

## STATUTORY INSTRUMENTS

# 2018 No. 135

## The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018

### PART 2

#### FCA powers over Miscellaneous BM persons

5.—(1) The FCA has the powers conferred on it by this Part of the Regulations in respect of Miscellaneous BM persons.

- (2) A “Miscellaneous BM person” is a person who is not an authorised person and is—
- (a) involved in the provision of, or contribution of input data to, a benchmark;
  - (b) a service provider to whom functions or any relevant services and activities in the provision of a benchmark have been outsourced;
  - (c) a person who is not the service provider but who is or has been party to a contract in relation to the outsourcing of functions or any relevant services and activities in the provision of a benchmark;
  - (d) a legal representative of a benchmark administrator located in a third country which has obtained or has applied for prior recognition as referred to in Article 32(1) and as provided for in Article 32(3) of the EU Benchmarks Regulation 2016;
  - (e) a person who administers a benchmark relying on [<sup>F1</sup>Article 46(8) or] Article 51(4) of the EU Benchmarks Regulation 2016; or
  - (f) a supervised entity.

#### Textual Amendments

- F1** Words in [reg. 5\(2\)\(e\)](#) inserted (14.10.2019) by [The Financial Services and Markets Act 2000 \(Benchmarks\) \(Amendment\) Regulations 2019 \(S.I. 2019/1256\)](#), regs. 1, **2(2)**

#### FCA's power to impose requirements

6.—(1) The FCA may exercise its power under paragraph (2) in relation to a Miscellaneous BM person if it appears to the FCA that—

- (a) the Miscellaneous BM person has contravened or is likely to contravene a relevant requirement;
- (b) it is desirable for the FCA to exercise its powers in order to advance any of its operational objectives [<sup>F2</sup>but only in respect of a Miscellaneous BM person coming within regulation 5(2)(d) or (e)]; or
- (c) it is desirable for the FCA to exercise its powers order to facilitate the performance of its functions under the EU Benchmarks Regulation 2016.

- (2) The FCA's power under this paragraph is a power to—
- (a) impose a requirement that the FCA considers appropriate;
  - (b) vary a requirement already imposed under this paragraph; or
  - (c) cancel such a requirement.
- (3) The FCA may, on the application of the Miscellaneous BM person—
- (a) impose a requirement that the FCA considers appropriate;
  - (b) vary a requirement already imposed by the FCA; or
  - (c) cancel such a requirement.
- (4) The FCA may refuse an application under paragraph (3) if it appears to the FCA that—
- (a) the Miscellaneous BM person has contravened or is likely to contravene a relevant requirement;
  - (b) it is desirable to do so in order to advance any of the FCA's operational objectives; or
  - (c) it is desirable to do so in order to facilitate the performance of the FCA's functions under the EU Benchmarks Regulation 2016.
- (5) Where the FCA refuses an application under paragraph (3), section 55X of the Act (determination of applications: warning notices and decision notices) applies as if—
- (a) the reference in section 55X(2) to “an application made under this Part” included applications made under paragraph (3) of this regulation;
  - (b) the reference to section 55X(4) to “an application under this Part” included applications made under paragraph (3) of this regulation; and
  - (c) each reference to a “regulator” were a reference to the FCA.
- (6) Where the FCA proposes to impose or vary a requirement or imposes or varies a requirement under paragraph (2), section 55Y of the Act <sup>M1</sup> (exercise of own-initiative power: procedure) applies as if—
- (a) each reference to either regulator's own-initiative requirement power were a reference to the FCA's power to impose a requirement under this regulation;
  - (b) each reference to the regulator were a reference to the FCA, and each reference to either regulator were a reference to the FCA only;
  - (c) each reference to an authorised person were a reference to a Miscellaneous BM person;
  - (d) each reference to a variation of permission, or the imposition or variation of a requirement, were a reference to a restriction imposed on a Miscellaneous BM person under paragraph (2); and
  - (e) the reference in subsection (12) <sup>M2</sup> to section 391(8) were a reference to section 391(8) as applied by these Regulations.

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#### Textual Amendments

- F2** Words in [reg. 6\(1\)\(b\)](#) inserted (14.10.2019) by [The Financial Services and Markets Act 2000 \(Benchmarks\) \(Amendment\) Regulations 2019 \(S.I. 2019/1256\)](#), regs. 1, **2(3)**
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#### Marginal Citations

- M1** Section 55Y was inserted by section 11(2) of the [Financial Services Act 2012 \(c. 21\)](#).
- M2** Subsection (12) of section 55Y of the Act was inserted by section 11(2) of the [Financial Services Act 2012](#).

### Right to refer matters to the Tribunal

7. A Miscellaneous BM person who is aggrieved by the exercise of the FCA's powers under regulation 6 may refer the matter to the Tribunal.

### Exercise of power in support of overseas regulator

8.—(1) The FCA's own-initiative requirement powers may be exercised in respect of a Miscellaneous BM person at the request of, or for the purpose of, assisting an overseas regulator.

(2) If a request to the FCA for the exercise of its own-initiative requirement powers has been made by an overseas regulator, the FCA must, in deciding whether or not to exercise those powers in response to the request, consider whether it is necessary to do so in order to comply with [F3a retained EU obligation].

(3) In deciding whether or not to do so, in any case in which the FCA does not consider that the exercise of its own-initiative requirement powers is necessary in order to comply with [F4a retained EU obligation], it may take into account in particular—

- (a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority;
- (b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom;
- (c) the seriousness of the case and its importance to persons in the United Kingdom;
- (d) whether it is otherwise appropriate in the public interest to give the assistance sought.

(a) (4) (a) The FCA may decide not to exercise its own-initiative requirement powers in response to a request unless the overseas regulator concerned undertakes to make such contribution towards the cost of their exercise as the FCA considers appropriate.

(b) in subparagraph (a) “request” means a request of a kind mentioned in paragraph (1).

(5) Paragraph (4) does not apply if the FCA decides that it is necessary for it to exercise its own-initiative requirement powers in order to comply with [F5a retained EU obligation].

#### Textual Amendments

- F3** Words in reg. 8(2) substituted (31.12.2020) by [The Financial Services \(Miscellaneous\) \(Amendment\) \(EU Exit\) Regulations 2019 \(S.I. 2019/710\)](#), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)
- F4** Words in reg. 8(3) substituted (31.12.2020) by [The Financial Services \(Miscellaneous\) \(Amendment\) \(EU Exit\) Regulations 2019 \(S.I. 2019/710\)](#), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)
- F5** Words in reg. 8(5) substituted (31.12.2020) by [The Financial Services \(Miscellaneous\) \(Amendment\) \(EU Exit\) Regulations 2019 \(S.I. 2019/710\)](#), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)

### Reporting requirements

9.—(1) A Miscellaneous BM person must provide the FCA with such information in respect of its compliance or non-compliance with any relevant requirement as the FCA may direct.

(2) Such information must be provided at such times, in such form, and verified in such manner, as the FCA may direct.

(3) If at any time a Miscellaneous BM person considers that it is unable to comply with a relevant requirement, it must as soon as reasonably practicable notify the FCA of that fact, including the reasons why it is unable to comply.

## Public censure

10. If the FCA considers that—

- (a) a Miscellaneous BM person has contravened a relevant requirement;
- (b) a member of the management body<sup>M3</sup> of a Miscellaneous BM person is responsible for the contravention by the Miscellaneous BM person of a relevant requirement; or
- (c) another member of the senior management<sup>M4</sup> of a Miscellaneous BM person is responsible for the contravention by the Miscellaneous BM person of a relevant requirement;

the FCA may publish a statement to that effect.

### Marginal Citations

- M3** “management body” is defined in point (20) of paragraph 1 of Article 3 of the EU Benchmarks Regulation 2016 (OJ No. L171 29.06.2016, p.1.).
- M4** “senior management” is defined in Article 4.1.37 of the Markets in Financial Instruments Directive (OJ No. L173 12.06.2014, p.349; the Directive was amended by Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 (OJ No. L257, 28.08.2014 p.1) and Directive (EU) 2016 of the European Parliament and of the Council of 23 June 2016 (OJ No. L 175 30.06.2016 p.8)).

## Financial penalties

11.—(1) If the FCA considers that a Miscellaneous BM person has contravened a relevant requirement, it may impose a penalty of such amount as it considers appropriate on—

- (a) the Miscellaneous BM person;
- (b) a member of the management body of the Miscellaneous BM person if the FCA considers the member is responsible for the contravention;
- (c) another member of the senior management of the Miscellaneous BM person if the FCA considers the member is responsible for the contravention.

(2) A penalty imposed under this regulation is payable to the FCA and may be recovered as a debt owed to the FCA.

## Warning notice

12.—(1) If the FCA proposes to—

- (a) publish a statement in respect of a person under regulation 10 (public censure); or
- (b) impose a penalty on a person under regulation 11 (financial penalties);

it must give the person a warning notice.

(2) A warning notice about a proposal to publish a statement must set out the terms of the statement.

(3) A warning notice about a proposal to impose a penalty must state the amount of the penalty.

## Decision notice

13.—(1) If, having considered any representations made in response to the warning notice, the FCA decides to—

- (a) publish a statement under regulation 10 (public censure) (whether or not in the terms proposed); or

- (b) impose a penalty under regulation 11 (financial penalties) (whether or not of the amount proposed);

it must without delay give the person concerned a decision notice.

- (2) In the case of a statement, the decision notice must set out the terms of the statement.
- (3) In the case of a penalty, the decision notice must state the amount of the penalty.
- (4) If the FCA decides to—
  - (a) publish a statement in respect of a person under regulation 10 (public censure); or
  - (b) impose a penalty on a person under regulation 11 (financial penalties);

the person may refer the matter to the Tribunal.

(5) After a statement under regulation 10 (public censure) is published, the FCA must send a copy of it to the person concerned and to any person to whom a copy of the decision notice was given under section 393(4)<sup>M5</sup> of the Act (third party rights) (as applied by regulation 23 (application of Part 26 of the Act (notices))).

#### Marginal Citations

**M5** [Section 393\(4\)](#) was amended by paragraph 32(4) of Schedule 9(6) to the Financial Services Act 2012.

#### Statements of policy

- 14.—(1) The FCA must prepare and issue a statement of policy with respect to—
- (a) the imposition of penalties under regulation 11 (financial penalties); and
  - (b) the amount of penalties under that regulation.
- (2) The policy must require the FCA, in determining the amount of penalties, to have regard to—
- (a) the gravity and duration of the infringement;
  - (b) the criticality of the benchmark to financial stability and the real economy;
  - (c) the degree of responsibility of the responsible person;
  - (d) the financial strength of the responsible person, as indicated, in particular, by the total annual turnover of the responsible legal person or the annual income of the responsible natural person;
  - (e) the level of the profits gained or the losses avoided by the responsible person, insofar as they can be determined;
  - (f) the level of cooperation of the responsible person with the FCA, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;
  - (g) previous infringements by the person concerned;
  - (h) measures taken, after the infringement, by a responsible person to prevent a repetition of the infringement;
  - (i) the seriousness of the contravention in question in relation to the nature of the requirement contravened.
- (3) The FCA may at any time alter or replace a statement issued by it under this regulation.
- (4) If a statement issued under this regulation is altered or replaced by the FCA, the FCA must issue the altered or replacement statement.
- (5) The FCA must, without delay, give the Treasury a copy of any statement which it issues under this regulation.

(6) A statement issued under this regulation by the FCA must be published by the FCA in the way appearing to the FCA to be best calculated to bring it to the attention of the public.

(7) The FCA may charge a reasonable fee for providing a person with a copy of the statement.

(8) In exercising, or deciding whether to exercise, its power under regulation 11 (financial penalties) in the case of any particular contravention, the FCA must have regard to any statement of policy published by it under this regulation and in force at the time when the contravention in question occurred.

### **Statements of policy: procedure**

**15.**—(1) Before the FCA issues a statement under regulation 14 (statements of policy), the FCA must publish a draft of the proposed statement in a way appearing to the FCA to be best calculated to bring it to the attention of the public.

(2) The draft must be accompanied by a notice that representations about the proposed statement may be made to the FCA within a specified time.

(3) Before issuing the proposed statement the FCA must have regard to any representations made to it in accordance with paragraph (2).

(4) If the FCA issues the proposed statement it must publish an account, in general terms, of—

- (a) the representations made to it in accordance with paragraph (2); and
- (b) its response to them.

(5) If the statement differs from the draft published under paragraph (1) in a way which is, in the opinion of the FCA, significant, the FCA must (in addition to complying with paragraph (4)) publish details of the difference.

(6) The FCA may charge a reasonable fee for providing a person with a copy of a draft published by it under paragraph (1).

(7) This regulation also applies to a proposed statement made by way of an alteration to or a replacement of a previous statement.

### **Misleading the FCA**

**16.**—(1) A person must not, for the purposes of compliance or purported compliance with a requirement under these Regulations, knowingly or recklessly give the FCA information which is false or misleading in a material particular.

(2) A person must not provide information to another person—

- (a) knowingly; or
- (b) being reckless as to whether;

the information is false or misleading in a material particular and knowing that the information is to be provided to, or to be used for the purpose of providing information to, the FCA in connection with the discharge of its functions under this Part.

(3) A person who contravenes paragraph (1) or (2) is guilty of an offence.

(4) A person guilty of an offence under this regulation is liable—

- (a) on summary conviction—
  - (i) in England and Wales, to a fine;
  - (ii) in Scotland or Northern Ireland, to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to a fine.

### Restriction on penalties

17.—(1) A person who is convicted of an offence under regulation 16 (misleading the FCA) is not subsequently liable to a penalty under regulation 11 (financial penalties) in respect of the same acts or omissions that constituted the offence.

(2) A person on whom a penalty has been imposed under regulation 11 (financial penalties) is not subsequently liable for an offence under regulation 16 (misleading the FCA) in respect of the same contravention that led to the imposition of the penalty.

### Application of Part 9 of the Act (hearings and appeals)

18.—(1) Part 9<sup>M6</sup> of the Act (hearings and appeals) applies with respect to proceedings pursuant to references to the Tribunal under Part 2 of these Regulations and under the Act as applied by Part 2 of these Regulations (“relevant proceedings”) as it applies with respect to proceedings pursuant to references to the Tribunal under the Act, with the following modifications.

(2) Section 133<sup>M7</sup> of the Act (proceedings before the Tribunal: general provision) applies as if—

(a) in subsection (1)—

(i) “(whether made under this or any other Act)” were omitted;

(ii) in paragraph (a) “or the PRA” were omitted; and

(iii) paragraphs (b) and (c) were omitted;

(b) in subsection (2) “, (b) or (c)” were omitted;

(c) a decision to impose a penalty under regulation 11 (financial penalties) and a decision to publish a statement of censure under regulation 10 (public censure) were a “disciplinary reference” in subsection (7A).

(3) Section 133A of the Act (proceedings before Tribunal: decision and supervisory notices, etc.) applies as if—

(a) for subsection (1) there were substituted—

“(1) In determining in accordance with section 133(5) (as applied by these Regulations) a reference made as a result of a decision notice given by the FCA, the Tribunal may not direct the FCA to take action which it would not, under the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018, have the power to take when giving the notice.”;

(b) in subsection (5) “or the PRA” were omitted.

(4) Section 133B<sup>M8</sup> of the Act (offences) applies as if in subsection (1)—

(a) in paragraph (a) “or the PRA” were omitted; and

(b) paragraphs (b) and (c) were omitted.

#### Marginal Citations

**M6** Part 9 was amended by paragraphs 44 and 45 of Schedule 2 to S.I. 2010/22, section 23(2)(a), (b), (c), and section 23(4) of Part 2 of the Financial Services Act 2012, paragraph 83 of Schedule 9(3) to the Crime and Courts Act 2013 (c.22), regulation 3(3) of Part 2 of S.I. 2013/1388, article 116 of S.I. 2014/3329, regulation 10(4) of Part 2 of S.I. 2016/680, and regulation 2(5)(b) of S.I. 2017/1064. There are other amendments but none is relevant.

**M7** Section 133 was amended by paragraph 45 of Schedule 2 to S.I. 2010/22, section 23(2)(a), (b) and (c) of the Financial Services Act 2012, paragraph 83 of Schedule 9(3) to the Crime and Courts Act 2013 (c.22), regulation 3(3) of Part 2 of S.I. 2013/1388, regulation 10(4) of Part 2 of S.I. 2016/680 and regulation 2(5)(b) of S.I. 2017/1064. There are other amendments but none is relevant.

**M8** Section 133B was inserted by paragraph 45 of Schedule 2 to S.I. 2010/22 and amended by section 23(4) of the Financial Services Act 2012.

### Application of Part 11 of the Act (information gathering and investigations)

**19.**—(1) Part 11<sup>M9</sup> of the Act (information gathering and investigations) applies with respect to the discharge by the FCA of its functions under Part 2 of these Regulations and the EU Benchmarks Regulation 2016 in respect of Miscellaneous BM persons, as it applies with respect to the discharge by the FCA of its functions under the Act, with the following modifications.

(2) Part 11 of the Act applies as if—

- (a) each reference to the Act included a reference to these Regulations;
- (b) each reference to a section or Part of, or Schedule to, the Act were a reference to that section, Part or Schedule as applied by these Regulations;
- (c) each reference to an authorised person were a reference to a Miscellaneous BM person;
- (d) each reference to the PRA were omitted;
- (e) each reference to a regulator were a reference to the FCA, and each reference to either regulator were a reference to the FCA only.

(3) Section 165<sup>M10</sup> of the Act (regulators' power to require information: authorised persons etc.) applies as if subsections (4)(b) and (8A) were omitted.

(4) Sections 165A<sup>M11</sup> (PRA's power to require information: financial stability), 165B (safeguards etc. in relation to exercise of power under section 165A) and 165C (orders under section 165A(2)(d)) of the Act do not apply.

(5) Section 166A<sup>M12</sup> of the Act (appointment of skilled person to collect and update information) applies as if—

(a) for subsection (1) there were substituted—

“(1) This section applies if the FCA considers that a Miscellaneous BM person has contravened a requirement imposed by or under the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 or the EU Benchmarks Regulation 2016 to collect, and keep up to date, information of a description specified in those regulations.”;

(6) subsection (10) were omitted.

(7) Section 167<sup>M13</sup> of the Act (appointment of persons to carry out general investigations) applies as if—

(a) for subsection (1) there were substituted—

“(1) If it appears to the FCA that there is a good reason for doing so, the FCA may appoint one or more competent persons to conduct an investigation on its behalf into—

- (a) the nature, conduct or state of the business of a Miscellaneous BM person in respect of whom a requirement is imposed by or under the EU Benchmarks Regulation 2016 (“a person subject to the 2016 Regulation”);
- (b) a particular aspect of that business; or
- (c) the ownership or control of a person subject to the 2016 Regulation.”;

(b) subsections (2)(c) and (3A) were omitted;

(c) for subsection (4) there were substituted—

“(4) The power conferred by this section may be exercised in relation to a person who was a person subject to the 2016 Regulation but only in relation to—



- (a) business carried on when the person was a person subject to the 2016 Regulation;  
or
  - (b) the ownership or control of a person who was formerly a person subject to the 2016 Regulation at any time when the person was a person subject to the 2016 Regulation.”;
  - (d) subsections (5A) and (6) were omitted.
- (8) Section 168<sup>M14</sup> of the Act (appointment of persons to carry out investigations in particular cases) applies as if—
- (a) for subsection (1) there were substituted—
    - “(1) Subsection (3) applies if it appears to the FCA that there are circumstances suggesting that—
      - (a) a Miscellaneous BM person may have contravened a requirement imposed by or under the EU Benchmarks Regulation 2016 or the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018;
      - (b) a member of the management body of a person referred to in paragraph (a) or another member of the senior management of a person referred to in paragraph (a) may be responsible for the contravention of a requirement imposed by or under either of those Regulations; or
      - (c) a person may be guilty of an offence under either of those Regulations or under the Act as applied by these Regulations.”;
    - (b) subsections (2), (4) and (5) were omitted;
    - (c) for subsection (6) there were substituted—
      - “(6) “Investigating authority” means the FCA.”
- (9) Section 169<sup>M15</sup> of the Act (investigations etc. in support of overseas regulator) applies as if—
- (a) subsection (2A) were omitted;
  - (b) for subsection (13) there were substituted—
    - “(13) “Overseas regulator” means an authority in a country or territory outside the United Kingdom which has functions corresponding to those of the FCA under the EU Benchmarks Regulation 2016.”.
- (10) Section 169A<sup>M16</sup> of the Act (support of overseas regulator with respect to financial stability) does not apply.
- (11) Section 170<sup>M17</sup> of the Act (investigations: general) applies as if—
- (a) each reference to the investigating authority were a reference to the FCA;
  - (b) in subsection (1) “or (5)” were omitted;
  - (c) for subsection (3) there were substituted—
    - “(3) Subsections (2) and (9) do not apply if the investigator is appointed as a result of section 168(1) and the FCA believes that the notice required by subsection (2) or (9) would be likely to result in the investigation being frustrated.”;
  - (d) subsection (10) were omitted.
- (12) Section 172 of the Act (additional power of persons appointed as a result of section 168(1) or (4)) applies as if in the heading and in subsection (4) “or (4)” were omitted.
- (13) Section 174<sup>M18</sup> of the Act (admissibility of statements made to investigators) applies as if—

- (a) in subsection (2) “or in proceedings in relation to action to be taken against that person under section 123 <sup>M19</sup> to which this subsection applies” were omitted;
  - (b) in the list of offences in subsection (3), after paragraph (d), there was inserted—
    - “(e) under regulation 18 (misleading the FCA) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018.”.
  - (c) subsection (3A) were omitted;
  - (d) in subsection (4) the words from “or (5),” to the end were omitted.
- (14) Section 175 <sup>M20</sup> of the Act (information and documents: supplemental provisions) applies as if in subsection (8) “or (5)” were omitted.
- (15) Section 176 <sup>M21</sup> of the Act (entry of premises under warrant) applies as if—
- (a) for subsection (1) there were substituted—
    - “(1) A justice of the peace may issue a warrant under this section if satisfied on information on oath given by or on behalf of the FCA or an investigator that there are reasonable grounds for believing that the first, second or third set of conditions is satisfied.”;
  - (b) in subsection (3)(a) “or an appointed representative” were omitted;
  - (c) in subsection (10) “or (5)” were omitted;
  - (d) in subsection (11)(a) “87C, 87J,” and “165A, 169A” were omitted.
- (16) In section 191G <sup>M22</sup> of the Act (interpretation) after the definition of “credit institution” there was inserted—
- ““Miscellaneous BM person” means a person who is not an authorised person as defined by section 31 and is—
- (a) involved in the provision of, or contribution of input data to, a benchmark;
  - (b) a service provider to whom functions, or any relevant services or activities in the provision of a benchmark have been outsourced;
  - (c) a person who is not the service provider but who is or has been party to a contract in relation to the outsourcing of functions, or any relevant services, or activities in the provision of a benchmark;
  - (d) a legal representative of an administrator located in a third country which has obtained or has applied for prior recognition as referred to in Article 32(1) and as provided for in Article 32(3) of the EU Benchmarks Regulation 2016;
  - (e) a person who administers a benchmark relying on Article 51(4) of the EU Benchmarks Regulation 2016; or
  - (f) a supervised entity, as defined in Article 3(1)(17) of the EU Benchmarks Regulation 2016;”.

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### Marginal Citations

**M9** Part 11 was amended by paragraph 54 of Schedule 26 to the [Criminal Justice Act 2003 \(c. 44\)](#), [paragraph 33](#) of Schedule 7 to the [Counter Terrorism Act 2008 \(c. 28\)](#), [section 18](#) of and Schedule 2 to the [Financial Services Act 2010 \(c. 28\)](#), [Schedule 12](#) to and paragraph 8 of Schedule 18 to the [Financial Services Act 2012](#), paragraphs 36 and 37 of Schedule 2 to the [Bank of England and Financial Services Act 2016 \(c. 14\)](#), [paragraph 9](#) of Schedule 2 to the [Investigatory Powers Act 2016 \(c. 25\)](#), [S.I. 2001/1090](#), [2005/11433](#), [2007/126](#), [2011/1043](#), [2012/2554](#), [2013/1773](#), [2015/575](#) and [2016/680](#). There are other amendments but none is relevant.

- M10** Section 165 was amended by Schedule 2 to the Financial Services Act 2010, Schedule 12 to the Financial Services Act 2012, S.I. 2013/1773 and S.I. 2015/575.
- M11** Section 165A was inserted by section 18(2) of the Financial Services Act 2010, and amended by Schedule 12(1) to the Financial Services Act 2012 and Schedule 2(2) to the [Bank of England and Financial Services Act 2016](#) (c.14).
- M12** Section 166A was inserted by paragraph 6 of Schedule 12(1) to the Financial Services Act 2012.
- M13** Section 167 was amended by paragraph 7(2) of Schedule 12 to the Financial Services and Markets Act 2000, S.I. 2007/126 and S.I. 2015/575.
- M14** Section 168 was amended by S.I. 2007/126, [paragraph 33\(3\)](#) of Schedule 7(7) to the Counter-Terrorism Act 2008 (c.28) Schedule 2(1) to the Financial Services Act 2010, Schedule 12(1) to the [Financial Services Act 2012](#) (c.21), [paragraph 11](#) of Schedule 3 to the [Pension Schemes Act 2015](#) (c.8) and S.I. 2016/680
- M15** Section 169 was amended by S.I. 2011/1043 and Schedule 12(1) to the [Financial Services Act 2012](#) (c.21).
- M16** Section 169A was inserted by section 18(3) of the Financial Services Act 2010 and amended by paragraph 10 of Schedule 12(1) to the Financial Services Act 2012.
- M17** Section 170 was amended by paragraph 11, Schedule 12(1) to the Financial Services Act 2012.
- M18** Section 174 was amended by paragraph 12 of Schedule 12(1) to the Financial Services Act 2012 and S.I. 2016/680. There are other amendments but none is relevant.
- M19** Section 123 was substituted by regulation 9(1) of S.I. 2016/680.
- M20** Section 175 was amended by paragraph 13 of Schedule 12(1) to the Financial Services Act 2012.
- M21** Section 176 was amended by paragraphs 14 and 17 of Schedule 12(1) to the Financial Services Act 2012.
- M22** Section 191G was inserted by S.I. 2009/534, and amended by section 26(12) of Part 2 of the Financial Services Act 2012 and S.I. 2013/3115.

### Information given by an auditor

20. Sections 342<sup>M23</sup> (information given by auditor or actuary to a regulator), 343<sup>M24</sup> (information given by auditor or actuary to a regulator: persons with close links) and 344 (duty of auditor or actuary resigning etc. to give notice) of the Act apply with respect to the auditor of a Miscellaneous BM person as if—

- (a) each reference to an authorised person were a reference to a Miscellaneous BM person;
- (b) each reference to a regulator were a reference to the FCA;
- (c) each reference to the appropriate regulator were a reference to the FCA;
- (d) references to an actuary were omitted;
- (e) sections 342(2), 343(2) and 344(4) were omitted.

### Marginal Citations

- M23** Section 342 was amended by paragraph 4 of Schedule 13 to the Financial Services Act 2012 and S.I. 2013/3115.
- M24** Section 343 was amended by paragraph 5 of Schedule 13 to the Financial Services Act 2012 and S.I. 2013/3115.

### Restrictions on disclosure of information

21. Sections 348<sup>M25</sup> (restrictions on disclosure of confidential information by FCA, PRA etc.), 349<sup>M26</sup> (exceptions from section 348) and 352 (offences) of the Act apply with respect to information

received under these Regulations and under the Act as applied by these Regulations as they apply with respect to information received under the Act as if—

- (a) each reference to the Act included a reference to these Regulations;
- (b) each reference to a section or Part of the Act were a reference to that section or Part as applied by these Regulations;
- (c) in section 348(2), for “In this Part” there were substituted “ In sections 348, 349 and 352 as applied by the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 ”;
- (d) in section 352—
  - (i) in subsection (1) “or 350(5)” were omitted;
  - (ii) subsection (4) were omitted;
  - (iii) in subsection (5) “or (4)” were omitted;
  - (iv) in subsection (6)(a) “or that it had been disclosed in accordance with section 350” were omitted.

#### Marginal Citations

- M25** Section 348 was amended by paragraph 26 of Schedule 2(1) to the Financial Services Act 2010, paragraph 18 of Schedule 12(2) to the Financial Services Act 2012, paragraph 5 of Schedule 8(1) to the Financial Services (Banking Reform) Act 2013, paragraph 45 of Schedule 2(2) to the [Bank of England and Financial Services Act 2016 \(c.14\)](#) and [S.I. 2016/1239](#).
- M26** Section 349 was amended by section 964(4) of the [Companies Act 2006 \(c.46\)](#), [S.I. 2007/1093](#), [S.I. 2011/1043](#) and paragraph 19 of Schedule 12(2) to the Financial Services Act 2012.

#### Application of Part 25 of the Act (injunctions and restitution)

**22.**—(1) Part 25 <sup>M27</sup> of the Act (injunctions and restitution) applies for the purposes of these Regulations and the Act as applied by these Regulations, with the following modifications.

- (2) Part 25 of the Act applies as if—
  - (a) each reference to the Act included a reference to these Regulations;
  - (b) each reference to a section of the Act were a reference to that section as applied by these Regulations;
  - (c) each reference to a regulator, the regulator concerned or the appropriate regulator were a reference to the FCA;
  - (d) references to the Secretary of State were omitted;
  - (e) each reference to a relevant requirement in Part 25 were a reference to a requirement which is imposed by or under—
    - (i) these Regulations;
    - (ii) the Act as applied by these Regulations; or
    - (iii) the EU Benchmarks Regulation 2016.
- (3) Section 380 of the Act (injunctions) applies as if subsections (6) to (12) were omitted.
- (4) Section 381 of the Act (injunctions in cases of market abuse) does not apply.
- (5) Section 382 of the Act (restitution orders) applies as if subsections (9) to (15) were omitted.
- (6) Section 383 of the Act (restitution orders in cases of market abuse) does not apply.
- (7) Section 384 of the Act (power of FCA or PRA to require restitution) applies as if—

- (a) the reference to “authorised person” in subsection (1) were a reference to a “Miscellaneous BM person”;
- (b) in subsection (1) references to “the appropriate regulator” and “the regulator concerned” were references to “the FCA”;
- (c) subsections (2) and (3) and references to those subsections were omitted;
- (d) in subsection (6) the reference to “the regulator concerned” is a reference to the “the FCA”;  
and
- (e) subsections (7) to (13) were omitted.

#### **Marginal Citations**

**M27** Part 25 and the relevant sections thereof were amended by paragraphs 19, 21 and 23 of Schedule 9(5) to the Financial Services Act 2012 and S.I. 2016/680. There are other amendments but none is relevant.

#### **Application of Part 26 of the Act (notices)**

**23.**—(1) Part 26<sup>M28</sup> of the Act (notices) applies with respect to the giving of notices under these Regulations and under the Act as applied by these Regulations as it applies with respect to the giving of notices under the Act, with the following modifications.

- (2) Part 26 of the Act applies as if—
  - (a) each reference to the Act included a reference to these Regulations;
  - (b) each reference to a section of the Act were a reference to that section as applied by these Regulations;
  - (c) each reference to a regulator or to the regulator concerned were a reference to the FCA;
  - (d) references to the PRA were omitted.
- (3) Section 387 of the Act (warning notices) applies as if subsections (1A) and (3A) were omitted.
- (4) Section 388 of the Act (decision notices) applies as if subsections (1A) and (2) were omitted.
- (5) Section 391 of the Act (publication) applies as if—
  - (a) in subsection (1) the reference to a warning notice falling within subsection (1ZB) were to a warning notice given under regulation 13 (warning notice);
  - (b) subsection (1ZB) were omitted;
  - (c) subsection (4A) were omitted; and
  - (d) subsections (5A), (6A), (8A), (8B) and (8C) were omitted.
- (6) Sections 391A (publication: special provisions relating to the capital requirements directive), 391B (publication: special provisions relating to the transparency obligations directive), 391C (publication: special provisions relating to the UCITS directive) and 391D (publication: special provisions relating to the markets in financial instruments directive) of the Act do not apply.
- (7) Section 392 of the Act (application of sections 393 and 394) applies as if for paragraphs (a) and (b) there were substituted—
  - “(a) a warning notice given in accordance with—
    - (i) regulation 13 (warning notice) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018, or
    - (ii) section 385 as applied by those Regulations;
  - (b) a decision notice given in accordance with—

- (i) regulation 14 (decision notice) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018, or
  - (ii) section 386 as applied by those Regulations.”.
- (8) Section 395 of the Act (the FCA's and PRA's procedures) applies as if—
- (a) for subsection (1) there were substituted—
    - “(1) The FCA must determine the procedure that it proposes to follow in relation to a decision which gives rise to an obligation for it to give—
      - (a) a supervisory notice, warning notice or decision notice; or
      - (b) a decision under section 391(1)(c) to publish information about the matter to which a warning notice relates.”;
  - (b) in subsection (2)(a) for “any of paragraphs (a) to (c)” there were substituted “ paragraph (a) ”;
  - (c) in subsection (2)(b) for “(d)” there were substituted “ (b) ”;
  - (d) in subsection (2)(c)—
    - (i) for “(d)” there were substituted “ (b) ”;
    - (ii) for “(b) or (c)” there were substituted “ (a) ”;
  - (e) subsections (3)(b) and (4) were omitted;
  - (f) in subsection (9) “other than a warning notice or decision notice relating to a decision of the PRA that is required by a decision of the FCA of the kind mentioned in subsection (1) (b)(ii)” were omitted;
  - (g) subsection (9A) were omitted; and
  - (h) for subsection (13) there were substituted—
    - “(13) “Supervisory notice” means a notice given in accordance with—
      - (a) section 55Y of the Act as applied by regulation 6 (FCA's power to impose requirements) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018,
      - (b) regulation 34(5), (7) and (10) (procedure for prior recognition of a benchmark administrator located in a third country) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018, where the decision falls within regulation 34(5), and
      - (c) regulation 35(5), (7) and (10) (endorsement of benchmarks provided in a third country) of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 where the decision falls within regulation 35(5) or (10).”.

### Marginal Citations

**M28** Part 26 and the relevant sections thereof were amended by paragraph 11 of Schedule 4 to the Regulation of Investigatory Powers Act 2000 (c.23), S.I. 2005/1433, S.I. 2007/126, S.I. 2007/1973, S.I. 2009/534, **section 13(3)** and paragraphs 28 and 29 of Schedule 2 to the Financial Services Act 2010, S.I. 2010/22, **sections 18, 19** and 24 and paragraphs 26, 27, 28, 29, 30, 32, 33 and 34 of Schedule 9(6) and paragraph 8 of Schedule 13 to the Financial Services Act 2012, S.I. 2012/916, **paragraphs 12** and 14 of Schedule 3 to the Financial Services (Banking Reform) Act 2013, S.I. 2013/1388, S.I. 2016/225, S.I. 2016/680, S.I. 2016/1239. There are other amendments but none is relevant.

### Application of Part 27 of the Act (offences)

**24.**—(1) Part 27<sup>M29</sup> of the Act (offences) applies with respect to offences under these Regulations and the Act as applied by Part 2 of these Regulations as it applies with respect to offences under the Act, with the following modifications.

(2) Part 27 of the Act applies as if—

- (a) each reference to the Act included a reference to these Part 2 of Regulations;
- (b) each reference to a section of the Act were a reference to that section as applied by Part 2 of these Regulations;
- (c) references to the Secretary of State were omitted; and
- (d) references to the appropriate regulator were references to the FCA.

(3) Sections 398 (misleading the FCA or PRA: residual cases) and 399 (misleading the CMA) of the Act do not apply.

(4) Section 400 of the Act (offences by bodies corporate) applies as if subsection (6A) were omitted.

(5) Section 401 of the Act (proceedings for offences) applies as if—

- (a) subsection (1)(c) were omitted; and
- (b) subsections (3A), (3AB) and (3B) were omitted.

(6) Section 402 of the Act (power of FCA to institute proceedings for certain other offences) does not apply.

(7) Section 403(7) of the Act (jurisdiction and procedure in respect of offences) applies as if the words from “or an offence” to the end were omitted.

#### Marginal Citations

**M29** Part 27 and the relevant sections thereof were amended by section 95 and paragraphs 37, 38 and 40 of Schedule 9(7) to the Financial Services Act 2012 and [S.I. 2013/1881](#).

### Application of section 413 of the Act (protected items)

**25.** Section 413 of the Act (protected items) applies for the purposes of Part 2 of these Regulations as it applies for the purposes of the Act.

### FCA: penalties, fees and exemption from liability in damages

**26.**—(1) Paragraphs 19 to 23 (penalties and fees) and 25 (exemption from liability in damages) of Schedule 1ZA<sup>M30</sup> to the Act apply with respect to the discharge by the FCA of its functions under these Regulations as they apply with respect to the discharge by it of its functions under the Act, with the following modifications.

(2) Those paragraphs apply as if—

- (a) each reference to penalties imposed under the Act included a reference to penalties imposed under Part 2 of these Regulations;
- (b) each reference to a section or Part of the Act included a reference to that section or Part as applied by Part 2 of these Regulations; and
- (c) each reference to the functions of the FCA included a reference to its functions under Part 2 of these Regulations.

(3) Paragraph 20 applies as if references to the FCA's enforcement powers included—

- (a) its powers under these Regulations and under Part 25<sup>M31</sup> of the Act as applied by Part 2 of these Regulations;
  - (b) its powers in relation to the investigation of offences under these Regulations or under the Act as applied by Part 2 of these Regulations; and
  - (c) its powers in England and Wales or Northern Ireland in relation to the prosecution of offences under these Regulations or under the Act as applied by Part 2 of these Regulations.
- (4) Paragraph 21 applies as if regulated persons included Miscellaneous BM persons.
- (5) Paragraph 23 applies as if references to qualifying functions included references to the functions of the FCA under these Regulations and under the Act as applied by Part 2 of these Regulations.

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#### **Marginal Citations**

**M30** [Schedule 1ZA](#) and the relevant paragraphs thereof were amended by Schedule 3 to the Financial Services Act 2012, section 109(1), paragraph 7(3) of Schedule 8(1) and paragraph 4 of Schedule 10 to the Financial Services (Banking Reform) Act 2013, [S.I. 2013/1773](#), [paragraphs 15](#) and 16 of Schedule 3 to the [Pension Schemes Act 2015 \(c.8\)](#) and section 29(6) of the [Bank of England and Financial Services Act 2016 \(c.14\)](#).

**M31** [Part 25](#) was amended by paragraphs 19, 21 and 23 of Schedule 9(5) to the Financial Services Act 2012 and [S.I. 2016/680](#). There are other amendments but none is relevant.



**Changes to legislation:**

There are currently no known outstanding effects for the The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018, PART 2.