

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Control of business transfers

Section 22 and Schedule 6: Control of business transfers

263. *Section 22(1)* omits certain words from *section 104* (control of business transfers), which has (at the date of publication of these notes) been brought into force only in relation to insurance business transfers. The effect of the partial commencement of section 104 is that the Part 7 procedure must be used in relation to insurance business transfers but need not be used in relation to banking business or reclaim fund business transfers. It is undesirable to continue to rely on the partial commencement of a provision of FSMA. Therefore the amendment made by *subsection (1)* preserves the position that the Part 7 procedure is only mandatory in relation to insurance business transfer schemes. The effect of section 107 (application for order sanctioning transfer scheme) is that the Part 7 process can be used in relation to banking business transfer schemes or reclaim fund business transfer schemes or, alternatively, other processes (such as a Private Act) may be used.
264. *Subsection (2)* introduces *Schedule 6* which makes a number of amendments to Part 7 of, and Schedule 12 to, FSMA.
265. *Paragraph 2 of Schedule 6* inserts a *new section 103A* into FSMA which defines the term “the appropriate regulator” for the purposes of Part 7. The effect of this change is that where the transfer scheme concerns business to be transferred from a transferor (the “authorised person concerned”) who is a PRA-*authorised person*, the PRA is to be the appropriate regulator; in any other case, the FCA is to be “the appropriate regulator”.
266. *Paragraph 3* amends section 109 (scheme reports) to specify that an application to court made under section 107 in relation to an insurance business transfer scheme must be accompanied by a report on the terms of the scheme which has been prepared by a person appearing to the “appropriate regulator” to have the appropriate skills to produce the report or has been nominated or approved by the regulator for the purpose of producing the report. As such, where the authorised person concerned is a PRA-*authorised person* the PRA will be responsible for nominating or approving the person to conduct the report (and the form of the report). However, as a result of the amendments made to the section (*sub-paragraph (3)*), before nominating or approving a person to produce the report or approving the form of the report the PRA is required to consult the FCA (*new subsection (4)*). Where the FCA is “the appropriate regulator” it is required to consult the PRA where the transferee is a PRA-*authorised person* or where the authorised person concerned or the transferee has in its immediate group a PRA-*authorised person* (*new subsections (5) and (6)*).
267. *Paragraph 4* amends section 110 (right to participate in proceedings) such that the “appropriate regulator” has the right to participate in court proceedings concerning a

*These notes refer to the Financial Services Act 2012
(c.21) which received Royal Assent on 19 December 2012*

transfer scheme in relation to which an application to court has been made. Where the authorised person concerned is a PRA-authorised person or a person who is regulated only by the FCA but has in its immediate group a PRA-authorised person (or where the transferee is a PRA-authorised person or has in its immediate group a PRA-authorised person) both the FCA and the PRA may participate in the proceedings. In other cases the FCA may participate in the proceedings.

268. If an insurance business or banking business transfer scheme is sanctioned by the court, the transferee is required to deposit two copies of the court order with the Authority within 10 days of the making of the order albeit that the Authority may extend that period (section 112(10) and (11)) (effect of order sanctioning a business transfer scheme). *Paragraph 5* amends the references to “the Authority” in subsections (10) and (11) to refer to “the appropriate regulator”. *Paragraph 6* inserts *new section 112ZA* after section 112 which requires the appropriate regulator to give a copy of any order received under section 112(10) to the other regulator in certain cases (for example, where the authorised person concerned is a PRA-authorised person the PRA must give a copy of the order to the FCA).
269. *Paragraph 7* replaces the references to “the Authority” in section 113 (appointment of an actuary in relation to the reduction of benefits). The amendments to this section enable the PRA and the FCA to apply to a court for an order appointing an actuary to investigate the business transferred under a scheme and to report to the relevant regulator on any reduction in benefits payable in relation to policies entered into by the transferor that, in the opinion of the actuary, ought to be made. *Sub-paragraph (3)* inserts a *new subsection (3)* which makes clear the circumstances in which an application may be made by the PRA.
270. *Section 111* (sanction of the court for business transfer schemes) provides that the court may only sanction a transfer scheme where it is satisfied that the relevant certification (specified in Schedule 12 to FSMA (transfer schemes: certificates)) has been obtained and that, in all the circumstances, it is appropriate to sanction the scheme. *Paragraph 8* amends section 115 (certificates for the purposes of insurance business transfers overseas) to replace the reference to “the Authority” with a reference to “the appropriate regulator”. *Paragraphs 9 to 19* amend the references to “the Authority” in Schedule 12 such that the “appropriate regulator” or (where appropriate) the prudential regulator of the transferee is specified as being the authority responsible for providing the relevant certification under that Schedule.