

SCHEDULES

SCHEDULE 9

DISCIPLINE AND ENFORCEMENT

PART 2

AUTHORISED PERSONS ACTING WITHOUT PERMISSION

- 2 (1) Section 20 (authorised persons acting without permission) is amended as follows.
- (2) In subsection (1)—
- (a) in the opening words, after “an authorised person” insert “other than a PRA-authorised person”,
 - (b) for paragraph (a) substitute—
 - “(a) given to that person under Part 4A, or”, and
 - (c) in the words after paragraph (b), for “Authority” substitute “FCA”.
- (3) After that subsection insert—
- “(1A) If a PRA-authorised person carries on a regulated activity in the United Kingdom, or purports to do so, otherwise than in accordance with permission given to the person under Part 4A or resulting from any other provision of this Act, the person is to be taken to have contravened—
- (a) a requirement imposed by the FCA, and
 - (b) a requirement imposed by the PRA.”
- (4) For subsection (2) substitute—
- “(2) A contravention within subsection (1) or (1A)—
- (a) does not, except as provided by section 23(1A), make a person guilty of an offence,
 - (b) does not, except as provided by section 26A, make any transaction void or unenforceable, and
 - (c) does not, except as provided by subsection (3), give rise to any right of action for breach of statutory duty.”
- (5) In subsection (3), for “the contravention”, in the first place, substitute “a contravention within subsection (1) or (1A)”.
- (6) After subsection (3) insert—
- “(4) Subsections (1) and (1A) are subject to section 39(1D).
- (5) References in this Act to an authorised person acting in contravention of this section are references to the person acting in a way that results in a contravention within subsection (1) or (1A).”

Status: This is the original version (as it was originally enacted).

- 3 (1) Section 23 (contravention of the general prohibition) is amended as follows.
- (2) After subsection (1) insert—
- “(1A) An authorised person (“A”) is guilty of an offence if A carries on a credit-related regulated activity in the United Kingdom, or purports to do so, otherwise than in accordance with permission—
- (a) given to that person under Part 4A, or
- (b) resulting from any other provision of this Act.
- (1B) In this Act “credit-related regulated activity” means a regulated activity of a kind designated by the Treasury by order.
- (1C) The Treasury may designate a regulated activity under subsection (1B) only if the activity involves a person—
- (a) entering into or administering an agreement under which the person provides another person with credit,
- (b) exercising or being able to exercise the rights of the lender under an agreement under which another person provides a third party with credit, or
- (c) taking steps to procure payment of debts due under an agreement under which another person is provided with credit.
- (1D) But a regulated activity may not be designated under subsection (1B) if the agreement in question is one under which the obligation of the borrower is secured on land.
- (1E) “Credit” includes any cash loan or other financial accommodation.
- (1F) A person guilty of an offence under subsection (1A) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding the applicable maximum term or a fine not exceeding the statutory maximum, or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.
- (1G) The “applicable maximum term” is—
- (a) in England and Wales, 12 months (or 6 months, if the offence was committed before the commencement of section 154(1) of the Criminal Justice Act 2003);
- (b) in Scotland, 12 months;
- (c) in Northern Ireland, 6 months.”
- (3) After subsection (3) insert—
- “(4) Subsection (1A) is subject to section 39(1D).
- (5) No proceedings may be brought against a person in respect of an offence under subsection (1A) in a case where either regulator has taken action under section 205, 206 or 206A in relation to the alleged contravention within section 20(1) or (1A).”
- (4) In the heading to the section, at the end insert “or section 20(1) or (1A)”.
- 4 After section 23 insert—

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“23A Parliamentary control in relation to certain orders under section 23

- (1) This section applies to the first order made under section 23(1B).
- (2) This section also applies to any subsequent order made under section 23(1B) which contains a statement by the Treasury that, in their opinion, the effect (or one of the effects) of the proposed order would be that an activity would become a credit-related regulated activity.
- (3) An order to which this section applies may not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House.”

5 After section 26 insert—

“26A Agreements relating to credit

- (1) An agreement that is made by an authorised person in contravention of section 20 is unenforceable against the other party if the agreement is entered into in the course of carrying on a credit-related regulated activity involving matters falling within section 23(1C)(a).
- (2) The other party is entitled to recover—
 - (a) any money or other property paid or transferred by that party under the agreement, and
 - (b) compensation for any loss sustained by that party as a result of having parted with it.
- (3) In subsections (1) and (2) “agreement” means an agreement—
 - (a) which is made after this section comes into force, and
 - (b) the making or performance of which constitutes, or is part of, the credit-related regulated activity.
- (4) If the administration of an agreement involves the carrying on of a credit-related regulated activity, the agreement may not be enforced by a person for the time being exercising the rights of the lender under the agreement unless that person has permission, given under Part 4A or resulting from any other provision of this Act, in relation to that activity.
- (5) If the taking of steps to procure payment of debts due under an agreement involves the carrying on of a credit-related regulated activity, the agreement may not be enforced by a person for the time being exercising the rights of the lender under the agreement unless the agreement is enforced in accordance with permission—
 - (a) given under Part 4A to the person enforcing the agreement, or
 - (b) resulting from any other provision of this Act.”

6 In section 27 (agreements made through unauthorised persons) for subsection (1) substitute—

- “(1) This section applies to an agreement that—
- (a) is made by an authorised person (“the provider”) in the course of carrying on a regulated activity,
 - (b) is not made in contravention of the general prohibition,

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- (c) if it relates to a credit-related regulated activity, is not made in contravention of section 20, and
- (d) is made in consequence of something said or done by another person (“the third party”) in the course of—
 - (i) a regulated activity carried on by the third party in contravention of the general prohibition, or
 - (ii) a credit-related regulated activity carried on by the third party in contravention of section 20.

(1A) The agreement is unenforceable against the other party.”

7 In section 28 (agreements made unenforceable by section 26 or 27)—

- (a) at the end of subsection (1) insert “, other than an agreement entered into in the course of carrying on a credit-related regulated activity”, and
- (b) in the heading to the section, at the end insert “: general cases”.

8 After section 28 insert—

“28A Credit-related agreements made unenforceable by section 26, 26A or 27

- (1) This section applies to an agreement that—
 - (a) is entered into in the course of carrying on a credit-related regulated activity, and
 - (b) is unenforceable because of section 26, 26A or 27.
- (2) The amount of compensation recoverable as a result of that section is—
 - (a) the amount agreed by the parties, or
 - (b) on the application of either party, the amount specified in a written notice given by the FCA to the applicant.
- (3) If on application by the relevant firm the FCA is satisfied that it is just and equitable in the circumstances of the case, it may by written notice to the applicant allow—
 - (a) the agreement to be enforced, or
 - (b) money paid or property transferred under the agreement to be retained.
- (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the FCA must—
 - (a) if the case arises as a result of section 26 or 26A, have regard to the issue mentioned in subsection (5), or
 - (b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).
- (5) The issue is whether the relevant firm reasonably believed that by making the agreement the relevant firm was neither contravening the general prohibition nor contravening section 20.
- (6) The issue is whether the provider knew that the third party was (in carrying on the credit-related regulated activity) either contravening the general prohibition or contravening section 20.

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- (7) An application to the FCA under this section by the relevant firm may relate to specified agreements or to agreements of a specified description or made at a specified time.
- (8) “The relevant firm” means—
 - (a) in a case falling within section 26, the person in breach of the general prohibition;
 - (b) in a case falling within section 26A or 27, the authorised person concerned.
- (9) If the FCA thinks fit, it may when acting under subsection (2)(b) or (3)—
 - (a) limit the determination in its notice to specified agreements, or agreements of a specified description or made at a specified time;
 - (b) make the determination in its notice conditional on the doing of specified acts by the applicant.

28B Decisions under section 28A: procedure

- (1) A notice under section 28A(2)(b) or (3) must—
 - (a) give the FCA's reasons for its determination, and
 - (b) give an indication of—
 - (i) the right to have the matter referred to the Tribunal that is conferred by subsection (3), and
 - (ii) the procedure on such a reference.
- (2) The FCA must, so far as it is reasonably practicable to do so, give a copy of the notice to any other person who appears to it to be affected by the determination to which the notice relates.
- (3) A person who is aggrieved by the determination of an application under section 28A(2)(b) or (3) may refer the matter to the Tribunal.”