

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Discipline and enforcement

Section 37 and Schedule 9: Discipline and enforcement

410. *Section 37(1)* introduces *Schedule 9* which contains various amendments to FSMA which confer powers relating to disciplinary and enforcement measures. *Section 37(2)* enables the Treasury to amend and to repeal various provisions of FSMA as amended by the Act: see the paragraphs below dealing with *paragraph 30 of Schedule 9*.
411. *Part 2 of Schedule 9* amends section 20 (authorised persons acting without permission). The effect is that a person who is authorised by the FCA to carry on regulated activities, and who carries on a regulated activity or purports to do so otherwise than in accordance with the permission, is to be taken to have contravened a requirement imposed by the FCA. This means that the FCA could, for example, take disciplinary action under Part 14 of FSMA (see below) in relation to that contravention. Also, a PRA-authorized person who carries on a regulated activity or purports to do so otherwise than in accordance with the permission is to be taken to have contravened a requirement imposed by the FCA and the PRA, which means that either regulator could take disciplinary action in relation to the contravention.
412. *Paragraph 3* amends section 23 (contravention of the general prohibition) so as to provide that an authorised person is guilty of an offence if that person carries on a credit-related regulated activity in the UK or purports to do so without the appropriate permission. “Credit-related regulated activity” means a regulated activity of a kind designated by the Treasury. The Treasury may only designate a regulated activity if it involves a person entering into, administering or being able to exercise the rights of the lender under a credit agreement or enforcing debts under such an agreement. By virtue of new section 23A inserted by *paragraph 4*, the first order under section 23(1B) and any subsequent order which specifies an additional credit-related regulated activity (and so extends the scope of the criminal offence) is subject to the affirmative procedure.
413. *Paragraph 5* inserts section 26A of FSMA. This makes provision for agreements made by an authorised person in contravention of section 20 where the entry into the agreement involves the carrying on of a credit-related regulated activity. Such agreements are unenforceable against the other party. The other party is entitled to recover any money or property paid or transferred under the agreement and to recover compensation for any loss sustained as a result. *Subsections (4) and (5)* provide that if the administration of an agreement or taking steps to procure payments of debts is a credit-related regulated activity, the agreement may not be enforced by a person who does not have permission to carry on such an activity. These provisions would not prevent the agreement being enforced by another person who did have the appropriate permission.

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414. *Paragraph 8* inserts sections 28A and 28B of FSMA. These sections make further provision for credit-related agreements rendered unenforceable by section 26, 26A or 27 including that the person may apply to the FCA (rather than the court) for a notice to allow the agreement to be enforced or money paid or property transferred under the agreement to be retained. The FCA may only give such a notice where satisfied that it is just and equitable to do so in the circumstances of the case.
415. *Part 3 of Schedule 9* makes certain amendments to Part 8 of FSMA (market abuse). Part 8 confers powers on the FSA to impose penalties for market abuse (see section 118) and to publish the Code of Market Conduct (section 119). Under the new arrangements, the FCA is to assume the FSA's functions under Part 8; therefore, *paragraph 9 of the Schedule* amends FSMA and replaces references to the "Authority" with references to the "FCA" in the relevant places.
416. *Part 4 of Schedule 9* amends Part 14 of FSMA (disciplinary measures). Part 14 confers powers to issue a statement that a person has contravened a requirement (section 205), impose a financial penalty (section 206) or suspend, or impose a restriction on, a person's authorisation under Part 4 of FSMA to carry on regulated activities (section 206A)) These powers may be exercised where, currently, the FSA considers that an authorised person has contravened a requirement imposed by or under the Act or by any directly applicable Community regulation made under the markets in financial instruments directive (Directive [2004/39/EC](#)).
417. The amendments give the PRA and the FCA powers to take action in relation to contraventions of requirements imposed by or under the Act or a qualifying EU provision (see *new section 425C*, inserted by *section 48*). *New section 204A* sets out when the powers are available to the FCA and when they are available to the PRA.
418. *Part 5 of Schedule 9* makes amendments to Part 25 of FSMA (injunctions and restitution). *Paragraph 19* amends section 380 (under which the court may grant an injunction where, for example, it is satisfied that there is a reasonable likelihood that any person will contravene a relevant requirement) to enable the PRA (in specified cases) and the FCA (in other cases) to make an application to court for an injunction.
419. *Paragraph 20* amends section 381 which confers a power to apply for an injunction to prevent threatened or continuing market abuse, to require a person to remedy the consequences of market abuse or to prevent the disposal of assets. As the FCA is to assume the FSA's functions under Part 8 relating to market abuse, the powers under section 381 are also transferred to the FCA.
420. *Paragraph 21* amends section 382 to enable the PRA and the FCA (as the case may be) to apply to the court for an order requiring a person to pay a sum by way of restitution. Section 382 (as amended) enables the relevant regulator to apply to the court for an order requiring a person to pay to the regulator concerned such sum as the court considers to be just having regard to (a) the profits appearing to have accrued as a result of a contravention of a relevant requirement; (b) the extent of the loss or other adverse effect arising as a result of the contravention. Any amount received by the regulator as a result of an order issued by the court under subsection (2) must be paid to such qualifying person (for example a consumer who suffers loss as a result of the contravention) as the regulator may direct. Section 383 provides for applications for restitution orders in cases of market abuse so powers under this section are transferred to the FCA.
421. *Paragraph 23* amends section 384 so as to enable the PRA and the FCA (as the case may be) to require a person to make payments by way of restitution where the relevant regulator is satisfied that the person has, for example, contravened a relevant requirement (defined in section 384(7)) and: (a) that profits have accrued to that person as a result of the contravention; or (b) that one or more persons have suffered loss or have been otherwise adversely affected as a result of the contravention. *Paragraphs 24 and 25* make consequential changes to sections 385 and 386.

422. *Part 6 of Schedule 9* makes amendments in relation to Part 26 of FSMA (notices). Part 26 makes provision in relation to the different types of notices which are required to be given in specified circumstances under the Act (for example, where a relevant regulator proposes to impose on a person a financial penalty).
423. *Section 387* sets out the matters which must be included in a warning notice (for example, the notice must specify the period in which the subject of the notice may make representations to the relevant regulator regarding the proposed action described in the notice). *Section 388* makes similar provision in relation to decision notices which are required to be given where the relevant regulator has decided to take the action described in the warning notice. In the event that a regulator decides not to take the action set out in the warning notice, or the action to which a decision notice relates, a “notice of discontinuance” must be issued (*section 389*). *Section 390* makes provision for final notices which are required to be given where a decision notice has been given and the matter has not been referred to the Tribunal within the time limit specified in the notice, or where the matter has been referred to the Tribunal and has been dealt with in accordance with any directions of the Tribunal.
424. *Paragraphs 26 to 29* make consequential changes so that the requirements regarding notices under these sections are to apply to the PRA and the FCA (as the case may be). In addition *paragraph 26(4)* changes the minimum time period within which a person must have an opportunity to make representations to the FCA or the PRA (as the case may be) concerning matters referred to in a warning notice (such period may be extended by the relevant regulator). This period is to be reduced from 28 days to 14 days in order to enable the regulators to take disciplinary action more expeditiously (for example, in relation to contraventions which have been admitted by an authorised person), albeit that each regulator may extend this period on a case-by-case basis. A corresponding reduction in the period in which representations may be made is made in *section 393* (third party rights).
425. *Section 391* of FSMA imposes a general prohibition on the FSA against publishing a warning notice or details concerning the notice. *Paragraph 30(2)* replaces *section 391(1)* and relaxes the general prohibition on the publication of information about warning notices given under the sections referred to in the *new subsection (1ZB)* such that the FCA or the PRA (as the case may be) may publish information about warning notices given in certain cases. Before publishing such information, the relevant authority must consult the person to whom the notice is given or copied, and must be of the view that the publication of the information would not, for example, be unfair to the person with respect to whom the action is proposed to be taken (see *new subsection (6) and (6A)*). *Section 395* (as amended by *paragraph 34*) makes further provision as to the procedure to be followed when the regulator is determining whether publication of information about a warning notice is appropriate. *Section 37(2)* gives the Treasury the power, by order subject to the affirmative procedure, to amend *section 391(1)* to reimpose a general prohibition against publishing a warning notice or details concerning the notice, if the Treasury considers it is in the public interest to do so; the order may also make certain repeals in consequence of such an amendment.
426. *Paragraphs 32 and 33* make consequential amendments to *sections 393 and 394* in order to apply them to the FCA and the PRA (as the case may be). *Section 393* imposes a requirement to give a copy of a warning notice or decision notice to which the section applies to a third party where any reasons set out in the notice relate to a matter which identifies that person and where, in the opinion of the relevant authority, any of those reasons are prejudicial to the third party. A person who receives a copy of the notice has certain rights (see, for example, *subsections (3) and (12)*). *Section 393* confers a right on a person who has received a warning or decision notice to which *section 394* applies to access the material on which the relevant authority has relied in taking the decision which gave rise to the notice; and any secondary material, which, in the opinion of the relevant regulator, might undermine that decision.

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427. *Section 395* deals with how the procedure to be followed in relation to the giving of supervisory notices (defined in subsection (13)), warning notices and decision notices is to be determined. Section 395 currently prohibits procedures which permit a person who has been involved in gathering evidence for a decision to be involved in making that decision. *Paragraph 34(3) and (4)* make amendments to section 395 so as to permit the regulators to adopt procedures which allow decisions of a kind described in section 395(1)(a) to (c) (decisions which give rise to a duty to give a supervisory notice, a warning notice or a decision notice) to be taken by a person who has been directly involved in establishing the evidence on which the decision is based provided that at least one person is involved in making the decision who was not directly involved in establishing the evidence. The amendments also provide that a decision under section 391(1)(c) to publish information about the matter to which a warning notice relates must be taken by a person other than the person by whom the decision to publish was first proposed and in accordance with a procedure which is, so far as possible, the same as the procedure applicable to the decision to issue the warning notice.
428. *Paragraph 34* also makes consequential changes to section 395 so that it applies to both the FCA and the PRA. *Paragraph 35* makes consequential changes to section 396.
429. *Part 7 of Schedule 9* makes provision in relation to specific offences which, currently, the FSA has the power to prosecute.
430. *Paragraph 36* makes consequential amendments to section 398 (misleading the Authority: residual cases) such that a person who, in purported compliance with a requirement imposed by or under FSMA knowingly or recklessly gives the PRA or the FCA (as the case may be) information which is false or misleading in a material particular is taken to have committed an offence.
431. *Paragraph 37* provides that references to offences in section 400 include an offence under Part 7 of the Financial Services Act 2012.
432. *Paragraphs 38 to 40* make amendments to sections 401, 402 and 403 and specify the circumstances in which the PRA and the FCA have the power to prosecute offences under FSMA and in certain other cases. These provisions are also applied to the offences under Part 7 of the Financial Services Act 2012.
433. *Part 8 of Schedule 9* inserts *new section 415B* which requires the PRA and the FCA (as the case may be) to consult with the other authority before taking certain qualifying steps (specified in *subsection (3)* of that section).