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STATUTORY INSTRUMENTS

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**2001 No. 2657**

**FINANCIAL SERVICES AND MARKETS**

The Financial Services and Markets Act 2000  
(Transitional Provisions and Savings) (Civil Remedies,  
Discipline, Criminal Offences etc.) Order 2001

<i>Made</i>	- - - -	<i>20th July 2001</i>
<i>Laid before Parliament</i>		<i>20th July 2001</i>
<i>Coming into force</i>	- -	<i>in accordance with article 1</i>

The Treasury, in exercise of the powers conferred on them by sections 426, 427 and 428(3) of the Financial Services and Markets Act 2000(1), hereby make the following Order:

PART 1  
GENERAL

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc.) Order 2001 and comes into force on the day on which section 19 comes into force.

(2) In this Order—

“the Act” means the Financial Services and Markets Act 2000;

“the 2BCD Regulations” means the Banking Coordination (Second Council Directive) Regulations 1992(2);

“the Banking Act” means the Banking Act 1987(3);

“the Building Societies Act” means the Building Societies Act 1986(4);

“commencement” means the beginning of the day on which section 19 comes into force;

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(1) 2000 c. 8.  
(2) S.I.1992/3218; amended by S.I. 1993/3225, S.I. 1995/1217, S.I. 1995/1442, S.I. 1996/1669, S.I. 1999/2094 and S.I.2000/2952.  
(3) 1987 c. 22.  
(4) 1986 c. 53.

“the Financial Services Act” means the Financial Services Act 1986<sup>(5)</sup>;  
 “the Insurance Companies Act” means the Insurance Companies Act 1982<sup>(6)</sup>;  
 “investment business” has the same meaning as in the Financial Services Act;  
 “the ISD Regulations” means the Investment Services Regulations 1995<sup>(7)</sup>;  
 “recognised clearing house”, “recognised investment exchange”, “recognised professional body”, “recognised self-regulating organisation” and “recognised self-regulating organisation for friendly societies”<sup>(8)</sup> have the same meanings as in the Financial Services Act;  
 “the Regulated Activities Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001<sup>(9)</sup>.

(3) Any reference in this Order to a section, Part or Schedule is, unless the context otherwise requires, a reference to that section or Part of, or Schedule to, the Act.

## PART 2

### CIVIL REMEDIES

#### Remedial injunctions and restitution orders

2.—(1) Any requirement imposed before commencement by or under any of the provisions specified by paragraph (3) is to be treated as a relevant requirement for the purposes of section 380(2) and section 382.

(2) An application under section 380(2) or 382 in relation to a contravention of a requirement mentioned in paragraph (1) may be made only by the Authority and, in relation to such an application—

- (a) section 380(2) has effect subject to paragraphs (4) to (6); and
- (b) section 382 has effect subject to paragraphs (7) to (11).

(3) The provisions specified by this paragraph are—

- (a) section 3 of the Financial Services Act (prohibition of carrying on investment business without being authorised or exempt);
- (b) any rule or regulation made under Chapter V of Part I of that Act (conduct of investment business)<sup>(10)</sup>;
- (c) section 47 (misleading statements and practices), 56 (unsolicited calls)<sup>(11)</sup>, 57 (restrictions on advertising)<sup>(12)</sup> or 59 (employment of prohibited persons)<sup>(13)</sup> of that Act;

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<sup>(5)</sup> 1986 c. 60.

<sup>(6)</sup> 1982 c. 50.

<sup>(7)</sup> S.I. 1995/3275; amended by the Bank of England Act 1998 (c. 11), S.I. 1996/1669 and S.I. 2000/2952.

<sup>(8)</sup> When the Act was enacted, the only self-regulating organisations within the meaning of the Financial Services Act were the Personal Investment Authority Limited; the Investment Management Regulatory Organisation Limited; and The Securities and Futures Authority Limited. The only self-regulating organisations for friendly societies at that time were the Personal Investment Authority Limited and the Investment Management Regulatory Organisation Limited. By virtue of Schedule 21 to the Act, no new application for recognition as a self-regulating organisation or self-regulating organisation for friendly societies may be entertained.

<sup>(9)</sup> S.I. 2001/544.

<sup>(10)</sup> Relevant amendments and modifications are made by the Companies Act 1989 (c. 40) section 192, Schedules 23 and 24; S.I. 1988/717; S.I. 1992/3218; S.I. 1994/1696; S.I. 1995/1537; S.I. 1995/3275 and S.I. 1996/2827.

<sup>(11)</sup> Amended by the Companies Act 1989 (c. 40) Schedule 23; and modified by S.I. 1992/3218. Functions transferred by S.I. 1987/942.

<sup>(12)</sup> Modified by S.I. 1992/3218 and S.I. 1995/3275. Functions transferred by S.I. 1987/942.

<sup>(13)</sup> Modified by S.I. 1992/3218 and S.I. 1995/3275. Functions transferred by S.I. 1987/942.

- (d) section 50 of that Act (modifications of conduct of business and financial resources rules), including that section as it applied by virtue of paragraph 14(3) of Schedule 11 to that Act (friendly societies)(**14**);
- (e) section 58(3) of that Act (exceptions from restrictions on advertising);
- (f) Chapter VI of Part I of that Act (powers of intervention), including that Chapter as it applied by virtue of paragraph 23 of Schedule 11 to that Act(**15**);
- (g) section 91(2) of that Act (directions to authorised unit trust schemes);
- (h) section 130 of that Act (restriction on promotion of contracts of insurance);
- (i) any rule or regulation made under Schedule 11 to that Act;
- (j) paragraph 24 of Schedule 11 to that Act (requirement to furnish information);
- (k) any rule of a recognised self-regulating organisation to which the person concerned was subject and which regulated the carrying on by him of investment business;
- (l) any rule of a recognised self-regulating organisation for friendly societies to which the person concerned was subject and which regulated the carrying on by him of investment business;
- (m) any rule of a recognised professional body, recognised investment exchange or recognised clearing house to which the person was subject and which regulated the carrying on by him of investment business;
- (n) regulation 18 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996(**16**); and
- (o) section 3 of the Banking Act (restriction on acceptance of deposits)(**17**).

(4) No order may be made under section 380(2) in relation to a contravention of a requirement imposed by section 3 of the Financial Services Act unless the court is satisfied that the person concerned contravened that requirement by entering into a transaction.

(5) No order may be made under section 380(2) in relation to a contravention of a requirement imposed by or under a provision of any rule that is specified by paragraph (3)(m) unless the court is satisfied that the body, exchange or clearing house is unable or unwilling to take appropriate steps to require the person concerned to take steps to remedy the contravention.

(6) The only order that the court may make under section 380(2) in relation to a contravention of a requirement imposed by section 3 of the Banking Act is an order requiring a person to repay the deposit forthwith or at such time as the court may direct and, in determining whether and, if so, on what terms, to make such an order, the court must have regard to the effect that repayment in accordance with the order would have on the solvency of the person concerned or otherwise on his ability to carry on his business in a manner satisfactory to his creditors.

(7) No order may be made under section 382(1) in relation to the contravention of a requirement mentioned in paragraph (1) solely on the ground that a person has been knowingly concerned in such a contravention by another.

(8) No order may be made under section 382(1) in relation to a contravention of a requirement imposed by section 3 of the Banking Act unless the court is satisfied that section 382(1)(a) is satisfied.

(9) In deciding whether, and if so, on what terms, to make an order under section 382(1)(a) in relation to such a contravention, the court must have regard to the effect that payment in accordance

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(14) Amended by the Friendly Societies Act 1992 (c. 40) Schedule 18 and amended and repealed in part by the Companies Act 1989 (c. 40) Schedules 23 and 24.

(15) Amended by the Friendly Societies Act 1992 (c. 40) Schedule 18.

(16) S.I. 1996/2827; to which there are amendments not relevant to this Order.

(17) Amended by the Bank of England Act 1998 (c. 11) Schedule 5; modified by S.I. 1992/3218 and S.I. 1995/3275.

with the order would have on the solvency of the person concerned or otherwise on his ability to carry on business in a manner satisfactory to his creditors.

(10) Paragraph (11) applies if an application is made under section 382(1) in relation to a contravention of a requirement imposed by section 3 of the Financial Services Act.

(11) For the purposes of section 382(1)(b), a person is not to be regarded as having suffered loss or been otherwise adversely affected as a result of the contravention unless the court is satisfied that—

- (a) he is an investor; and
- (b) he suffered the loss or has been adversely affected as a result of—
  - (i) the contravention by the person concerned of section 47 or 56 of the Financial Services Act; or
  - (ii) the failure of that person to act substantially in accordance with any of the rules or regulations made under Chapter V of Part I of that Act.

### **Restitution by the Authority**

3.—(1) Paragraph (2) applies if—

- (a) an authorised person (within the meaning of the Act) was, immediately before commencement, a member of a recognised self-regulating organisation or a recognised self-regulating organisation for friendly societies;
- (b) the Authority is satisfied that before commencement he contravened a requirement imposed by a rule of that organisation which regulated the carrying on by him of investment business;
- (c) that organisation had, immediately before commencement, a power that corresponded to the power of the Authority under section 384(5) (power to order restitution) in relation to that contravention (or would have had such a power had an application been made to it by or on behalf of a person who had suffered loss or been otherwise adversely affected as a result of the contravention) but had not exercised that power in relation to that contravention; and
- (d) the Authority is satisfied that section 384(1)(b) is met in relation to that contravention.

(2) The Authority may, subject to paragraph (3), exercise the power in section 384(5).

(3) The Authority may exercise the power in section 384(5) in relation to a contravention of a requirement imposed by a rule of The Securities and Futures Authority Limited only on the application by or on behalf of a person who has suffered loss or been otherwise adversely affected as a result of the contravention.

### **Injunctions to prevent disposal of assets**

4.—(1) Any requirement imposed by or under any of the provisions specified by paragraph (3) is to be treated as a relevant requirement for the purposes of section 380(3)(a).

(2) An application under section 380(3) in relation to a contravention of a requirement mentioned in paragraph (1) may be made only by the Authority and, in relation to such an application, section 380(3) has effect subject to paragraph (4).

(3) The provisions specified by this paragraph are—

- (a) section 3 (restriction on acceptance of deposits)(**18**), 18 (false statements as to authorised status)(**19**), 35 (fraudulent inducement to make a deposit), 67 (restriction on use of banking

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**(18)** Amended by the Bank of England Act 1998 (c. 11) Schedule 5 and modified by S.I. 1992/3218 and S.I. 1995/3275.

**(19)** Modified by S.I. 1992/3218.

names)(20), 69 (restrictions on use of banking descriptions)(21), 71 (notices relating to names of institutions)(22) or 77 (notices relating to names of overseas institutions)(23) of the Banking Act;

- (b) regulations under section 32 (advertisement regulations)(24), 34 (unsolicited calls)(25) or 80 (regulations imposing requirements on overseas-based banks)(26) of that Act;
- (c) a direction under section 19(27) of that Act given before commencement; and
- (d) a restriction imposed under regulation 10 (power to restrict listed activities) or 23 (restriction on activities of UK subsidiaries) of the 2BCD Regulations.

(4) An order made under section 380(3) in relation to a contravention of a requirement mentioned in paragraph (1) has effect only while the suspected contravention is being investigated.

### **Unenforceable contracts**

5.—(1) Subsections (1) and (2) of section 26 apply to an agreement of the kind specified by paragraph (4) as they apply to an agreement of the kind specified in subsection (1) of that section (and so an agreement of the kind specified by paragraph (4) is unenforceable against the other party).

(2) Subsections (1) and (2) of section 27 apply to an agreement of the kind specified by paragraph (5) as they apply to an agreement of the kind specified in subsection (1) of that section (and so an agreement of the kind specified by paragraph (5) is unenforceable against the other party).

(3) In this article, a “regulated agreement” is an agreement made before commencement, the making or performance of which by one party (“the relevant party”) constituted an activity which fell within any paragraph of Part II of Schedule 1 to the Financial Services Act and which was not excluded by Part III or IV of that Schedule (or the performance of which would have constituted such an activity but for any repeal of that Act).

(4) The kind of agreement specified by this paragraph is any agreement which—

- (a) is a regulated agreement which was entered into by the relevant party in the course of carrying on investment business in contravention of section 3 of that Act; or
- (b) is a contract of insurance, other than a regulated agreement, which was entered into by a person before commencement in the course of carrying on insurance business (within the meaning of the Insurance Companies Act) in contravention of section 2 of that Act.

(5) The kind of agreement specified by this paragraph is any regulated agreement where—

- (a) the relevant party was, at the time the agreement was made, an authorised person (within the meaning of the Financial Services Act) or an exempted person (within the meaning of that Act) in respect of the investment business in the course of which he entered into the agreement; and
- (b) the agreement was entered into in consequence of anything said or done by a person (“the third party”) in the course of investment business carried on by the third party in contravention of section 3 of that Act.

(6) Section 28 (amount of compensation recoverable) applies to an agreement of the kind specified by paragraph (4) or (5) which is unenforceable because of section 26 or 27 (as applied by this Order) subject to the following modifications—

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(20) Amended by the Bank of England Act 1998, Schedule 5.

(21) Amended by the Bank of England Act 1998, Schedule 5 and modified by S.I. 1992/3218.

(22) Amended by the Bank of England Act 1998, Schedule 5 and modified by S.I. 1992/3218.

(23) Amended by the Bank of England Act 1998, Schedule 5.

(24) Amended by the Bank of England Act 1998, Schedule 5 and modified by S.I. 1995/1442.

(25) Amended by the Bank of England Act 1998, Schedule 5.

(26) Amended by the Bank of England Act 1998, Schedule 5.

(27) Amended by the Bank of England Act 1998, Schedule 5.

- (a) for subsection (5), substitute—

“(5) The issue is whether the person carrying on investment business (within the meaning of the Financial Services Act 1986) reasonably believed that his entering into the agreement did not constitute a contravention of section 3 of that Act, or, as the case may be, that the person carrying on insurance business (within the meaning of the Insurance Companies Act 1982) reasonably believed that his entering into the contract did not constitute a contravention of section 2 of that Act.”; and

- (b) for subsection (6), substitute—

“(6) The issue is whether the party who was, at the time the agreement was made, an authorised person or exempted person (within the meaning of the Financial Services Act 1986) knew that the agreement was entered into in consequence of anything said or done by the third party in contravention of section 3 of that Act.”.

## PART 3

### DISCIPLINARY POWERS

#### **Public statements in respect of pre-commencement contraventions of the Financial Services Act**

- 6.—(1) Paragraph (3) applies if—

- (a) the Authority considers that an authorised person contravened a pre-commencement provision that related to him before commencement; and  
 (b) the Authority has not given a written notice under section 60(2) of the Financial Services Act in respect of that contravention.

- (2) Paragraph (3) also applies if—

- (a) the Authority considers that an authorised person contravened a pre-commencement friendly societies provision that related to him before commencement;  
 (b) that person was, immediately before commencement, a regulated friendly society other than a member society; and  
 (c) the Authority has not given a written notice under paragraph 21 of Schedule 11 to the Financial Services Act(28) in respect of that contravention.

(3) The Authority may exercise the power conferred by section 205 (public censure) as if the contravention of the pre-commencement provision or pre-commencement friendly societies provision were a contravention of a requirement imposed by or under the Act.

- (4) “Pre-commencement provision”, in relation to an authorised person (“A”), means—

- (a) if immediately before commencement A was a regulated person—  
 (i) any rule or regulation made under Chapter V of Part I of the Financial Services Act;  
 (ii) section 56 or 59 of that Act; or  
 (iii) any condition imposed under section 50 of that Act;  
 (b) if immediately before commencement A was an authorised person (within the meaning of that Act), any prohibition or requirement imposed under Chapter VI of Part I of that Act (powers of intervention);

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(28) Functions transferred by S.I. 1987/925.

- (c) if immediately before commencement A was a manager or trustee (within the meaning of that Act) of an authorised unit trust scheme (within the meaning of that Act), any direction given to an authorised unit trust scheme under section 91 of that Act (directions to authorised unit trust schemes); or
  - (d) any direction under regulation 18 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996 to which A was subject.
- (5) “Pre-commencement friendly societies provision” means—
- (a) any rule or regulation made under Schedule 11 to the Financial Services Act;
  - (b) section 56 or 59 of that Act;
  - (c) any condition imposed under section 50 of that Act as it applied by virtue of paragraph 14(3) of Schedule 11 to that Act;
  - (d) any prohibition or requirement imposed under Chapter VI of Part I of that Act as it applied by virtue of paragraph 23 of that Schedule; or
  - (e) any requirement imposed by paragraph 24 of that Schedule.
- (6) For the purposes of paragraph (2)(b), “regulated friendly society” and “member society” have the meanings given by the Financial Services Act.
- (7) For the purposes of paragraph (4)(a), “regulated person” means any of—
- (a) an authorised person under the Financial Services Act by virtue of—
    - (i) section 22 (authorised insurers)(**29**);
    - (ii) section 24 (operators and trustees of recognised schemes);
    - (iii) section 25 (authorisation by the Authority)(**30**); or
    - (iv) section 31 (authorisation in other member State)(**31**);
  - (b) a European institution carrying on home-regulated investment business in the United Kingdom, within the meaning of the 2BCD Regulations; or
  - (c) a European investment firm carrying on home-regulated investment business in the United Kingdom, within the meaning of the ISD Regulations.

### **Public statements in respect of pre-commencement contraventions of the rules of self-regulating organisations**

- 7.—(1) Paragraph (2) applies if the Authority considers that—
- (a) an authorised person (within the meaning of the Act) was, immediately before commencement, a member of a recognised self-regulating organisation or a recognised self-regulating organisation for friendly societies;
  - (b) that person contravened a requirement imposed by a rule of that organisation which regulated the carrying on by him of investment business; and
  - (c) that organisation had, immediately before commencement, a power to make a statement corresponding to the power of the Authority under section 205 (public censure) in relation to that contravention but had not exercised that power in relation to that contravention.
- (2) The Authority may exercise the power conferred by section 205 as if the contravention of that requirement were a contravention of a requirement imposed by or under the Act.

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(29) Modified by S.I. 1994/1696.

(30) Functions transferred by S.I. 1987/942.

(31) Modified by S.I. 1992/3218 and S.I. 1995/3275.

### **Imposition of penalties in respect of pre-commencement contraventions of the rules of self-regulating organisations**

8.—(1) Paragraph (2) applies if the Authority considers that—

- (a) an authorised person (within the meaning of the Act) was, immediately before commencement, a member of a recognised self-regulating organisation or a recognised self-regulating organisation for friendly societies;
- (b) that person contravened a requirement imposed by a rule of that organisation which regulated the carrying on by him of investment business (“a relevant pre-commencement requirement”); and
- (c) that organisation had, immediately before commencement, a power to impose a penalty corresponding to the power of the Authority under section 206 (financial penalties) in relation to that contravention but had not exercised that power in relation to that contravention.

(2) The Authority may exercise the power conferred by section 206 as if the contravention of that relevant pre-commencement requirement were a contravention of a requirement imposed by or under the Act.

(3) The Authority may not, in the case of any particular contravention of a relevant pre-commencement requirement, impose under section 206 a penalty that exceeds the penalty which the relevant recognised self-regulating organisation or recognised self-regulating organisation for friendly societies could have imposed in relation to that contravention immediately before commencement.

(4) In exercising, or deciding whether to exercise, its powers under section 206 in relation to a contravention of a relevant pre-commencement requirement, the Authority must, in the case of any particular contravention, have regard to any statement issued by the relevant recognised self-regulating organisation or recognised self-regulating organisation for friendly societies of its policy with respect to the imposition of, and amount of, penalties which was in force at the time when the contravention in question occurred.

### **Disciplinary powers in relation to persons registered with self-regulating organisations**

9.—(1) Paragraph (2) applies where—

- (a) a person was, immediately before commencement—
  - (i) a registered person or former registered person for the purposes of the rules of The Securities and Futures Authority Limited (“SFA rules”);
  - (ii) a registered individual for the purposes of Rule 1.2(2) to (4) of Chapter IV of the rules of the Investment Management Regulatory Organisation Limited (“IMRO rules”); or
  - (iii) a registered individual or former registered individual for the purposes of the rules of the Personal Investment Authority Limited (“PIA rules”);
- (b) it appears to the Authority that that person, before commencement, contravened a requirement imposed by a SFA, IMRO or PIA rule which applied to him in his capacity as a person who performed (or was to perform) a function of the kind which, if performed immediately after commencement, would have been a controlled function within the meaning of Part V (“a relevant pre-commencement requirement”); and
- (c) that organisation had, immediately before commencement, a power to make a statement or impose a penalty corresponding to the power of the Authority under section 66(3)(a) or (b) (imposition of penalties and statements of misconduct) in relation to that contravention but had not exercised that power in relation to that contravention.



(2) The Authority may exercise the power conferred by subsection (3)(a) or (b) (as appropriate) of section 66 as if the person were guilty of misconduct within the meaning of subsection (2) of that section, subject to the condition specified by paragraph (3).

(3) The condition specified by this paragraph is that where the person—

(a) was, immediately before commencement—

(i) a former registered person, for the purposes of the SFA rules,

(ii) a person who had, before commencement, ceased to be a registered individual but who was treated as a registered individual for the purposes of Rule 1.2(2) to (4) of Chapter IV of the IMRO rules, or

(iii) a former registered individual for the purposes of the PIA rules,

(b) is a person, other than a person of the kind specified by sub-paragraph (a), who was not, immediately after commencement, an approved person (within the meaning of Part V), or

(c) was, immediately after commencement, an approved person, but has ceased to be an approved person,

the Authority may not exercise the power conferred by section 66 in relation to a contravention of a relevant pre-commencement requirement after the relevant period has expired.

(4) For the purposes of paragraph (3), the relevant period is the period in which the relevant, recognised self-regulating organisation had, before commencement, power to impose such a measure after a person ceased to be a registered person or registered individual (as the case may be), running from—

(a) in the case of a person specified by paragraph (3)(a), the time at which the person ceased to be a registered person or registered individual;

(b) in the case of a person specified by paragraph (3)(b), commencement;

(c) in the case of a person specified by paragraph (3)(c), the time at which the person ceased to be an approved person.

(5) For the purposes of section 66(4), if the Authority is proposing to take action under section 66 in relation to a contravention of a relevant pre-commencement requirement, the Authority is deemed to know of the misconduct on the first day on which the relevant recognised self-regulating organisation knew of the contravention of the requirement or had information from which the contravention could reasonably have been inferred.

(6) The Authority may not, in the case of any particular contravention of a relevant pre-commencement requirement, impose under section 66 a penalty that exceeds the penalty which the relevant recognised self-regulating organisation could have imposed in relation to that contravention immediately before commencement.

(7) In exercising, or deciding whether to exercise, its powers under section 66 in relation to a contravention of a relevant pre-commencement requirement, the Authority must, in the case of any particular contravention, have regard to any statement issued by the relevant recognised self-regulating organisation of its policy with respect to the imposition of, and amount of, penalties which was in force at the time when the contravention in question occurred.

## PART 4

### PROVISIONS RELATING TO THOSE FORMERLY AUTHORISED IN RELATION TO DEPOSIT TAKING

#### **Saving of sections 19 and 20 of the Banking Act**

**10.**—(1) The provisions of this article apply notwithstanding any repeal of section 19 or 20 of the Banking Act.

(2) If, immediately before commencement, a former authorised institution was subject to a direction given under section 19 of that Act, that direction continues to have effect after commencement.

(3) The Authority may, after commencement, give a former authorised institution a direction under section 19 of that Act where before commencement—

- (a) its authorisation under that Act had been revoked;
- (b) the former authorised institution had surrendered its authorisation under that Act;
- (c) the restricted authorisation of the institution had expired (other than by virtue of section 12(8) of that Act); or
- (d) a disqualification notice had been served on the institution under section 183 of the Financial Services Act.

(4) Section 19(2), (5), (6) and (7) and section 20 of the Banking Act continue to have effect in relation to any direction which has been given (or is to be given) under section 19 of that Act as modified by paragraph (3) or which continues to have effect by virtue of paragraph (2), subject to the following modifications to section 20—

- (a) in subsection (2), omit the words “, except one varying a previous direction with the agreement of the institution concerned” so far as they relate to section 20(2)(a);
- (b) in subsection (2)(a), for the words “section 27 below” substitute “article 10(5) of the Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc.) Order 2001”;
- (c) in subsection (2)(b), for the words “section 19(3), (4) and (5)” substitute “section 19(5)”.

(5) Where—

- (a) a person is aggrieved by a decision of the Authority after commencement to give him a direction under section 19 of the Banking Act or to vary a direction given to him under that section (whether given before or after commencement), or
- (b) the effect of such a decision of the Authority is to require the removal of a person as director, controller or manager (in each case, within the meaning of the Act) of a former authorised institution,

that person may refer the matter to the Tribunal.

(6) Section 133 applies to a reference to the Tribunal under this article subject to the following modifications—

- (a) the reference in section 133(1) to “this Act” includes a reference to this article;
- (b) the reference in section 133(1)(a) to the “decision notice” includes a reference to the notice given under section 20(1) of the Banking Act and any copy of the direction given under section 20(3) of that Act;
- (c) for subsection (4), substitute—

“(4) On a reference the Tribunal may direct the Authority to give a different direction or to vary an existing direction in a different way.”;

(d) subsections (6) to (9) are omitted.

(7) Section 414 (service of notices) has effect as if section 20 of the Banking Act, to the extent that it requires any notice to be given, were a provision of the Act.

(8) Sections 400 (offences by bodies corporate etc.), 401 (proceedings for offences) and 403 (jurisdiction and procedure in respect of offences) have effect as if any offence committed under section 19(6) of the Banking Act after commencement were an offence under the Act.

(9) In proceedings for an offence under section 19 of the Banking Act committed after commencement it is a defence for the person charged to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(10) Part XXV has effect as if any requirement imposed by a direction given under section 19 of that Act after commencement were a relevant requirement.

(11) In this article “former authorised institution” means any person who—

- (a) immediately before commencement did not hold an authorisation granted (or deemed to be granted) under section 9 of the Banking Act, but formerly held such an authorisation; and
- (b) is not and never has been an authorised person within the meaning of the Act.

### **Saving of sections 43A and 43B of the Building Societies Act**

**11.**—(1) The provisions of this article apply notwithstanding any repeal of section 43A or 43B of the Building Societies Act<sup>(32)</sup>.

(2) If, immediately before commencement, a former authorised building society was subject to a direction, given under section 43A of that Act, that direction continues to have effect after commencement.

(3) The Authority may, after commencement, give a former authorised building society a direction under section 43A of that Act where before commencement the authorisation of the society under the Building Societies Act had been revoked or its registration under that Act had been cancelled (including at the society’s request).

(4) Section 43A(2), (3) and (6) to (8) and section 43B of that Act continue to have effect in relation to any direction which has been given (or is to be given) under section 43A of that Act as modified by paragraph (3) or which continues to have effect by virtue of paragraph (2), subject to the following modifications—

- (a) for each reference to the Building Societies Commission, substitute a reference to the Financial Services Authority;
- (b) in subsection (2) of section 43A, for paragraph (b) substitute—
  - “(b) may relate to any activities of the society, whether or not they are regulated activities (within the meaning of the Financial Services and Markets Act 2000);”;
- (c) in subsection (2)(a) of section 43B, for the words “section 46” substitute “article 11(5) of the Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc.) Order 2001”;
- (d) in subsection (2)(b) of section 43B, for the words “section 43A(4), (5) and (6)” substitute “section 43A(6)”.

(5) Where—

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(32) Inserted by the Building Societies Act 1997 (c. 53) sections 19 and 20.

- (a) a person is aggrieved by a decision of the Authority to give him a direction under section 43A of the Building Societies Act,
- (b) the Authority, in deciding to give a direction under that section, makes a determination that a person is not a fit and proper person to hold or to remain in an office in the former authorised building society, or
- (c) the Authority imposes a requirement that any person be removed from an office in the former authorised building society,

that person may refer the matter to the Tribunal.

(6) Section 133 applies to a reference to the Tribunal under this article subject to the following modifications—

- (a) the reference in section 133(1) to “this Act” includes a reference to this article;
- (b) the reference in section 133(1)(a) to the “decision notice” includes a reference to the notice given under section 43B of the Building Societies Act and any copy of the direction given under section 43B(3) of that Act;
- (c) for subsection (4), substitute—
  - “(4) On a reference the Tribunal may direct the Authority to give a direction imposing different requirements.”;
- (d) subsections (6) to (9) are omitted.

(7) Section 414 (service of notices) has effect as if section 43B of the Building Societies Act, to the extent that it requires any notice to be given, were a provision of the Act.

(8) Sections 400 (offences by bodies corporate etc.), 401 (proceedings for offences) and 403 (jurisdiction and procedure in respect of offences) have effect as if any offence committed under section 43A(7) of the Building Societies Act after commencement were an offence under the Act.

(9) In proceedings for an offence under section 43A of the Building Societies Act committed after commencement it is a defence for the person charged to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(10) Part XXV has effect as if any requirement imposed by a direction given under section 43A of that Act after commencement were a relevant requirement.

(11) In this article “former authorised building society” means any person who—

- (a) immediately before commencement did not hold an authorisation within the meaning of the Building Societies Act, but formerly held such an authorisation; and
- (b) is not and never has been an authorised person within the meaning of the Act.

### **Winding-up of former authorised institutions etc.**

12.—(1) Section 367 (winding-up petitions) has effect as if—

- (a) the reference in subsection (1)(a) to a body which has been an authorised person included a reference to a body which—
  - (i) is not and never has been an authorised person (within the meaning of the Act);
  - (ii) has been an authorised institution within the meaning of the Banking Act;
  - (iii) was not, immediately before commencement, authorised under that Act; and
  - (iv) continues to have any liability in respect of deposits which it accepted when it was authorised under that Act;
- (b) the reference in subsection (1)(c) to a body which has carried on a regulated activity in contravention of the general prohibition included a reference to a company or partnership

which has, before commencement, contravened section 3 of the Banking Act and which continues to have any liability in respect of deposits which it accepted in contravention of that enactment.

(2) In that section as it has effect by virtue of paragraph (1), for subsections (4) and (5) substitute—

“(4) If a body is in default on an obligation to pay a sum due and payable in respect of a deposit, within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (including any sum that would otherwise be excluded by article 6 of that Order), it is to be treated for the purpose of subsection (3)(a) as unable to pay its debts.”.

## PART 5

### CRIMINAL OFFENCES

#### **Offences committed before commencement**

**13.**—(1) Sections 401 (proceedings for offences) and 403 (jurisdiction and procedure in respect of offences) have effect as if each offence to which this article applies were an offence under the Act.

(2) This article applies to any offence under any of the following provisions (or, where appropriate, subordinate legislation made under those provisions) which was committed before commencement—

- (a) the Financial Services Act;
- (b) the Banking Act;
- (c) the Insurance Companies Act;
- (d) the 2BCD Regulations;
- (e) the ISD Regulation;
- (f) section 9 or 43A of the Building Societies Act;
- (g) paragraph 3 of Schedule 3 to that Act;
- (h) section 31 of the Friendly Societies Act 1992<sup>(33)</sup>.

(3) In any proceedings brought after commencement for an offence to which this article applies, the person charged may raise any defence or excuse which he would have been entitled to raise had the proceedings been brought before commencement, notwithstanding any repeal or revocation of any provisions specified in paragraph (2).

## PART 6

### INFORMATION GATHERING AND INVESTIGATIONS

#### **Regulated persons**

**14.** For the purposes of this Part—

“former regulated person” means any person who was, at any time before commencement, a regulated person but who is not, and never has been, an authorised person within the meaning of the Act;

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(33) 1992 c. 40.

“regulated person” means—

- (a) an authorised person within the meaning of the Financial Services Act;
- (b) an exempted person by virtue of section 43(34) (listed money market institutions) or section 44(35) (appointed representatives) of that Act;
- (c) an authorised institution within the meaning of the Banking Act;
- (d) a person who was authorised under section 3 or 4 of the Insurance Companies Act(36);
- (e) a European institution within the meaning of the 2BCD Regulations;
- (f) a European investment firm within the meaning of the ISD Regulations;
- (g) an EC company within the meaning of the Insurance Companies Act which, by virtue of paragraph 1 or 8 of Schedule 2F to that Act(37), was able to carry on direct insurance business through a branch in the United Kingdom or provide insurance in the United Kingdom;
- (h) a friendly society which was authorised or treated as authorised for the purposes of Part IV of the Friendly Societies Act 1992, or which was permitted by virtue of section 31(2) or (3) of that Act to carry on any activities without authorisation under that Part; or
- (i) a building society which was authorised or treated as authorised for the purposes of the Building Societies Act.

### Power to require information

15.—(1) Section 165 (Authority’s power to require information) has effect as if—

- (a) each reference to an authorised person (except the references in subsections (7)(b) and (8)) included a reference to a former regulated person; and
- (b) the reference in subsection (4) to information and documents reasonably required in connection with the exercise by the Authority of functions conferred on it by or under the Act were, so far as it relates to information and documents held by or on behalf of—
  - (i) a former regulated person, or
  - (ii) a person connected with such a person,

a reference to information and documents reasonably required in connection with the exercise by the Authority of functions conferred on the Authority by, or exercisable by the Authority by virtue of, this Order in relation to that former regulated person.

(2) In determining whether a person is connected with a former regulated person under section 165(11), Part I of Schedule 15 has effect as if each reference to an authorised person were a reference to a former regulated person.

### Reports by skilled persons

16. Section 166 (reports by skilled persons) has effect as if—

- (a) the reference in subsection (2)(d) to a person who has at any relevant time been a person falling within paragraph (a), (b), or (c) included a reference to a person who has at any relevant time been—
  - (i) a regulated person (“A”);

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(34) Amended by the Bank of England Act 1998 (c. 11) sections 23, 25 and 26 and modified by S.I. 1992/3218, S.I. 1995/3275 and S.I. 1996/1669.

(35) Modified by S.I. 1992/3218 and S.I. 1995/3275.

(36) Section 3 was amended by S.I. 1997/2781.

(37) Inserted by S.I. 1994/1696 and amended by S.I. 1997/2781.

- (ii) any other member of A's group; or
  - (iii) a partnership of which A is a member; and
- (b) so far as it relates to a requirement to be imposed under section 166 on any of the persons specified by paragraph (a), the reference in subsection (1) of that section to any matter about which the Authority has required or could require the provision of information or production of documents under section 165 were a reference to any matter about which the Authority has required or could require the provision of information or production of documents under section 165 by virtue of article 15 of this Order.

### **Appointment of persons to carry out general investigations**

17.—(1) Section 167 (appointment of persons to carry out general investigations) has effect as if—

- (a) the reference in subsection (4) to a former authorised person, so far as it applies to paragraph (a) (but not paragraph (b)) included a reference to a former regulated person; and
- (b) the reference in paragraph (a) of that subsection to an authorised person included a reference to a regulated person.

(2) The Authority may not exercise the power conferred on it by section 167 in relation to a former regulated person unless it considers that an investigation is reasonably required in connection with the exercise by the Authority of functions conferred on it by, or exercisable by the Authority by virtue of, this Order.

(3) The Secretary of State may not exercise the power conferred on him by section 167 in relation to a former regulated person.

### **Appointment of persons to carry out investigations in particular cases**

18.—(1) Section 168(3) applies if it appears to the Authority or the Secretary of State that there are circumstances suggesting that any person may have committed an offence under any of the following enactments or if it appears to the Authority that any person may have contravened any of the following enactments—

- (a) section 3, 47, 56(38), 57(39), 76(40) or 200(2) of the Financial Services Act;
- (b) section 3(1) or 18 of the Banking Act(41);
- (c) section 2 or 72(42) of the Insurance Companies Act;
- (d) section 9 of, or paragraph 3 of Schedule 3 to, the Building Societies Act;
- (e) section 31 of the Friendly Societies Act 1992.

(2) For the purposes of Part XI, a person appointed under section 168(3) as a result of paragraph (1) is to be treated as having been appointed as a result of subsection (2) of section 168.

(3) Section 168(5) applies if—

- (a) it appears to the Authority or the Secretary of State that there are circumstances suggesting that any person may have committed an offence under any of the provisions specified by article 13 other than those specified by paragraph (1); or
- (b) it appears to the Authority that there are circumstances suggesting that—

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(38) Amended by the Companies Act 1989 (c. 40) Schedule 23 and modified by S.I. 1992/3218.

(39) Modified by S.I. 1992/3218 and S.I. 1995/3275.

(40) Amended by S.I. 1996/2827 and modified by S.I. 1992/3218 and S.I. 1995/3275.

(41) Modified by S.I. 1992/3218.

(42) Amended by the Cable and Broadcasting Act 1984 (c. 46) Schedule 5.

- (i) any person may have contravened any of the provisions specified by article 2(3) other than those enactments specified by paragraph (1);
  - (ii) an authorised person who was immediately before commencement a member of a recognised self-regulating organisation or recognised self-regulating organisation for friendly societies may have contravened a rule imposed by that organisation that regulated the carrying on by him of investment business; or
  - (iii) a person who was, immediately before commencement, a person specified by paragraph (1)(a) of article 9 may have contravened a requirement specified by paragraph (1)(b) of that article.
- (4) For the purposes of Part XI, a person appointed under section 168(5) as a result of paragraph (3) is to be treated as having been appointed as a result of subsection (4) of section 168.

## PART 7

### MISCELLANEOUS

#### Auditors

**19.** Section 345 (disqualification of auditors) has effect as if the reference to a duty imposed on an auditor under the Act included a reference to a duty imposed (whether before or, where applicable, after commencement) on an auditor under any of the following enactments—

- (a) section 109 of the Financial Services Act (communication by auditor with supervisory authorities)**(43)**;
- (b) section 47 of the Banking Act (communication by auditor with the Authority)**(44)**;
- (c) section 21A of the Insurance Companies Act (communications by auditor with the Treasury or the Secretary of State)**(45)**;
- (d) section 82 of the Building Societies Act (auditors' duties to Commission)**(46)**;
- (e) section 79 of the Friendly Societies Act 1992 (auditors' duties to Commission)**(47)**.

#### Recognised professional bodies

**20.**—(1) Notwithstanding any repeal of section 18 of, or Schedule 3 to, the Financial Services Act (requirements for recognition of professional bodies)**(48)**, the following provisions of that Schedule continue to have effect in relation to any body which was, immediately before commencement, a recognised professional body—

- (a) paragraphs 3 and 3A, so far as they relate to the carrying on of investment business before commencement;
- (b) sub-paragraphs (2) and (4) to (6) of paragraph 4;
- (c) sub-paragraph (3) of paragraph 4, so far as it relates to provision for disciplining members of the body;
- (d) paragraph 5, so far as it relates to investment business carried on before commencement;

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**(43)** Modified by S.I. 1992/3218, S.I. 1995/3275 and S.I. 1996/1669; functions transferred by S.I. 1987/942.

**(44)** Amended by the Bank of England Act 1998 (c. 11), Schedule 5 and S.I. 1996/1669 and modified by 1992/3218.

**(45)** Inserted by the Financial Services Act 1986, s. 135 and amended by S.I. 1996/1669 and S.I. 1997/2781.

**(46)** Amended by the Building Societies Act 1997 (c. 40), Schedules 7 and 9, S.I. 1991/1729 and S.I. 1996/1669; repealed by S.I. 2001/2617.

**(47)** Amended by S.I. 1996/1669 and repealed by S.I. 2001/2617.

**(48)** Amended by the Companies Act 1989 (c. 40) section 204 and Schedule 23.



(e) paragraph 6, so far as it relates to the obligation to co-operate with the Authority in the exercise of functions conferred on it by or under the Act in relation to the supervision or regulation of investment business or other financial services (or any other person having responsibility for the supervision or regulation of such business or services) in so far as that obligation relates to investment business carried on before commencement by a person who held a certificate issued by that body for the purposes of Part I of the Financial Services Act.

(2) Notwithstanding any repeal of section 211(3) of, or Schedule 15 to, the Financial Services Act (transitional provisions), sub-paragraphs (1) and (3) of paragraph 6 of that Schedule continue to have effect in relation to any rules which are required to be made by a body which was, immediately before commencement, a recognised professional body, so that the body can continue to satisfy the requirements of Schedule 3 to that Act which continue to have effect by virtue of paragraph (1).

(3) For the purposes of section 380(1) and (2) (injunctions), any requirement imposed by the provisions of Schedule 3 to the Financial Services Act which continues to have effect by virtue of paragraph (1) is deemed to be a relevant requirement.

#### **Information from former recognised professional bodies**

**21.** The Authority may by notice in writing require any person who was, immediately before commencement, a recognised professional body to furnish it with information—

- (a) which relates to—
  - (i) investment business carried on before commencement by a person who held a certificate issued by that body for the purposes of Part I of the Financial Services Act; or
  - (ii) the regulation or supervision of that investment business; and
- (b) which the Authority reasonably requires for the exercise of functions conferred on it by or under the Act.

#### **Tribunal proceedings that relate to the contravention of a rule**

**22.** In any reference to, or proceedings before, the Tribunal, in any subsequent appeal under section 137 and in any proceedings under Part XXV, the validity of any rule of a recognised self-regulating organisation, a recognised self-regulating organisation for friendly societies, a recognised professional body, a recognised investment exchange or a recognised clearing house may, in accordance with any provisions that relate to such references, proceedings or appeals, be raised.

20th July 2001

*Tony McNulty*  
*John Heppell*  
Two of the Lords Commissioners of Her  
Majesty's Treasury

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order relates to the civil, prosecutorial and disciplinary powers of the Financial Services Authority (“the Authority”) in relation to conduct that took place before the commencement of section 19 (the general prohibition) (“commencement”) of the Financial Services and Markets Act 2000 (“the Act”) and related matters. Generally, these powers reflect the powers of Authority before commencement under the Insurance Companies Act 1982 (“the 1982 Act”), the Financial Services Act 1986 (“the 1986 Act”), the Banking Act 1987 (“the 1987 Act”), and related enactments and the powers of the self-regulating organisations and self-regulating organisations for friendly societies (within the meaning of the 1986 Act).

Articles 2 and 4 modify Part XXV of the Act (injunctions and restitution) to enable the Authority to apply to the court for an order under section 380(2) (remedial orders), section 380(3)(a) (orders preventing disposal of assets) or section 382(1) (restitutionary orders) where a person has, before commencement, contravened certain enactments or provisions.

Article 3 modifies section 384 of the Act (restitution by the Authority) to enable the Authority to require an authorised person who was, immediately before commencement, a member of a recognised self-regulating organisation or a self-regulating organisation for friendly societies to make restitution where that organisation had a corresponding power.

Article 5 applies sections 26 to 28 of the Act (unenforceability of agreements) to certain agreements entered into in contravention of the 1986 Act or the 1982 Act.

Articles 6 and 7 modify section 205 of the Act (public censure) so that where a self-regulating organisation or self-regulating organisation for friendly societies could have exercised a corresponding power, or in certain other circumstances (which equate broadly to those set out in section 60 of, and paragraph 21 of Schedule 11 to, the 1986 Act) the Authority may exercise the power conferred by section 205 of the Act in relation to an authorised person.

Article 8 modifies section 206 of the Act (financial penalties) to enable the Authority to impose a financial penalty on an authorised person who was, immediately before commencement, a member of a self-regulating organisation or self-regulating organisation for friendly societies where that organisation had a corresponding power.

Article 9 enables the Authority to take disciplinary action under section 66 of the Act (approved persons) in relation to persons who were formerly registered individuals (or registered persons) under the rules of a self-regulating organisation where that organisation had a corresponding power.

Articles 10 and 11 save sections 19 and 20 of the 1987 Act and sections 43A and 43B of the Building Societies Act 1986 respectively for certain purposes. Under these provisions, the Authority may give formerly authorised institutions under the 1987 Act or former authorised building societies a direction where this appears desirable in the interests of depositors. Any such directions in force in relation to such a person immediately before commencement continue to have effect after commencement.

Article 12 applies section 367 of the Act (winding-up petitions) to those who were formerly an authorised institution under the 1987 Act or who, before commencement, contravened section 3 of that Act.

Article 13 applies section 401 of the Act (proceedings for offences) to offences committed before commencement under the 1982 Act, the 1986 Act, the 1987 Act and certain related provisions.

Articles 15 to 17 modify sections 165 (power to require information), 166 (reports by a skilled person) and 167 (general investigations) of the Act so that the powers conferred by those sections are exercisable in respect of former regulated persons (as defined in article 14). The powers are only exercisable where reasonably required in connection with the exercise by the Authority of functions conferred on it by, or exercisable by virtue of, this Order. Article 18 modifies section 168 of the Act (investigations in particular cases) so as to apply where there are circumstances suggesting that a person has contravened, or committed an offence under, certain enactments, provisions or rules before commencement.

Article 19 modifies section 345 of the Act (disqualification of auditors) so that failure to comply with certain duties imposed by the 1982 Act, the 1986 Act, the 1987 Act and certain enactments relating to mutual societies may be a basis on which to disqualify a person from being an auditor of an authorised person under the Act.

Article 20 saves certain provisions of Schedule 3 to the 1986 Act (recognised professional bodies) so far as they relate to investment business carried on before commencement. Article 21 provides that the Authority may require a person who was, immediately before commencement, a recognised professional body within the meaning of the 1986 Act to furnish it with certain information. The Authority may only require the production of information that relates to investment business carried on before commencement by a person who held a certificate issued pursuant to the 1986 Act by that body which the Authority reasonably requires for the exercise of functions conferred by or under the Act.

Article 22 provides that in any proceedings before the Tribunal, in any subsequent appeal or proceedings under Part XXV of the Act, the validity of certain rules (including those of a self-regulating organisation or recognised professional body) may be raised.

A copy of the rules of The Securities and Futures Authority Limited, the Personal Investment Authority Limited and the Investment Management Regulatory Organisation Limited may be obtained from the Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS.