

FINANCIAL SERVICES ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

FSA's disciplinary powers

Section 9: Suspending permission to carry on regulated activities etc

152. Sections 205 and 206 of FSMA set out the disciplinary measures available to the FSA in respect of a contravention by an authorised person of a requirement imposed by or under FSMA or a directly applicable EU regulation made under the markets in financial instruments directive.
153. This section inserts a new section 206A into FSMA providing the FSA with additional sanctions to deal with such breaches. Those additional sanctions are the power to suspend, limit or otherwise restrict an authorised person's permission for up to a maximum of 12 months.
154. The section permits the FSA to impose one or more of the available sanctions in respect of the same contravention.
155. Sections 207 and 208 of FSMA set out the procedure for taking disciplinary measures, namely a warning notice followed by a decision notice and right of referral to the Tribunal. *Paragraphs 18 and 19 of Schedule 2* make consequential amendments to those sections to apply the same procedure to the imposition of the new sanctions.
156. Section 210 of FSMA requires the FSA to issue a statement of policy regarding the imposition of a financial penalty under section 206. *Paragraph 20 of Schedule 2* makes a consequential amendment to that section so that the statement of policy must also cover the length of any suspensions or restrictions imposed under the new s206A.

Section 10: Removal of restriction on imposing a penalty and cancelling authorisation

157. Section 206(2) of FSMA prohibits the FSA from both imposing a penalty on an authorised person under that section and withdrawing a person's authorisation under section 33 in respect of the same contravention. This section repeals this prohibition thus enabling the FSA to stop an authorised person from continuing to carry on a regulated activity at the same time as imposing a financial penalty on that person.

Section 11: Performance of controlled function without approval

158. Section 59 of FSMA requires an authorised person ('A') to take reasonable care to ensure that no person ('P') performs a controlled function under an arrangement entered into by A or A's contractor in relation to the carrying on by A of a regulated activity, unless P has been approved by the FSA to do so. There is currently no prohibition on a person performing a controlled function without FSA approval.
159. This section inserts new sections 63A to 63D into FSMA. New section 63A(1) enables the FSA to impose a financial penalty on a person if it is satisfied that that person has

performed a controlled function without approval and that the person knew or could reasonably be expected to have known that he or she was performing a controlled function without approval.

160. New section 63B sets out the procedure for imposing a financial penalty, namely issuing a warning notice followed by a decision notice. There is a right of referral to the Tribunal.
161. New section 63C requires the FSA is required to consult on and publish a statement of its policy on the imposition of penalties and the amount of such penalties.
162. New section 63D sets out the procedure to be followed by the FSA before issuing such a policy statement.
163. Section 168 of FSMA enables the FSA to carry out investigations in particular cases, including the circumstances listed in subsection (4). *Paragraph 16 of Schedule 2* makes a consequential amendment to subsection (4) to provide for the FSA to appoint an investigator if it thinks that a person may have performed a controlled function without approval.

Section 12: Approved persons guilty of misconduct

164. Section 66 of FSMA sets out the FSA's disciplinary powers in respect of misconduct by approved persons. Approved persons are persons who have approval from the FSA to carry out controlled functions. Controlled functions are set out in FSA rules and include, for example, having responsibility for compliance with FSA rules or being a director.
165. This section amends section 66 of FSMA to add to the current sanctions (financial penalty and public censure) that the FSA can impose for misconduct. It enables the FSA to suspend an approved person from carrying on certain functions, and / or impose restrictions on that person's performance of certain functions, for a maximum period of 2 years.
166. *Paragraphs 9 and 10* of Schedule 2 make consequential amendments to sections 67 (disciplinary measures: procedure and right to refer to Tribunal) and 69 (statements of policy) so that they apply to the new sanctions.
167. *Subsection (4)* amends section 66(4) to increase the limitation period on the FSA taking disciplinary action against an approved person from two to three years.

Section 13: Publication of decision notices

168. This section amends section 391 of FSMA, which establishes common rules on publication of notices by the Authority, to widen the categories of supervisory notices that may be published.
169. *Subsection (2)* removes the prohibition on the publication of decision notices.
170. *Subsection (3)* inserts a new subsection (1A) which provides that the person to whom a decision notice is given may only publish such details of the notice as the FSA has published.
171. *Subsection (4)* amends section 391(4) to require the FSA to publish such information about decision notices (as well as final notices) as it considers appropriate. This new requirement will be subject to section 391(6).