with a requirement applicable to the carrying on by it of any activity.
- (6) References in those sections to the carrying on of an activity by a relevant firm are, accordingly, to be read in that case with the appropriate modifications.
- (7) If the Authority varies a permission or authorisation of a person so as to impose requirements on the person to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme, the provision that may be included in the permission or authorisation as varied includes—
  - (a) provision imposing requirements on the person corresponding to those that could be included in rules made under section 404; and



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(b) provision corresponding to section 404B.

(8) In subsection (7) the reference to the variation of a permission or authorisation by the Authority is a reference to—

- (a) the variation under section 44 or 45 of a Part IV permission; or
- (b) the variation under regulation 8 or 11 of the Payment Services Regulations 2009 of an authorisation under those regulations.

VALID FROM 12/10/2010

#### **404G Power to widen the scope of consumer redress schemes**

- (1) The Treasury may by order amend the definition of “relevant firms” in section 404 or the definition of “consumers” in section 404E (or both).
- (2) An order under this section may make consequential amendments of any provision of sections 404 to 404F.]

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