

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Information

Section 41 and Schedule 12: Information, investigations, disclosure etc.

459. *Section 41* introduces *Schedule 12* which makes various amendments to FSMA including amendments relating to information gathering and investigations (*Part 1*) and the public record, disclosure of information and cooperation (*Part 2*)).
460. *Paragraphs 1 to 5* of *Schedule 12* amend sections 165 to 166 of FSMA, transferring the information gathering powers of the FSA under these sections to the new regulators, or to the relevant regulator as the case may be (for example, the FCA in certain of the amendments to section 165(7) made by *paragraph 1(6)*, or the PRA in relation to the power to obtain information relating to financial stability under sections 165A and 165B as amended by *paragraphs 2 and 3*). The power in section 166 to require an authorised person to appoint a “skilled person” to produce a report is also extended so that the regulators may appoint such a skilled person directly and recover the cost from the authorised person in question.
461. *Paragraph 4* amends section 165C of FSMA. This relates to the making of an order by the Treasury under section 165A(2)(d) of FSMA to prescribe persons in relation to whom the PRA may impose a requirement to provide information or produce a document in connection with financial stability. The amendment provides that, in addition to the existing basis on which this power may be exercised (the activities carried on by the person pose or would be likely to pose a serious threat to the stability of the UK financial system), the Treasury may make such an order to implement a recommendation made by the FPC under section 9P of the BoE Act. Section 9P(4) of that Act (as inserted by section 4) provides that the FPC may only give such a recommendation if it considers that the making of an order under section 165A(2)(d) of FSMA in the manner recommended is desirable for the purposes of the FPC’s functions.
462. *Paragraph 6* inserts a *new section 166A* which confers a power on the regulators to require an authorised person to appoint a “skilled person” to collect or update information which the authorised person was required (but failed) to collect or maintain under rules imposed by that regulator, for example in relation to recovery plans; it also confers a power for the regulators to make the appointment directly and to recover the cost from the authorised person. As with *new section 137N*, *new section 166A* facilitates the collection of confidential information from others (for example, other members of the authorised person’s group) (*subsection (7)*) and enables the authorised person to disclose confidential information if required (*subsection (8)*).
463. *Paragraphs 7 to 14* amend sections 167 to 176 of FSMA, transferring powers of the FSA under these sections to the new regulators, or the relevant regulator as the case

may be, including powers in relation to investigations, information and documents, and entry to premises under warrants.

464. *Paragraph 13(3)* also amends section 175 to provide that where a regulator or investigator has obtained documents under information-gathering powers set out in Part 11 of FSMA, they may retain the originals for as long as necessary for the purpose for which they were requested, or until any legal proceeding are concluded. The effect of *paragraph 14(3)* is to place on a statutory footing in a uniform way across the United Kingdom the provisions relating to the execution of warrants and the powers exercisable by those accompanying the constable in the execution of the warrant, for example FCA or PRA staff who accompany a constable in entering and searching premises under a warrant. And *paragraph 15* inserts *new section 176A* which provides for original documents seized under a warrant to be retained as long as may be necessary, but for the owner to be able to apply for a court order requiring their return; this replaces the three month limit for retention set out in section 176(8) (though that limit is extended if criminal proceedings are commenced within that period).
465. Section 347 of FSMA requires the FSA to maintain a publicly available record of certain details about authorised persons (and other categories of persons set out in subsection (1)), including details of the services provided by authorised persons, their addresses, and any other information the FSA thinks is appropriate. *Paragraph 16* transfers the function of maintaining the record of authorised persons (including PRA-authorized persons) to the FCA; the public record to be maintained by the FCA will not include recognised clearing houses (*sub-paragraphs (2) and (3)*). *Paragraph 17* inserts a *new section 347A*, which requires the PRA to give the FCA information needed to maintain the record.
466. *Paragraphs 18 to 23* make consequential amendments to sections 348, 349, 350, 351, 351A and 353 of FSMA, replacing references to the FSA with references to the new regulators; these sections deal with restrictions on disclosure of information. *Paragraph 20* also amends section 350 so that HMRC may provide information to the FCA and the PRA for any of the FCA's or the PRA's functions, rather than only for the purposes of an investigation under section 168.
467. *Paragraph 24* inserts *new section 353A* which protects information about monetary policy, financial stability operations and private banking services that has been provided by the Bank of England. The regulators must not disclose this information (*subsection (1)*) though they may, for example, disclose such information to each other (*subsection (6)(a)*) and to investigators (*subsections (7) and (8)*).
468. Section 354 of FSMA imposes a duty on the FSA to cooperate with various bodies. *Paragraph 24* replaces section 354 with *new sections 354A and 354B*, imposing duties on the new regulators to cooperate with the persons listed in those new sections.
469. *New section 354C* requires the PRA to provide information to the Bank to assist the Bank in achieving its financial stability objective set out in section 2A(1) of the Bank of England Act 1998, which (as amended by *section 2*) is to protect and enhance the stability of the financial system of the United Kingdom.