

# FINANCIAL SERVICES ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 2 - Amendments of Financial Services and Markets Act 2000**

#### **Financial Conduct Authority and Prudential Regulation Authority**

#### *Section 6 and Schedule 3: The new Regulators*

#### **Further provisions relating to the FCA and the PRA**

164. *New sections 3A to 3S* contain further provisions relating to the FCA and the PRA.
165. New section 3B lists the regulatory principles to which the regulators must have regard when discharging their general functions, for example the principle of the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term (subsection (1)(c)). These principles do not place burdens or requirements on consumers or firms. They are matters which the regulators must take into account when exercising their general functions. For example, the principle that consumers should take responsibility for their decisions, and the principle that firms' senior management have responsibilities in relation to compliance with the regulatory requirements (including those relating to consumers), makes clear that the FCA and PRA should not aim for a zero-failure regime, which would effectively obviate consumers of their responsibility to look after their own interests and of firms to manage their own business.
166. The Treasury may amend the definition of "consumer" in this context, by order; the order must be approved in draft by each House of Parliament (see the amendments to section 429 of FSMA made by section 49 of the Act).
167. *New section 3C* requires the regulators to have regard to generally accepted principles of good corporate governance where relevant; for example the UK Corporate Governance Code issued by the Financial Reporting Council and, where appropriate, the corporate governance code for central government departments.
168. *New section 3D* requires the regulators to coordinate the exercise of the functions conferred on them by or under FSMA for three purposes: to ensure that they consult each other before exercising a function under FSMA in a way which may have a material adverse impact on advancement by the other regulator of its objectives; to ensure that they obtain advice and information from each other in connection with the exercise of their functions under FSMA in relation to matters of common regulatory interest (see *subsection (3)*), where the other regulator has relevant information or expertise; and to ensure that, in relation to matters of common regulatory interest, they have regard to the need to use resources efficiently and economically and to the proportionality principle set out in section 3B(1)(b). The duty to coordinate may, for example, require the regulators to coordinate requests for information from authorised persons. The duty to coordinate does not, however, override the requirement that each regulator discharge its general functions in a way which advances its objectives, and it

does not apply where the burden on the regulators of coordinating the exercise of their functions would outweigh the benefits (*subsection (2)*).

169. Under *new section 3E*, the regulators must prepare a memorandum setting out their roles in relation to matters of common regulatory interest and how they will comply with the duty to coordinate the exercise of their functions. The memorandum may contain specific provision about the matters set out in *subsection (2)*. *Subsection (3)* sets out additional matters on which the memorandum must contain provision. The memorandum is to be reviewed annually; the regulators must publish the current memorandum and send a copy to the Treasury, which must lay it before Parliament. *Subsection (8)* indicates that the memorandum need not relate to matters publication of which would be against the public interest or which are technical or operational matters which do not affect the public.
170. *New section 3F* provides that the FCA and PRA must prepare and maintain a memorandum which sets out the role of each regulator in relation to the regulation of with-profits insurers (as defined by *subsection (5)*) and how the regulators intend to comply with their duty to coordinate such functions. The memorandum may be combined with the memorandum required under section 3E. The section only applies if the activity of effecting or carrying out of contracts of insurance is a PRA-regulated activity. *Subsection (6)* enables the Treasury, by order, to amend the definition of “with-profits policy” that applies for the purposes of this section.
171. *New section 3G* enables the Treasury by order to specify matters which are primarily or solely the responsibility of one or other regulator. *New section 3H* provides that such an order must be laid before Parliament in draft and approved by each House of Parliament before being made; where the order contains a statement by the Treasury as to its urgency, the order may be laid before Parliament after being made but ceases to have effect unless approved by each House of Parliament within 28 sitting days (see *subsections (4) and (5)*).
172. *New section 3I* makes provision for the PRA, where the FCA proposes to exercise a regulatory power in relation to PRA-authorized persons or a particular PRA-authorized person, or to exercise an insolvency power in relation to a PRA-authorized person or certain other persons, to direct the FCA not to exercise the power or not to exercise it in a particular manner. The PRA may only give a direction if exercise by the FCA of the power might threaten the stability of the UK financial system or result in the failure of a PRA-authorized person in a manner that would adversely affect the UK financial system and the PRA considers that giving a direction is necessary in order to avoid that consequence. For example, the FCA could propose to cancel a firm’s deposit taking permission under Part 4A of FSMA. If the PRA determined that this could lead to the sudden and disorderly failure of the firm, the PRA could, if it deemed it necessary, give a direction under *new section 3I* to prevent the FCA from cancelling the firm’s permission. The FCA is not required to comply with a direction to the extent that compliance would be incompatible with an EU or international law obligation of the United Kingdom (*new section 3I(8)*). Certain functions of the FCA are excluded from this power (those relating to the giving of consent to the giving of permission under *new section 55F* or variation of permission under *new section 55I*).
173. *New section 3J* makes provision for the PRA, where the FCA proposes to exercise a regulatory power (as defined in *subsection (3)*) in relation to the provision of discretionary benefits by with-profits insurers, to direct the FCA not to exercise the power or not to exercise it in a particular manner, where the PRA considers that giving the direction is desirable in order to advance the PRA’s general objective or insurance objective. The FCA is not required to comply with a direction to the extent that compliance would be incompatible with an EU or international law obligation of the United Kingdom (*new section 3J(8)*). Certain functions of the FCA are excluded from this power (those relating to the giving of consent to the giving of permission under

*These notes refer to the Financial Services Act 2012  
(c.21) which received Royal Assent on 19 December 2012*

*new section 55F* or variation of permission under *new section 55I* and its functions in relation to insolvency under Part 24 of FSMA).

174. *New sections 3K and 3L* make further provision in relation to directions under sections 3I or 3J. The PRA must consult the FCA before giving such a direction; and the direction must be published and, in the case of a direction under section 3I, laid before Parliament unless the PRA after consulting the Treasury decides it would be against the public interest to do so; the PRA must keep any such determination under review and publish the direction if and when it is no longer against the public interest to do so (*new section 3L(8)*).
175. *New sections 3M to 3P* provide that one regulator may give the other a direction in relation to the consolidated supervision of some or all of the members of a group for the purposes of relevant EU directives. The direction may require the regulator to exercise, or not to exercise, its functions in a particular way. The direction may not require the regulator to do something that it does not have the power to do. The regulator need not comply with a direction it has received if compliance with the direction would not be compatible with the EU obligations or other international obligations of the United Kingdom. Certain functions of the regulators (including rule making) are excluded.
176. The regulators are obliged to cooperate with the Bank in pursuit of its financial stability objective and the Bank's compliance with its duties under *sections 54 and 55* of the Act (duty to notify the Treasury of possible need for public funds). The duty to cooperate includes the sharing of information (*new section 3Q*). This might include, for example, the PRA collecting information from PRA-authorized persons and passing it to the FPC for the purposes of its financial stability functions or the FCA informing the Bank that there may be a need to provide public funds in connection with an authorized person regulated only by the FCA.
177. *New section 3R* enables the regulators to make arrangements to provide services to each other, to the Bank (or services from the Bank to the regulators), to the consumer financial education body, the scheme manager of the financial services compensation scheme or the scheme operator of the financial ombudsman service on such terms as may be agreed. This would allow, for example, the Bank to provide human resources (staff) to the PRA and allow the FCA to collect fees payable to the PRA on the PRA's behalf. *Subsection (5)* enables the FCA to enter into arrangements with local weights and measures authorities in England, Wales and Scotland or, in Northern Ireland, the Department of Enterprise, Trade and Investment for the provision of services in relation certain types of regulated activity (for example, consumer credit). This would allow the FCA to enter into a contract with a local weights and measures authority or that Department so that the authority visits firms and carries out compliance checks on behalf of the FCA. The regulators will also be able, pursuant to powers under their own constitution, to make arrangements with private sector entities for the private sector entity to provide services to the regulator, for example legal advice or the analysis of data.
178. *New section 3S* provides for the consumer financial education body to continue to have the consumer financial education function. The consumer financial education function is to enhance (a) the understanding and knowledge of members of the public of financial matters (including the UK financial system), and (b) the ability of members of the public to manage their own financial affairs. *Subsection (4)* is a non exhaustive list of activities that fall within the consumer financial education function. These largely restate the activities currently set out in section 6A of FSMA. Paragraph (b) of subsection (4) differs from the wording in section 6A of FSMA to make it clear that the consumer financial education body is to promote awareness in relation to the whole life of a product not just its initial supply; and paragraphs (f) and (g) are new. These paragraphs make it clear that the consumer financial education function includes assisting members of the public with the management of debt and working with other organisations which provide debt services.