

# FINANCIAL SERVICES ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

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

##### **Permission to carry on regulated activities**

##### *Section 11: Permission to carry on regulated activities*

190. *Section 11* replaces Part 4 of FSMA with a new *Part 4A* dealing with the application, granting, limitation, variation and cancellation of permission to carry on regulated activities (as defined in section 22 of FSMA). *Part 4A* replicates Part 4 with modifications reflecting the replacement of the FSA by the new regulators.
191. *New section 55A* provides that permission to carry on a regulated activity can be granted to individuals, bodies corporate, partnerships and unincorporated associations.
192. Permission may cover a number of regulated activities. *Subsection (3)* prevents an authorised person who already has permission under Part 4A from making a further application: once permission is granted, it can be varied to include further (or exclude certain) regulated activities (see *sections 55H to 55J*). Similarly, under *subsection (4)* EEA firms who could exercise rights derived from the single market directives listed in paragraph 1 of Schedule 3 to carry on regulated activities in the UK are precluded from applying for permission.
193. Applications for permission are to be made to the “appropriate regulator”; this means the FCA, unless the regulated activities to which the application relates are or include PRA-regulated activities. Thus where any of the activities for which permission is sought is a PRA-regulated activity, permission should be sought from the PRA. The PRA is also the appropriate regulator where the applicant is a PRA-authorised person otherwise than by virtue of permission under Part 4A (for example, an EEA firm carrying on a PRA-regulated activity and qualifying for authorisation under Schedule 3).
194. *New section 55B* specifies that the “threshold conditions” are those set out in Schedule 6 as read with any threshold condition code made by the regulators under new section 137O. The threshold conditions are the minimum conditions which a regulator must ensure that the person concerned (for example, the person making the application for authorisation) will satisfy when the regulator makes a decision relevant to that person under Part 4A. Where the person concerned is, or is seeking to become, a PRA-authorised person, each regulator will be responsible for separate threshold conditions, as provided for in Schedule 6. But the requirement to ensure that the person concerned will satisfy the threshold conditions is not to prevent the FCA from taking steps to advance any of its operational objectives (see *new section 1B(3)*) or the PRA from advancing any of its objectives (see *new sections 2B to 2D*). For example, the PRA might delay for a short period the cancellation of the permission of a deposit taker which does not satisfy its threshold conditions to allow preparations to be made to ensure that the failure of the deposit taker is orderly.

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195. *New section 55C* enables the Treasury by order to amend Schedule 6. Such an order may in particular make provision in relation to the discharge of functions of each regulator, provide for different conditions for different regulated activities and provide for different provision in relation to persons who are or are seeking to, carry on PRA-regulated activities.
196. *Paragraph 5 of Schedule 20* requires the Treasury to make an order under *new section 55C* prior to the commencement of section 11 which makes provision as to which of the conditions set out in Schedule 6 are to relate to the discharge by each regulator of its functions. In other words, the Treasury must, prior to commencement of section 11, make an order which provides for separate threshold conditions for the PRA and the FCA.
197. *New section 55D* makes provision for where a regulator is considering whether a person from outside the EEA is satisfying or will satisfy, and continue to satisfy, any one or more of the threshold conditions for which that regulator is responsible, for example where a firm authorised in Singapore applies for permission to undertake regulated activity in the UK. In that situation, *new section 55D* provides that the regulator can have regard to a view of (for example) the Singaporean regulator which is relevant to compliance with the threshold condition, such as a view on the adequacy of a firm's resources. But, if the FCA or the PRA takes the view of a non-UK regulator into account, it must, in considering how much weight to give that opinion, have regard to the nature and scope of the supervision exercised in relation to the non-EEA firm by the overseas regulator.
198. *New sections 55E and 55F* provides that the regulators may grant permission for all the activities applied for, or just some of them, may impose limitations (for example, limitations on the class of consumer to whom the authorised person may provide services or limiting the type of insurance contracts that an authorised person could write to a particular class) and may permit activities which are wider or narrower than the activities as described in the application.
199. Although the FCA may give permission for a regulated activity which was not included in the application, it may not give permission for such an activity if it is a PRA-regulated activity. And the FCA must always consult the PRA if the application is from a member of a group which includes a PRA-authorised person.
200. The PRA requires the FCA's consent to give permission in all cases. This is because all PRA-authorised persons will also be regulated by the FCA. The FCA may make its consent conditional; for example, if the FCA has concerns about the applicant, it may give consent conditional on the PRA imposing a limitation on the permission given to the applicant that addresses those concerns. The PRA may not give permission that results in the person being an authorised person who is not a PRA-authorised person.
201. *New section 55G* makes provision for special cases. *Subsection (2)* deals with the situation where a person who is exempt from the general prohibition in section 19 (that is, the prohibition on carrying on a regulated activity in the United Kingdom unless the person in question is authorised or exempt) by virtue of an order under section 38 of FSMA or by virtue of being an appointed representative (see section 39 of FSMA) makes an application for permission to carry on another regulated activity. This reflects the existing principle that a person cannot be both exempt and regulated at the same time. In those cases, the regulator is to treat the application as an application to carry on all the regulated activities in question, that is both the activities from which the person is exempt and the activities for which permission is applied for. This means that the regulator must assess the ability of the firm to meet the threshold conditions for both the exempt activity and the new (regulated) activity, rather than just the new activity. This might happen if an appointed representative who gives mortgage advice wishes to provide advice on other matters (for example entering into contracts of insurance). If the appointed representative's principal firm does not have permission to carry on the activity of providing advice on entering into contracts of insurance, or does not

want to allow the appointed representative to do so, the appointed representative would have to apply for permission from the FCA. If the application were granted, the person would cease to be an appointed representative. In such cases, the person is treated as applying for permission to carry out both the activity which he carries out as an appointed representative (mortgage advice) and the additional activity he wishes to carry out (advice on entering into contracts of insurance), and will be assessed for its ability to do both activities as part of the authorisation process.

202. *Subsection (3)* provides that recognised investment exchanges and recognised clearing houses which make an application for permission to carry on a regulated activity are assessed only in respect of the application and not as to their activities as an investment exchange or clearing house (in relation to which they are exempt from the general prohibition). *Subsection (4)* makes similar provision in respect of members of Lloyd's. *Subsection (6)* deals with cases where an application was made to the wrong regulator, or made to the right regulator but refused, and a similar application is subsequently submitted: it requires the regulator dealing with the new application to have regard to the desirability of minimising the additional work and processing time for the applicant.
203. *New sections 55H and 55I* make provision for authorised person to apply for a variation or cancellation of their permission, in terms parallel to the provisions dealing with applications for permission. Thus under *new section 55H* an authorised person who is not a PRA-authorized person may apply to the FCA to vary his permission either by adding a regulated activity (other than a PRA-regulated activity) to the permission, removing a regulated activity from permission or varying the description of regulated activity for which permission has been given. An application may also be made to cancel the permission. The FCA may refuse an application if it considers it desirable to do so to advance one of its operational objectives. The FCA must consult with the PRA on an application if the applicant is a member of a group which includes a PRA-authorized person.
204. *New section 55I* makes similar provision for the PRA to vary or cancel the permission on the application of a PRA-authorized person. The PRA may only vary permission in such cases with the consent of the FCA and must consult the FCA before cancelling permission. An authorised person who is not a PRA-authorized person may apply to the PRA for a variation of his permission to add a PRA-regulated activity to his permission. The PRA must obtain the consent of the FCA before granting such an application.
205. *New sections 55J and 55K* permit the regulators to vary or cancel permission without an application from the authorised person. This "own-initiative variation power" may only be exercised by the regulator: if the authorised person is not satisfying or is likely not to satisfy the threshold conditions for which that regulator is responsible; if the authorised person has not carried on for at least 12 months a regulated activity within its permission (so the regulators can remove permission for a regulated activity which the authorised person is no longer undertaking); or if desirable to advance the regulator's objectives. For example, the FCA might vary a firm's permission on its own initiative to prevent a firm taking new deposits relating to a particular product, where in the FCA's view the firm in question does not have adequate processes in place to protect consumers purchasing these products.
206. *New sections 55L to 55P* permit the regulators to impose or vary requirements on an authorised person, including requirements relating to the holding or disposal of assets. The PRA must always consult the FCA before imposing a requirement. The FCA must consult the PRA before imposing or varying a requirement on a person who is (or will become) a PRA-authorized person or is the member of a group which includes a PRA-authorized person. Unlike the power to vary permission on the regulator's own initiative (dealt with under section 55J), this "own-initiative requirement power" may be used to impose requirements which do not relate to the regulated activity which an authorised person has permission to carry on. For example, the PRA might require a firm to dispose of a particular loan portfolio, where retention of that portfolio might undermine the

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firm's safety and soundness. The power replicates the power in section 43 of FSMA to impose requirements as part of permission, with the exception of the new provisions in *new section 55N*. *Subsection (4)* expressly reflects the effect of the current law (that is that a requirement may, but need not, be expressed to expire at the end of a period specified by the regulator imposing it). *Subsection (5)* enables a requirement to refer to the past conduct of the person concerned. This could be used by either regulator to require an authorised person to carry out a review of its past conduct (for example, to identify customers who have been treated unfairly).

207. *New section 55Q* provides that the own-initiative variation and requirement powers may also be exercised at the request of an overseas regulator.
208. *New section 55R* provides that the regulators may have regard to relevant relationships of an authorised person or an applicant for permission when exercising their powers under Part 4A, for example other members of the authorised person's group. In circumstances prescribed in regulations by the Treasury, the regulator must also consult the home state regulator of any EEA firm in the applicant's or the authorised person's group (except where the EEA firm is an insurance intermediary or a reinsurance intermediary).
209. Where an EEA firm or Treaty firm has permission under Part 4A in addition to qualifying for permission under Schedule 3 or 4, *new section 55S* provides that, in considering the exercise of own initiative powers in relation to the permission granted under Part 4A, the regulators must take account of the relevant EU law and of the home state authorisation of the person concerned. Such consideration may inform the regulator's view on whether the firm or scheme is fit and proper to continue to hold the additional permissions in question, or its view on whether the cancellation or variation it proposes is appropriate in light of the wider assessment of the firm which the home State regulator is responsible for making. The FCA must also take these matters into account in exercising its own initiative power in relation to an additional Part 4A permission of a collective investment scheme operator, trustee or depositary.
210. *New section 55T* provides that in exercising their functions in relation to a particular person to protect the interests of another person, there need not be a relationship between the particular person and the person whose interests are being protected. For example, where authorised person Y is refusing to provide services to authorised person Z which are necessary for the continued provision of financial services to Z's customers, the FCA could impose a requirement on Y to protect the interests of the customers of Z.
211. *New sections 55U to 55W* make provision relating to the making and content of applications for permission, the timescale for determining applications (which is six months from the date of receipt of the application where the application is a complete application), and for the PRA to notify the FCA of the receipt or withdrawal of an application for permission or an application for the variation or cancellation of a permission or a requirement. *New section 55V(4)* confirms that an applicant may withdraw an application at any time, and *new section 55V(5)* requires the regulator to issue a written notice when it grants an application for permission, an application for a variation or cancellation of permission or an application for the imposition, variation or cancellation of a requirement.
212. *New section 55X* requires the regulators to give a warning notice where they propose to refuse an application, or where they propose to grant the application but with requirements, with limitations, or with a description of regulated activity different from that specified in the application. No warning notice need be given if the applicant is an EEA firm which could exercise an EEA right to carry on the activity (see Schedule 3 to FSMA). The issue of a warning notice provides an opportunity for the applicant to make representations to the regulator if the applicant wishes to do so. *Subsection (4)* requires the regulator to issue a decision notice where it grants or varies permission in response to an application but with requirements, with limitations, or with a description of regulated activity different from that specified in the application; the regulator must

also issue a decision notice where it refuses the application. In addition, the FCA must issue a warning notice if it proposes to impose a requirement on an applicant whose application was made to the PRA, and must issue a decision notice when it imposes the requirement.

213. *New section 55Y* sets out the procedural requirements relating to the exercise of the regulators' own-initiative powers. The variation of permission, or the variation or imposition of a requirement, may take effect immediately or on a specified date if the regulator considers it necessary for it to do so having regard to the ground on which the regulator is exercising the power. If the regulator does not specify a date, the variation will take effect only after the time for referring the matter to the Tribunal has expired and any reference and further appeal has been finally determined (see the definition of "open to review" in section 391(8) of FSMA). The regulator must give the authorised person a written notice which gives the details of the variation, the date on which it takes effect, the reasons for the variation and for the choice of date. The notice must also inform the person of his right to make representations to the regulator within a specified period, and to refer the matter to the Tribunal. *Subsections (7) to (11)* require the regulator to give further written notice of its response to any representations which are made. This can be a decision not to proceed with the variation (or to cancel it if it has already taken effect), to propose a different variation (in which case the original notice procedure must be repeated), or to proceed with the variation (in which case the person concerned has a further right to refer the matter to the Tribunal).
214. *New section 55Z* requires the regulator to issue warning and decision notices regarding, respectively, the proposal to cancel permission and the cancellation of a permission.
215. *New sections 55Z1 and 55Z2* require a regulator to notify the relevant European Supervisory Authority when giving or cancelling a relevant permission.
216. *New section 55Z3* confers a right to refer to the Tribunal matters under Part 4A, such as a decision to refuse an application for permission, to impose conditions or to vary a permission other than in the way requested. On such a reference, the applicant is not limited to challenging the regulator which has taken the decision which the applicant is concerned about. Thus on a reference in relation to a refusal by the PRA to give permission, the applicant may challenge the decision of the FCA to refuse to give consent to the grant of permission.