

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 9 – Miscellaneous

Consumer credit

Section 107: Power to make further provision about regulation of consumer credit

615. The amendments to section 22 and Schedule 2 to FSMA made by *section 7* enable the Treasury to make an order the effect of which would be that the provision of credit would become a regulated activity and therefore within the scope of FSMA. *Section 107* confers a power on the Treasury to make further provision by order about the regulation of consumer credit. It is intended to be used as part of a package of measures to provide for the transfer of responsibility for the regulation of consumer credit from the Office of Fair trading (OFT) to the FCA. The power enables substantive provisions of the Consumer Credit Act 1974 (“CCA”) to continue to apply, notwithstanding the transfer of responsibility of regulation to the FCA. The FCA may also make rules under FSMA in relation to consumer credit, including rules which supplement and support the provisions of the CCA which continue to have effect.
616. *Subsection (1)* sets out the circumstances in which the power can be exercised. The power can only be used in circumstances where the Treasury have made an order under section 22 of FSMA after the passing of the Act which has the effect that an activity (a “transferred activity”) ceases to be an activity for which a licence under section 21 of the CCA is required, or would have been required but for a relevant exemption, and becomes a regulated activity for the purposes of FSMA.
617. *Subsection (2)* sets out what the Treasury may use the order to do, including:
- to transfer OFT functions under any provision of the CCA to the FCA, for example all or some of the general functions of the OFT set out in section 1 of the CCA (*paragraph (a)*);
 - to apply the enforcement powers of the FCA under FSMA (for example, section 205 (public censure) and section 206 (financial penalties)) to contraventions of the CCA (*paragraph (b)*). This could be used to enable the FCA to impose unlimited fines on firms for breach of a requirement imposed by or under a specified provision of the CCA;
 - to require the FCA to issue a statement of policy in relation to the exercise of powers conferred on it by virtue of *paragraph (b)*. This could be used to ensure that the FCA’s enforcement policy is clear so that firms will know what powers and sanctions the FCA are likely to use;
 - to provide that a person may not be convicted of an offence under the CCA in relation to an act or omission which has already been the subject of sanction under FSMA (*paragraph (d)*). This could be used to ensure that a person cannot receive

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a sanction twice (once under the CCA and once under FSMA) in relation to the same action;

- to transfer to the Treasury any functions under CCA previously exercisable by the Secretary of State (*paragraph (e)*);
 - to provide that functions of the Secretary of State under the CCA are exercisable concurrently with the Treasury (*paragraph (f)*);
 - provide for local weights and measures authorities or, in Northern Ireland, the Department of Enterprise, Trade and Investment, to exercise investigative powers under the CCA in relation to the commission or suspected commission of an offence under FSMA in relation to activities relating to consumer credit which are regulated under FSMA (*paragraph (g)*); and
 - to enable local weights and measures authorities in England and Wales or, in Northern Ireland, the Department of Enterprise, Trade and Investment to institute proceedings in England and Wales or Northern Ireland, without obtaining the consent of the Director of Public Prosecutions, for an offence under FSMA in relation to activities relating to consumer credit which are regulated under FSMA (*paragraphs (h) and (i)*).
618. *Subsection (3)* provides that where an order provides that the FCA may exercise its disciplinary powers under 205 to 206A of FSMA in relation to an act or omission that constitutes an offence under the CCA, the order must provide that a person who has been the subject of action under FSMA cannot be convicted under the CCA by reference to the same act or omission. The provision does not apply where the FCA exercises its regulatory powers, for example its power to vary or to cancel permission or to impose a requirement on an authorised person under Part 4A of FSMA.
619. *Subsection (5)* provides that functions to institute proceedings under subsection 2(i) may not be conferred on the Department of Enterprise, Trade and Investment without the consent of that Department.
620. *Subsection (6)* confers on the Treasury a power to repeal or exclude the application of any provision of the CCA in relation to a transferred activity.
621. *Subsection (7)* provides that in exercising their powers under this section the Treasury must have regard to the importance of securing an appropriate degree of protection for consumers and the principle of proportionality.
622. *Subsection (8)* provides for orders under subsection (2) to make such consequential provision as the Treasury consider appropriate, and to amend any enactment, including any provision of, or made under, the Act.

Section 108: suspension of licences under Part 3 of Consumer Credit Act 1974

623. *Section 108* makes a number of amendments to Part 3 of the CCA to provide for the OFT to suspend consumer credit licences. *Subsection (3)* inserts a new section 32A of the CCA which provides for the OFT to suspend an individual or group licence under the CCA if during the currency of a licence it appears to the OFT to be urgently necessary for the protection of consumers that the licence should cease to have effect immediately or on a specified date. A licence may be suspended for up to 12 months. *Subsection (3)* also inserts a new section 32B of the CCA which provides that a suspension can last for longer than 12 months if the OFT has given notice that it is minded to revoke the licence either on or before giving the notice of suspension under section 32A or during the suspension period. *Subsection (6)* inserts a new section 34ZA of the CCA which provides that where a person is invited by the OFT to submit representations in relation to a licence suspension the licence holder will be given 21 days to submit written representations or give notice that he wishes to do this orally. The OFT is then obliged to reconsider the decision to suspend the licence and make a new determination,

and give general notice of that decision once it has been made. There is no time limit on the OFT for doing this. *Subsection (8)* amends section 41 of the CCA to insert a new subsection (1ZA). This is in order to make it clear that, where the OFT has reconsidered a decision to suspend a licence (under section 34ZA) and confirmed the suspension, the 28 day appeal period runs from the decision to confirm the suspension.

Penalties received by Financial Services Authority or Bank of England

Section 109: payment to Treasury of penalties received by Financial Services Authority

624. *Section 109* requires the FSA, in respect of its financial year beginning 1 April 2012 and any subsequent financial year, to pay to the Treasury its penalty receipts after deducting and retaining its enforcement costs. *Subsection (2)* defines “penalty receipts” for this purpose as any amounts received by the FSA by way of penalties imposed under FSMA. *Subsection (3)* defines “enforcement costs” for these purposes as the expenses incurred by the FSA in connection with the exercise of consideration of the exercise of its enforcement powers (as defined by *subsection (4)*) in particular cases or the recovery of penalties. The effect of this provision is that the FSA may retain from penalty receipts funds to cover its enforcement case costs. The general costs of the FSA’s enforcement capability which are not attributable to case work (e.g. the cost of senior management or enforcement policy work) would not be treated as an “enforcement cost”. *Subsection (7)* provides that the Treasury may give a direction to the FSA as to how it is to comply with its duty under subsection (1). *Subsection (10)* provides that the Treasury must pay into the Consolidated Fund any sums received under this paragraph. *Subsection (11)* provides that the scheme operated by the FSA under Paragraph 16 of Schedule 1 to FSMA (scheme for distribution of penalties received under FSMA) is to apply, in relation to penalties received on or after 1 April 2012, only to the sums retained by the FSA in respect of enforcement costs.

Section 110: payment to Treasury of penalties received by Bank of England

625. *Section 110* requires the Bank, in respect of each of its financial years, to pay to the Treasury its penalty receipts after deducting and retaining its enforcement costs. *Subsection (2)* defines “penalty receipts” for this purpose as any amounts received by the Bank by way of penalties imposed under FSMA or section 198 of the Banking Act 2009. *Subsection (3)* defines “enforcement costs” for these purposes as the expenses incurred by the Bank in connection with the exercise of consideration of the exercise of its enforcement powers (as defined by *subsection (4)*) in particular cases or the recovery of penalties. The effect of this provision is that the Bank may retain from penalty receipts funds to cover its enforcement case costs. The general costs of the Bank’s enforcement capability which are not attributable to case work (e.g. the cost of senior management or enforcement policy work) would not be treated as an “enforcement cost”. *Subsection (6)* provides that the Treasury may give a direction to the Bank as to how it is to comply with its duty under subsection (1). *Subsection (9)* provides that the Treasury must pay into the Consolidated Fund any sums received under this paragraph. The Bank is not required to maintain a penalty scheme of the kind provided for by paragraph 16 of Schedule 1 to FSMA so no specific provision is made for the distribution of sums retained by the Bank under this section.

Amendments of the Companies Act 1989

Section 111: Amendments of the Companies Act 1989

626. *Section 111* amends section 166 of the Companies Act 1989 (power of Secretary of State to give directions to persons specified as recognised investment exchanges or recognised clearing houses under Part 18 of FSMA).

627. *Subsections (2) and (3)* replace references to the “Authority” (i.e. the FSA) in section 166 with references to “the appropriate regulator”, which is defined in *new subsection (9)* as the FCA in the case of recognised investment exchanges and the Bank in the case of recognised clearing houses (*subsection (8)*). These amendments are consequential on the amendments to Part 18 of FSMA (see, in particular, the amendments made by *section 29*).
628. *Subsection (4)* amends subsection (3) so as to make provision for two new grounds on which a direction may be given to a recognised body under subsection (2). Such directions may require the recognised body concerned to take action or to refrain from taking action under its default rules and may only be given where the relevant regulator is satisfied that it is necessary to give the direction for the purposes of any of the grounds specified in subsection (3) following consultation with the recognised body concerned. These changes will provide additional flexibility for the relevant regulators to take action to address risks to financial stability or to help facilitate a proposed, possible, or actual exercise of a power under section 1 of the Banking Act 2009 (special resolution regime).
629. *Section 166* confers a power of direction which applies where the exchange or clearing house has taken action under its default rules (without being directed to do so under subsection (2)) or has taken action following such a direction. Subsection (7) provides for an appropriate regulator to direct that the exchange or clearing house do or refrain from doing things it has power to do under its default rules. *Subsections (5) and (6)*, respectively, make amendments to subsection (7) and insert *new subsections (7A) and (7B)*. The general effect of these amendments is to remove, in certain circumstances, the restriction that applies to the exercise of the power of direction in subsection (7) (that the direction will not adversely affect default proceedings).

Settlement systems

Section 112: Evidencing and transfer of title to securities without written instrument

630. Chapter 2 of Part 21 of the Companies Act 2006 (evidencing and transfer of title to securities without written instrument) confers on the Treasury and the Secretary of State the power to make (either on a joint or concurrent basis) regulations concerning: (a) the procedures for recording and transferring title to “securities” (defined in section 783); and (b) the regulation of those procedures and the persons responsible for, or involved in the operation of, relevant systems (section 785(2)). [The Uncertificated Securities Regulations 2001, S.I. 2001/3755](#) (the “Regulations”) were made under this power.
631. The Regulations enable title to securities to be transferred without a written instrument (that is, in “dematerialised” or “uncertificated” form). In addition, the Regulations set out the regulatory framework for the operators of settlement systems which provide for the electronic transfer of title (see Part 2 (the operator) and Schedule 1 to the Regulations (requirements for approval of a person as an operator)).
632. Currently, certain functions (for example, concerning the approval of a person as an operator) are conferred on the Treasury under the Regulations. However, the Treasury has exercised its power under regulation 11 (delegation of Treasury functions) to delegate to the Authority (defined as the FSA) all of the functions conferred by Part 2 of the regulations (for example, responsibility for approving systems as “relevant systems”) save for those specified in regulation 12 (international obligations).
633. As part of the regulatory reforms, it is intended that the Bank is to assume the FSA’s functions under the Regulations. This is to be achieved by making new regulations conferring the relevant functions directly on the Bank. In order to facilitate this, minor amendments to the enabling power in section 785 are needed. *Section 93* inserts a *new subsection (7)* into section 785 of the Companies Act 2006 in order to enable provision to be made in the regulations for the purposes of conferring functions directly on the

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Bank (or any other person), and ensuring that the Bank could be given the power to make guidance or issue codes of practice or rules in relation to any provision made by the regulations. In addition, a *new subsection (8)* is inserted which will enable provision to be made in the regulations which confers immunity from liability in damages in specified cases (for example, in cases in which action is taken in the interests of addressing a threat to financial stability).

Director of Savings

Section 113: Provision of services by Director of Savings

634. *Section 113* enables National Savings and Investments (the Director of Savings) to enter into arrangements with other public bodies for it or persons authorised by it to provide services to those bodies.