

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Performance of regulated activities

Section 13: Prohibition orders

225. *Section 13* makes amendments to sections 56 and 57 of FSMA consequential on the replacement of the FSA by the new regulators. It also imposes requirements for the FCA to consult the PRA (where a PRA-*authorised person*, or a person who is an exempt person in relation to a PRA-regulated activity, is concerned), and for the PRA to consult the FCA, before issuing a warning notice to an individual that it proposes to make a prohibition order, and before revoking or varying such an order.

Section 14: Approval for particular arrangements

226. *Section 14* makes amendments to sections 59, 63 and 64 of FSMA consequential on the replacement of the FSA by the new regulators; it also inserts *new sections 59A and 59B*.
227. *Section 59* provides that authorised persons must take reasonable care not to allow persons to perform certain functions without the approval of the regulator; a person in respect of whom approval is given is an “approved person”. The effect of the amendments made by *section 14* is that each regulator will specify in rules the functions in respect of which approval must be sought from that regulator. Both regulators may specify “significant-influence functions” (defined in new subsection (7B) of section 59) but only the FCA may specify “customer-dealing functions” (defined in new subsection (7A) of section 59). The PRA may only give approval in relation to a significant-influence function specified by the PRA with the consent of the FCA (but see *new section 59B*, below). Also, the PRA may only specify functions performed in relation to the carrying on of regulated activities by a PRA-*authorised person*.
228. *New section 59A* requires the regulators to consult each other before specifying significant-influence functions and for the FCA to keep its power to specify such functions under review and to exercise that power in a way designed to minimise the need for a person to be approved by both regulators. Thus the FCA should generally not specify as a significant-influence function a function which has already been specified by the PRA. Where the PRA specifies a function which the FCA has specified as a significant-influence function, the FCA should generally revoke its specification of that function.
229. *New section 59B* provides that the regulators may enter into arrangements under which the PRA does not need to obtain the consent of the FCA before giving approval to a person to carry on a significant-influence function under section 59. Such arrangements must be in writing, and the regulators must publish them. This will allow the regulators to dispense with the requirement to obtain FCA consent where the FCA has insufficient

interest in the performance of the function to justify the PRA obtaining the FCA's consent.

230. Under section 63 (as amended by *subsection (3)*), either regulator may withdraw approval from a person who is carrying on a significant-influence function in connection with a PRA-authorized person, regardless of which regulator gave approval. Only the FCA can withdraw approval to carry on a customer-dealing function.
231. Under section 64 (as amended by *subsection (4)*) both regulators may issue statements of principle with respect to the conduct expected of persons who have been given approval (from either regulator) to perform a significant-influence function in relation to the carrying on of a regulated activity by a PRA-authorized person. Only the FCA can issue statements of principle about the conduct expected of other approved persons.

Section 15 and Schedule 5: Further amendments relating to performance of regulated activities

232. *Section 15* introduces Schedule 5, which makes amendments to Part 5 of FSMA (performance of regulated activities) consequential on the replacement of the FSA by the new regulators.
233. *Paragraph 2* of Schedule 5 makes consequential amendments to section 58 of FSMA (prohibition orders).
234. *Paragraphs 3 to 18* amend sections 59 to 70 of FSMA (approval). The amendments are primarily consequential on the amendments made by *section 14*.
235. *Paragraph 5(6)* amends the timetable for determining an application for approval set out in section 61 of FSMA. The amendment provides that where the application is made by a person who is also applying for permission under Part 4A, the application must be determined by the date by which the application for permission must be determined (see new section 55V) or 3 months after the application is received, whichever is the later.
236. *Paragraph 7* amends section 63 of FSMA (withdrawal of approval) to ensure that both regulators may withdraw approval. The withdrawal does not have to be by the regulator that gave the approval provided that the application for approval could have been made to that regulator.
237. *Paragraph 13* amends section 65 of FSMA (statements and codes: procedure) to require the FCA and PRA to consult each other before issuing a statement or code under section 64. The definition of "cost benefit analysis" in section 65(11) is also amended so that the regulator need only provide an analysis of the costs and benefits arising from the proposal rather than an estimate of those costs and benefits where the regulator is of the opinion that the costs or benefits cannot be reasonably estimated or it is not reasonably practicable to produce an estimate; where that is the case, the regulator must include in a statement with an explanation of its opinion.
238. *Paragraph 14* amends section 66 of FSMA (disciplinary powers) to provide that a person is guilty of misconduct for the purposes of each regulator (and so amenable to action by that regulator under section 66) if a person has failed to comply with a statement of principle issued by that regulator. Thus each regulator may take action only in relation to a breach of its own statement. In addition, each regulator may take action if the approved person is knowingly concerned in a contravention by the relevant person of requirements under FSMA or EU provisions specified by the Treasury.