

2009 No. 534

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Controllers)
Regulations 2009**

<i>Made</i> - - - -	<i>9th March 2009</i>
<i>Laid before Parliament</i>	<i>10th March 2009</i>
<i>Coming into force</i> - -	<i>21st March 2009</i>

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to credit and financial institutions.

The Treasury, in exercise of the powers conferred upon them by section 2(2) of the European Communities Act 1972, make the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Financial Services and Markets Act 2000 (Controllers) Regulations 2009 and come into force on 21st March 2009.

Interpretation

2. In these Regulations—

“the Act” means the Financial Services and Markets Act 2000(c);

“the Authority” means the Financial Services Authority.

Amendments to the Financial Services and Markets Act 2000

3. Sections 178 to 191G as set out in Schedule 1 have effect in place of the existing sections 178 to 191 in Part 12 of the Act (control over UK authorised persons).

4. In section 192 of the Act (power to change definitions of control etc)—

(a) in paragraph (a) for “190” substitute “191D”;

(b) in paragraph (b)—

(i) for “179” substitute “181”; and

(ii) for “having” substitute “acquiring”;

(c) in paragraph (c) for “180” substitute “182”; and

(d) in paragraph (d)—

(a) See the European Communities (Designation) (No.3) Order 2001 (S.I. 2001/3495).

(b) 1972 c.68.

(c) 2000 c.8.

- (i) for “181” substitute “183”; and
- (ii) for “reducing his” substitute “reducing or ceasing to have”.

5. Chapter 1A as set out in Schedule 2 has effect in place of the existing Chapter 1A of Part 18 of the Act (control over recognised investment exchanges)(a).

6. In section 395(13) of the Act (the Authority’s procedures)(b)—

- (a) after paragraph (bb) insert “(bc) 191B(1);”and
- (b) after paragraph (f) insert “(fa) 301J(1);”.

7. Sections 422 and 422A as set out in Schedule 3 have effect in place of the existing section 422 of the Act (controller)(c).

Transitional arrangements for notices

8. Part 12, Chapter 1A of Part 18 and section 422 of the Act as they stood immediately before these Regulations came into force apply in respect of any notification submitted to the Authority under those provisions before the date these Regulations came into force.

Repeal and revocation

9.—(1) Paragraph 165 of Schedule 27 to the Civil Partnership Act 2004(d) is repealed.

(2) The following provisions of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007(e) are revoked—

- (a) paragraph 10 of Schedule 2; and
- (b) paragraph 20 of Schedule 5.

*Dave Watts
Tony Cunningham*

9th March 2009

Two of the Lords Commissioners of Her Majesty’s Treasury

SCHEDULE 1

Regulation 3

“Notices of acquisitions of control over UK authorised persons

Obligation to notify the Authority: acquisitions of control

178.—(1) A person who decides to acquire or increase control over a UK authorised person must give the Authority notice in writing before making the acquisition.

(2) For the purposes of calculations relating to this section, the holding of shares or voting power by a person (“A1”) includes any shares or voting power held by another (“A2”) if A1 and A2 are acting in concert.

(3) In this Part, a notice given under this section is a “section 178 notice” and a person giving notice is a “section 178 notice-giver”.

-
- (a) Chapter 1A was inserted by regulation 3(2) of and paragraph 10 of Schedule 2 to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126).
 - (b) There are amendments to section 395(13); relevant amendments for the purposes of these Regulations are that paragraph (ba) was inserted by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 (S.I. 2005/381) and paragraph (bb) was inserted by the Prospectus Regulations 2005 (S.I. 2005/1433).
 - (c) Section 422 has been amended by the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126) (see regulation 3(5) and paragraphs 1 and 20 of Schedule 5) and the Civil Partnership Act 2004 (c. 33)(see section 261(1) and Schedule 27 paragraph 165).
 - (d) 2004 c.33. Paragraph 165 of Schedule 27 amends section 422 of the Act.
 - (e) S.I. 2007/126. Paragraph 10 of Schedule 2 inserts Chapter 1A of Part 18 of the Act and paragraph 20 of Schedule 5 amends section 422 of the Act.

Requirements for section 178 notices

179.—(1) A section 178 notice must be in such form, include such information and be accompanied by such documents as the Authority may reasonably require.

(2) The Authority must publish a list of its requirements as to the form, information and accompanying documents for a section 178 notice.

(3) The Authority may impose different requirements for different cases and may vary or waive requirements in particular cases.

Acknowledgment of receipt

180.—(1) The Authority must acknowledge receipt of a completed section 178 notice in writing before the end of the second working day following receipt.

(2) If the Authority receives an incomplete section 178 notice it must inform the section 178 notice-giver as soon as reasonably practicable.

Acquiring control and other changes of holding

Acquiring control

181.—(1) For the purposes of this Part, a person (“A”) acquires control over a UK authorised person (“B”) if any of the cases in subsection (2) begin to apply.

(2) The cases are where A holds—

- (a) 10% or more of the shares in B or in a parent undertaking of B (“P”);
- (b) 10% or more of the voting power in B or P; or
- (c) shares or voting power in B or P as a result of which A is able to exercise significant influence over the management of B.

Increasing control

182.—(1) For the purposes of this Part, a person (“A”) increases control over a UK authorised person (“B”) whenever—

- (a) the percentage of shares which A holds in B or in a parent undertaking of B (“P”) increases by any of the steps mentioned in subsection (2);
- (b) the percentage of voting power A holds in B or P increases by any of the steps mentioned in subsection (2); or
- (c) A becomes a parent undertaking of B.

(2) The steps are—

- (a) from less than 20% to 20% or more;
- (b) from less than 30% to 30% or more;
- (c) from less than 50% to 50% or more.

Reducing or ceasing to have control

183.—(1) For the purposes of this Part, a person (“A”) reduces control over a UK authorised person (“B”) whenever—

- (a) the percentage of shares which A holds in B or in a parent undertaking of B (“P”) decreases by any of the steps mentioned in subsection (2);
- (b) the percentage of voting power which A holds in B or P decreases by any of the steps mentioned in subsection (2); or
- (c) A ceases to be a parent undertaking of B.

- (2) The steps are—
- (a) from 50% or more to less than 50%;
 - (b) from 30% or more to less than 30%;
 - (c) from 20% or more to less than 20%.

(3) For the purposes of this Part, a person (“A”) ceases to have control over a UK authorised person (“B”) if A ceases to be in the position of holding—

- (a) 10% or more of the shares in B or in a parent undertaking of B (“P”);
- (b) 10% or more of the voting power in B or P; or
- (c) shares or voting power in B or P as a result of which A is able to exercise significant influence over the management of B.

Disregarded holdings

184.—(1) For the purposes of sections 181 to 183, shares and voting power that a person holds in a UK authorised person (“B”) or in a parent undertaking of B (“P”) are disregarded in the following circumstances.

(2) Shares held only for the purposes of clearing and settling within a short settlement cycle are disregarded.

(3) Shares held by a custodian or its nominee in a custodian capacity are disregarded, provided that the custodian or nominee is only able to exercise voting power represented by the shares in accordance with instructions given in writing.

(4) Shares representing no more than 5% of the total voting power in B or P held by an investment firm are disregarded, provided that it—

- (a) holds the shares in the capacity of a market maker (as defined in article 4.1(8) of the markets in financial instruments directive);
- (b) is authorised by its home state regulator under the markets in financial instruments directive; and
- (c) neither intervenes in the management of B or P nor exerts any influence on B or P to buy the shares or back the share price.

(5) Shares held by a credit institution or investment firm in its trading book are disregarded, provided that—

- (a) the shares represent no more than 5% of the total voting power in B or P; and
- (b) the credit institution or investment firm ensures that the voting power is not used to intervene in the management of B or P.

(6) Shares held by a credit institution or an investment firm are disregarded, provided that—

- (a) the shares are held as a result of performing the investment services and activities of—
 - (i) underwriting a share issue; or
 - (ii) placing shares on a firm commitment basis in accordance with Annex I, section A.6 of the markets in financial instruments directive; and
- (b) the credit institution or investment firm—
 - (i) does not exercise voting power represented by the shares or otherwise intervene in the management of the issuer; and
 - (ii) retains the holding for a period of less than one year.

(7) Where a management company (as defined in Article 1a.2 of the UCITS directive) and its parent undertaking both hold shares or voting power, each may disregard holdings of the other, provided that each exercises its voting power independently of the other.

(8) But subsection (7) does not apply if the management company—

- (a) manages holdings for its parent undertaking or an undertaking in respect of which the parent undertaking is a controller;
- (b) has no discretion as to the exercise of the voting power attached to such holdings; and
- (c) may only exercise the voting power in relation to such holdings under direct or indirect instruction from—
 - (i) the parent undertaking; or
 - (ii) an undertaking in respect of which of the parent undertaking is a controller.

(9) Where an investment firm and its parent undertaking both hold shares or voting power, the parent undertaking may disregard holdings managed by the investment firm on a client by client basis and the investment firm may disregard holdings of the parent undertaking, provided that the investment firm—

- (a) has permission to provide portfolio management;
- (b) exercises its voting power independently from the parent undertaking; and
- (c) may only exercise the voting power under instructions given in writing, or has appropriate mechanisms in place for ensuring that individual portfolio management services are conducted independently of any other services.

Assessment procedure

Assessment: general

185.—(1) Where the Authority receives a section 178 notice, it must—

- (a) determine whether to approve the acquisition to which it relates unconditionally; or
- (b) propose to—
 - (i) approve the acquisition subject to conditions (see section 187); or
 - (ii) object to the acquisition.

(2) The Authority must—

- (a) consider the suitability of the section 178 notice-giver and the financial soundness of the acquisition in order to ensure the sound and prudent management of the UK authorised person;
- (b) have regard to the likely influence that the section 178 notice-giver will have on the UK authorised person; and
- (c) disregard the economic needs of the market.

(3) The Authority may only object to an acquisition—

- (a) if there are reasonable grounds for doing so on the basis of the matters set out in section 186; or
- (b) if the information provided by the section 178 notice-giver is incomplete.

Assessment criteria

186. The matters specified in section 185(3)(a) are—

- (a) the reputation of the section 178 notice-giver;
- (b) the reputation and experience of any person who will direct the business of the UK authorised person as a result of the proposed acquisition;
- (c) the financial soundness of the section 178 notice-giver, in particular in relation to the type of business that the UK authorised person pursues or envisages pursuing;

- (d) whether the UK authorised person will be able to comply with its prudential requirements (including the threshold conditions in relation to all of the regulated activities for which it has or will have permission);
- (e) if the UK authorised person is to become part of a group as a result of the acquisition, whether that group has a structure which makes it possible to—
 - (i) exercise effective supervision;
 - (ii) exchange information among regulators; and
 - (iii) determine the allocation of responsibility among regulators; and
- (f) whether there are reasonable grounds to suspect that in connection with the proposed acquisition—
 - (i) money laundering or terrorist financing (within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26th October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing^(a)) is being or has been committed or attempted; or
 - (ii) the risk of such activity could increase.

Approval with conditions

- 187.**—(1) The Authority may impose conditions on its approval of an acquisition.
- (2) The Authority may only impose conditions where, if it did not impose those conditions, it would propose to object to the acquisition.
- (3) The Authority may not impose conditions requiring a particular level of holding to be acquired.
- (4) The Authority may vary or cancel the conditions.

Assessment: consultation with EC competent authorities

- 188.**—(1) The Authority must consult any appropriate home state regulator before making a determination under section 185 and, in doing so, must comply with such requirements as to consultation as may be prescribed.
- (2) Where the Authority makes a determination under section 185, it must indicate any views or reservations received from any home state regulator it consults in accordance with subsection (1).
- (3) The Authority must cooperate with any equivalent consultation by a host state regulator in relation to a UK authorised person.
- (4) In order to comply with an obligation under subsection (1) or (3), the Authority must provide the regulator with—
- (a) any relevant information that it requests; and
 - (b) any information that the Authority considers that it needs.

Assessment: Procedure

- 189.**—(1) The Authority must act under section 185 within a period of 60 working days beginning with the day on which the Authority acknowledges receipt of the section 178 notice (“the assessment period”).
- (2) The assessment period may be interrupted, no more than once, in accordance with section 190.
- (3) The Authority must inform the section 178 notice-giver in writing of—

(a) OJ. L 309, 25.11.2005, p.15.

- (a) the duration of the assessment period;
 - (b) its expiry date; and
 - (c) any change to the expiry date by virtue of section 190.
- (4) The Authority must, within two working days of acting under section 185 (and in any event no later than the expiry date of the assessment period)—
- (a) notify the section 178 notice-giver that it has determined to approve the acquisition unconditionally; or
 - (b) give a warning notice stating that it proposes to—
 - (i) approve the acquisition subject to conditions; or
 - (ii) object to the acquisition.
- (5) Where the Authority gives a warning notice stating that it proposes to approve the acquisition subject to conditions—
- (a) it must, in the warning notice, specify those conditions; and
 - (b) the conditions take effect as interim conditions.
- (6) The Authority is treated as having approved the acquisition if, at the expiry of the assessment period, it has neither—
- (a) given notice under subsection (4); nor
 - (b) informed the section 178 notice-giver that the section 178 notice is incomplete.
- (7) If the Authority decides to approve an acquisition subject to conditions or to object to an acquisition it must give the section 178 notice-giver a decision notice.
- (8) Following receipt of a decision notice under this section, the section 178 notice-giver may refer the Authority’s decision to the Tribunal.

Requests for further information

190.—(1) The Authority may, no later than the 50th working day of the assessment period, in writing ask the section 178 notice-giver to provide any further information necessary to complete its assessment.

(2) On the first occasion that the Authority asks for further information, the assessment period is interrupted from the date of the request until the date the Authority receives the requested information (“the interruption period”).

(3) But the interruption period may not exceed 20 working days, unless subsection (4) applies.

(4) The interruption period may not exceed 30 working days if the notice-giver—

- (a) is situated or regulated outside the European Community; or
- (b) is not subject to supervision under—
 - (i) the UCITS directive;
 - (ii) the insurance directives;
 - (iii) the markets in financial instruments directive;
 - (iv) the reinsurance directive; or
 - (v) the banking consolidation directive.

(5) The Authority may make further requests for information (but a further request does not result in a further interruption of the assessment period).

(6) The Authority must acknowledge in writing receipt of further information before the end of the second working day following receipt.

Duration of approval

191.—(1) Approval of an acquisition (whether granted unconditionally or subject to conditions) is effective for such period as the Authority may specify in writing.

(2) Where the Authority has specified a period under subsection (1), it may extend the period.

(3) Where the Authority has not specified a period, the approval is effective for one year beginning with the date—

- (a) of the notice given under section 189(4)(a) or (b)(i);
- (b) on which the Authority is treated as having given approval under section 189(6); or
- (c) of a decision on a reference to the Tribunal which results in the person receiving approval.

Enforcement procedures

Objection by the Authority

191A.—(1) The Authority may object to a person’s control over a UK authorised person in any of the circumstances specified in subsection (2).

(2) The circumstances are that the Authority reasonably believes that—

- (a) the person acquired or increased control without giving notice under section 178(1) in circumstances where notice was required;
- (b) the person is in breach of a condition imposed under section 187; or
- (c) there are grounds for objecting to control on the basis of the matters in section 186.

(3) The Authority—

- (a) must take into account whether influence exercised by the person is likely to operate to the detriment of the sound and prudent management of the UK authorised person; and
- (b) may take into account whether the person has co-operated with any information requests made or requirements imposed by the Authority.

(4) If the Authority proposes to object to a person’s control over a UK authorised person, it must give that person a warning notice.

(5) The Authority must consult any appropriate home state regulator before giving a warning notice under this section and, in doing so, must comply with such requirements as to consultation as may be prescribed.

(6) If the Authority decides to object to a person’s control over a UK authorised person, it must give that person a decision notice.

(7) A person to whom the Authority gives a decision notice under this section may refer the matter to the Tribunal.

Restriction notices

191B.—(1) The Authority may give notice in writing (a “restriction notice”) to a person in the following circumstances.

(2) The circumstances are that—

- (a) the person has control over a UK authorised person by virtue of holding shares or voting power; and
- (b) in relation to the shares or voting power, the Authority has given the person a warning notice or a decision notice under section 189 or 191A or a final notice which confirms a decision notice given under section 189 or 191A.

(3) In a restriction notice, the Authority may direct that shares or voting power to which the notice relates are, until further notice, subject to one or more of the following restrictions—

- (a) except by court order, an agreement to transfer or a transfer of any such shares or voting power or, in the case of unissued shares, any agreement to transfer or transfer of the right to be issued with them, is void;
- (b) no voting power is to be exercisable;
- (c) no further shares are to be issued in pursuance of any right of the holder of any such shares or voting power or in pursuance of any offer made to their holder;
- (d) except in a liquidation, no payment is to be made of any sums due from the body corporate on any such shares, whether in respect of capital or otherwise.

(4) A restriction notice takes effect—

- (a) immediately; or
- (b) on such date as may be specified in the notice.

(5) A restriction notice does not extinguish rights which would be enjoyable but for the notice.

(6) A copy of the restriction notice must be served on—

- (a) the UK authorised person in question; and
- (b) in the case of shares or voting power held in a parent undertaking of a UK authorised person, the parent undertaking.

(7) A person to whom the Authority gives a restriction notice may refer the matter to the Tribunal.

Orders for sale of shares

191C.—(1) The court may, on the application of the Authority, order the sale of shares or the disposition of voting power in the following circumstances.

(2) The circumstances are that—

- (a) a person has control over a UK authorised person by virtue of holding the shares or voting power; and
- (b) the acquisition or continued holding of the shares or voting power by that person is in contravention of a final notice which confirms a decision notice given under section 189 or section 191A.

(3) Where the court orders the sale of shares or disposition of voting power it may—

- (a) if a restriction notice has been given in relation to the shares or voting power, order that the restrictions cease to apply; and
- (b) make any further order.

(4) Where the court makes an order under this section, it must take into account the level of holding that the person would have been entitled to acquire, or to continue to hold, without contravening the final notice.

(5) If shares are sold or voting power disposed of in pursuance of an order under this section, any proceeds, less the costs of the sale or disposition, must be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for payment of a whole or part of the proceeds.

(6) The jurisdiction conferred by this section may be exercised by the High Court and the Court of Session.

Obligation to notify the Authority: dispositions of control

191D.—(1) A person who decides to reduce or cease to have control over a UK authorised person must give the Authority notice in writing before making the disposition.

(2) For the purposes of calculations relating to this section, the holding of shares or voting power by a person (“A1”) includes any shares or voting power held by another (“A2”) if A1 and A2 are acting in concert.

Requirements for notices under section 191D

191E.—(1) A notice under section 191D must be in such form, include such information and be accompanied by such documents as the Authority may reasonably require.

(2) The Authority must publish a list of its requirements as to the form, information and accompanying documents for a notice under section 191D.

(3) The Authority may impose different requirements for different cases and may vary or waive requirements in particular cases.

Offences

Offences under this Part

191F.—(1) A person who fails to comply with an obligation to notify the Authority under section 178(1) or 191D(1) is guilty of an offence.

(2) A person who gives notice to the Authority under section 178(1) and makes the acquisition to which the notice relates before the expiry date of the assessment period is guilty of an offence unless the Authority has approved the acquisition or given a warning notice under section 189(4)(b)(i).

(3) A person who contravenes an interim condition in a warning notice given under section 189(4)(b)(i) or a condition in a decision notice given under section 189(7) or a final notice which confirms a decision notice under that section is guilty of an offence.

(4) A person who makes an acquisition in contravention of a warning notice given under section 189(4)(b)(ii) or a decision notice given under section 189(7) or a final notice which confirms a decision notice under that section is guilty of an offence.

(5) A person who makes an acquisition after the Authority’s approval for the acquisition has ceased to be effective by virtue of section 191 is guilty of an offence.

(6) A person who provides information to the Authority which is false in a material particular is guilty of an offence.

(7) A person who breaches a direction contained in a restriction notice given under section 191B is guilty of an offence.

(8) A person guilty of an offence under subsection (1) to (3) or (5) to (7) is liable—

- (a) on summary conviction to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to a fine.

(9) A person guilty of an offence under subsection (4) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

Interpretation

Interpretation

191G.—(1) In this Part—

“acquisition” means the acquisition of control or of an increase in control over a UK authorised person;

“credit institution” means—

- (a) a credit institution authorised under the banking consolidation directive; or
- (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA State;

“shares” has the same meaning as in section 422;

“UK authorised person” means an authorised person who—

- (a) is a body incorporated in, or an unincorporated association formed under the law of, any part of the United Kingdom; and
- (b) is not a person authorised as a result of paragraph 1 of Schedule 5; and

“voting power” has the same meaning as in section 422.

(2) For the purposes of this Part, a “working day” is a day other than—

- (a) a Saturday or a Sunday; or
- (b) a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971^(a).

SCHEDULE 2

Regulation 5

“CHAPTER 1A

CONTROL OVER RECOGNISED INVESTMENT EXCHANGE

Notices of acquisitions of control over recognised investment exchanges

Obligation to notify the Authority: acquisitions of control

301A.—(1) A person who decides to acquire or increase control over a recognised investment exchange must give the Authority notice in writing before making the acquisition.

(2) A person who acquires or increases control over a recognised investment exchange in circumstances where notice is not required under subsection (1) must give the Authority notice in writing before the end of 14 days beginning with—

- (a) the day the person acquired or increased the control; or
- (b) if later, the day on which the person first became aware that the control had been acquired or increased.

(3) For the purposes of calculations relating to this section, the holding of shares or voting power by a person (“A1”) includes any shares or voting power held by another (“A2”) if A1 and A2 are acting in concert.

(4) A notice given under this section is a “section 301A notice” and a person giving notice is a “section 301A notice-giver”.

(a) 1971 c.80.

Requirements for section 301A notices

301B.—(1) A section 301A notice must be in such form, include such information and be accompanied by such documents as the Authority may reasonably require.

(2) The Authority must publish a list of its requirements as to the form, information and accompanying documents for a section 301A notice.

(3) The Authority may impose different requirements for different cases and may vary or waive requirements in particular cases.

Acknowledgment of receipt

301C.—(1) The Authority must acknowledge receipt of a section 301A notice in writing before the end of the second working day following receipt.

(2) If the Authority receives an incomplete section 301A notice it must inform the section 301A notice-giver as soon as reasonably practicable.

Acquiring and increasing control

Acquiring and increasing control

301D.—(1) For the purposes of this Chapter, a person (“A”) acquires control over a recognised investment exchange (“B”) if any of the cases in subsection (2) begin to apply.

(2) The cases are where A holds—

- (a) 20% or more of the shares in B or in a parent undertaking of B (“P”);
- (b) 20% or more of the voting power in B or P; or
- (c) shares or voting power in B or P as a result of which A is able to exercise significant influence over the management of B.

(3) For the purposes of this Chapter, a person (“A”) increases control over a recognised investment exchange (“B”) whenever—

- (a) the percentage of shares which A holds in B or in a parent undertaking of B (“P”) increases from less than 50% to 50% or more;
- (b) the percentage of voting power A holds in B or P increases from less than 50% to 50% or more; or
- (c) A becomes a parent undertaking of B.

Disregarded holdings

301E.—(1) For the purpose of section 301D, shares and voting power that a person holds in a recognised investment exchange (“B”) or in a parent undertaking of B (“P”) are disregarded in the following circumstances.

(2) Shares held only for the purposes of clearing and settling within a short settlement cycle are disregarded.

(3) Shares held by a custodian or its nominee in a custodian capacity are disregarded, provided that the custodian or nominee is only able to exercise voting power represented by the shares in accordance with instructions given in writing.

(4) Shares representing no more than 5% of the total voting power in B or P held by an investment firm are disregarded, provided that it—

- (a) holds the shares in the capacity of a market maker (as defined in article 4.1(8) of the markets in financial instruments directive);
- (b) is authorised by its home state regulator under the markets in financial instruments directive; and

- (c) neither intervenes in the management of B or P nor exerts any influence on B or P to buy the shares or back the share price.
- (5) Shares held by a credit institution or investment firm in its trading book are disregarded, provided that—
- (a) the shares represent no more than 5% of the total voting power in B or P; and
 - (b) the credit institution or investment firm ensures that the voting power is not exercised nor otherwise used to intervene in the management of B or P.
- (6) Shares held by a credit institution or an investment firm are disregarded, provided that—
- (a) the shares are held as a result of performing the investment services and activities of—
 - (i) underwriting a share issue; or
 - (ii) placing shares on a firm commitment basis in accordance with Annex I, section A.6 of the markets in financial instruments directive; and
 - (b) the credit institution or investment firm—
 - (i) does not exercise voting power represented by the shares or otherwise intervene in the management of the issuer; and
 - (ii) retains the holding for a period of less than one year.
- (7) Where a management company (as defined in Article 1a.2 of the UCITS directive) and its parent undertaking both hold shares or voting power, each may disregard holdings of the other, provided that each exercises its voting power independently of the other.
- (8) But subsection (7) does not apply if the management company—
- (a) manages holdings for its parent undertaking or an undertaking in respect of which the parent undertaking is a controller;
 - (b) has no discretion as to the exercise of the voting power attached to such holdings; and
 - (c) may only exercise the voting power in relation to such holdings under direct or indirect instruction from—
 - (i) the parent undertaking; or
 - (ii) an undertaking in respect of which of the parent undertaking is a controller.
- (9) Where an investment firm and its parent undertaking both hold shares or voting power, the parent undertaking may disregard holdings managed by the investment firm on a client by client basis and the investment firm may disregard holdings of the parent undertaking, provided that the investment firm—
- (a) has permission to provide portfolio management;
 - (b) exercises its voting power independently from the parent undertaking; and
 - (c) may only exercise the voting power under instructions given in writing, or has appropriate mechanisms in place for ensuring that individual portfolio management services are conducted independently of any other services.

Assessment procedure

Assessment: general

- 301F.**—(1) Where the Authority receives a section 301A notice, it must—
- (a) determine whether to approve the acquisition to which it relates; or
 - (b) propose to object to the acquisition.
- (2) In making its determination the Authority must—

- (a) consider the suitability of the section 301A notice-giver and the financial soundness of the acquisition in order to ensure the sound and prudent management of the recognised investment exchange in question; and
 - (b) have regard to the likely influence that the section 301A notice-giver will have on the recognised investment exchange.
- (3) The Authority may only object to an acquisition if it is not satisfied that the approval requirement is met.
- (4) The approval requirement is that the acquisition in question by the notice-giver does not pose a threat to the sound and prudent management of any financial market operated by the recognised investment exchange.

Assessment: Procedure

301G.—(1) The Authority must act under section 301F within a period three months from the date the Authority receives the completed section 301A notice (“the assessment period”).

- (2) The Authority must inform the section 301A notice-giver in writing of—
 - (a) the duration of the assessment period; and
 - (b) its expiry date.
- (3) The Authority must, within two working days of acting under section 301F (and in any event no later than the expiry date of the assessment period)—
 - (a) notify the section 301A notice-giver that it has determined to approve the acquisition; or
 - (b) in the case of a proposed objection to an acquisition, give a warning notice.
- (4) The Authority is treated as having approved the acquisition if, at the expiry of the assessment period, it has neither—
 - (a) given notice under subsection (3); nor
 - (b) informed the section 301A notice-giver that the notice is incomplete.
- (5) If the Authority decides to object to an acquisition it must give the section 301A notice-giver a decision notice.
- (6) Following receipt of a decision notice under this section, the section 301A notice-giver may refer the Authority’s decision to the Tribunal.

Duration of approval

301H.—(1) Approval of an acquisition is effective for such period as the Authority may specify in writing.

- (2) Where the Authority has specified a period under subsection (1), it may extend the period.
- (3) Where the Authority has not specified a period, the approval is effective for one year beginning with the date—
 - (a) of the notice given under section 301G(3)(a);
 - (b) on which the Authority is treated as having given approval under section 301G(5); or
 - (c) of a decision on a reference to the Tribunal which results in the person receiving approval.

Objections by the Authority

301I.—(1) The Authority may object to a person’s control over a recognised investment exchange in any of the circumstances specified in subsection (2).

(2) The circumstances are that the Authority reasonably believes that—

- (a) the person acquired or increased control without giving notice under section 301A in circumstances where notice was required; and
- (b) there are grounds for objecting to control on the basis of the approval requirement in section 301F(4).

(3) If the Authority proposes to object to a person’s control over a recognised investment exchange, it must give that person a warning notice.

(4) If the Authority decides to object to a person’s control over a UK authorised person, it must give that person a decision notice.

(5) A person to whom the Authority gives a decision notice under this section may refer the matter to the Tribunal.

Restriction notices

301J.—(1) The Authority may give notice in writing (a “restriction notice”) to a person in the following circumstances.

(2) The circumstances are that—

- (a) the person has control over a recognised investment exchange by virtue of holding shares or voting power; and
- (b) in relation to the shares or voting power, the Authority has given the person a warning notice or a decision notice under section 301G or 301I or a final notice which confirms a decision notice given under section 301G or 301I.

(3) In a restriction notice, the Authority may direct that shares or voting power to which the notice relates are, until further notice, subject to one or more of the following restrictions—

- (a) except by court order, an agreement to transfer or a transfer of any such shares or voting power or, in the case of unissued shares, any agreement to transfer or transfer of the right to be issued with them, is void;
- (b) no voting power is to be exercisable;
- (c) no further shares are to be issued in pursuance of any right of the holder of any such shares or voting power or in pursuance of any offer made to their holder;
- (d) except in a liquidation, no payment is to be made of any sums due from the body corporate on any such shares, whether in respect of capital or otherwise.

(4) A restriction notice takes effect—

- (a) immediately; or
- (b) on such date as may be specified in the notice.

(5) A restriction notice does not extinguish rights which would be enjoyable but for the notice.

(6) A copy of the restriction notice must be served on—

- (a) the recognised investment exchange in question; and
- (b) in the case of shares or voting power held in a parent undertaking of a recognised investment exchange, the parent undertaking.

(7) A person to whom the Authority gives a restriction notice may refer the matter to the Tribunal.

Orders for sale of shares

301K.—(1) The court may, on the application of the Authority, order the sale of shares or the disposition of voting power in the following circumstances.

(2) The circumstances are that—

- (a) a person has control over a recognised investment exchange by virtue of holding the shares or voting power; and
- (b) the acquisition or continued holding of the shares or voting power by that person is in contravention of a final notice which confirms a decision notice given under section 301G or section 301I.

(3) Where the court orders the sale of shares or disposition of voting power it may—

- (a) if a restriction notice has been given in relation to the shares or voting power, order that the restrictions cease to apply; and
- (b) make any further order.

(4) Where the court makes an order under this section, it must take into account the level of holding that the person would have been entitled to acquire, or to continue to hold, without contravening the final notice.

(5) If shares are sold or voting power disposed of in pursuance of an order under this section, any proceeds, less the costs of the sale or disposition, must be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for payment of a whole or part of the proceeds.

(6) The jurisdiction conferred by this section may be exercised by the High Court and the Court of Session.

Offences

Offences under this Chapter

301L.—(1) A person who fails to comply with an obligation to notify the Authority under section 301A(1) or (2) is guilty of an offence.

(2) A person who gives notice to the Authority under section 301A(1) and makes the acquisition to which the notice relates before the expiry date of the assessment period is guilty of an offence unless the Authority has approved the acquisition.

(3) A person who makes an acquisition in contravention of a warning notice or a decision notice given under section 301G or a final notice which confirms a decision notice under that section is guilty of an offence.

(4) A person who makes an acquisition after the Authority's approval for the acquisition has ceased to be effective by virtue of section 301H is guilty of an offence.

(5) A person who provides information to the Authority which is false in a material particular is guilty of an offence.

(6) A person who breaches a direction contained in a restriction notice given under section 301J is guilty of an offence.

(7) A person guilty of an offence under subsection (1), (2) or (4) to (6) is liable—

- (a) on summary conviction to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to a fine.

(8) A person guilty of an offence under subsection (3) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(9) It is a defence for a person charged with an offence under subsection (1) in relation to section 301A(2) to show that the person had, at the time of the alleged offence, no knowledge of the act or circumstances by virtue of which the duty to notify the Authority arose.

Interpretation

Interpretation

301M.—(1) In this Chapter—

“acquisition” means the acquisition of control or of an increase in control over a recognised investment exchange;

“credit institution” means—

- (a) a credit institution authorised under the banking consolidation directive; or
- (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA State; and

“shares” and “voting power” have the same meaning as in section 422.

(2) For the purposes of this Chapter, a “working day” is a day other than—

- (a) a Saturday or a Sunday; or
- (b) a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.”

SCHEDULE 3

Regulation 7

“Controller

422.—(1) In this Act “controller”, in relation to an undertaking (“B”), means a person (“A”) who falls within any of the cases in subsection (2).

(2) The cases are where A holds—

- (a) 10% or more of the shares in B or in a parent undertaking of B (“P”);
- (b) 10% or more of the voting power in B or P; or
- (c) shares or voting power in B or P as a result of which A is able to exercise significant influence over the management of B.

(3) For the purposes of calculations relating to this section, the holding of shares or voting power by a person (“A1”) includes any shares or voting power held by another (“A2”) if A1 and A2 are acting in concert.

(4) In this section “shares”—

- (a) in relation to an undertaking with a share capital, means allotted shares;
- (b) in relation to an undertaking with capital but no share capital, means rights to share in the capital of the undertaking;
- (c) in relation to an undertaking without capital, means interests—
 - (i) conferring any right to share in the profits, or liability to contribute to the losses, of the undertaking; or
 - (ii) giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up.

(5) In this section “voting power”—

- (a) includes, in relation to a person (“H”)—

- (i) voting power held by a third party with whom H has concluded an agreement, which obliges H and the third party to adopt, by concerted exercise of the voting power they hold, a lasting common policy towards the management of the undertaking in question;
 - (ii) voting power held by a third party under an agreement concluded with H providing for the temporary transfer for consideration of the voting power in question;
 - (iii) voting power attaching to shares which are lodged as collateral with H, provided that H controls the voting power and declares an intention to exercise it;
 - (iv) voting power attaching to shares in which H has a life interest;
 - (v) voting power which is held, or may be exercised within the meaning of subparagraphs (i) to (iv), by a subsidiary undertaking of H;
 - (vi) voting power attaching to shares deposited with H which H has discretion to exercise in the absence of specific instructions from the shareholders;
 - (vii) voting power held in the name of a third party on behalf of H;
 - (viii) voting power which H may exercise as a proxy where H has discretion about the exercise of the voting power in the absence of specific instructions from the shareholders; and
- (b) in relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, means the right under the constitution of the undertaking to direct the overall policy of the undertaking or alter the terms of its constitution.

Disregarded holdings

422A.—(1) For the purposes of section 422, shares and voting power that a person holds in an undertaking (“B”) or in a parent undertaking of B (“P”) are disregarded in the following circumstances.

(2) Shares held only for the purposes of clearing and settling within a short settlement cycle are disregarded.

(3) Shares held by a custodian or its nominee in a custodian capacity are disregarded, provided that the custodian or nominee is only able to exercise voting power attached to the shares in accordance with instructions given in writing.

(4) Shares representing no more than 5% of the total voting power in B or P held by an investment firm are disregarded, provided that it—

- (a) holds the shares in the capacity of a market maker (as defined in article 4.1(8) of the markets in financial instruments directive);
- (b) is authorised by its home state regulator under the markets in financial instruments directive; and
- (c) neither intervenes in the management of B or P nor exerts any influence on B or P to buy the shares or back the share price.

(5) Shares held by a credit institution or investment firm in its trading book are disregarded, provided that—

- (a) the shares represent no more than 5% of the total voting power in B or P; and
- (b) the credit institution or investment firm ensures that the voting power is not used to intervene in the management of B or P.

(6) Shares held by a credit institution or an investment firm are disregarded, provided that—

- (a) the shares are held as a result of performing the investment services and activities of—

- (i) underwriting shares; or
 - (ii) placing shares on a firm commitment basis in accordance with Annex I, section A.6 of the markets in financial instruments directive; and
- (b) the credit institution or investment firm—
- (i) does not exercise voting power represented by the shares or otherwise intervene in the management of the issuer; and
 - (ii) retains the holding for a period of less than one year.
- (7) Where a management company (as defined in Article 1a.2 of the UCITS directive) and its parent undertaking both hold shares or voting power, each may disregard holdings of the other, provided that each exercises its voting power independently of the other.
- (8) But subsection (7) does not apply if the management company—
- (a) manages holdings for its parent undertaking or an undertaking in respect of which the parent undertaking is a controller;
 - (b) has no discretion to exercise the voting power attached to such holdings; and
 - (c) may only exercise the voting power in relation to such holdings under direct or indirect instruction from—
 - (i) its parent undertaking; or
 - (ii) an undertaking in respect of which of the parent undertaking is a controller.
- (9) Where an investment firm and its parent undertaking both hold shares or voting power, the parent undertaking may disregard holdings managed by the investment firm on a client by client basis and the investment firm may disregard holdings of the parent undertaking, provided that the investment firm—
- (a) has permission to provide portfolio management;
 - (b) exercises its voting power independently from the parent undertaking; and
 - (c) may only exercise the voting power under instructions given in writing, or has appropriate mechanisms in place for ensuring that individual portfolio management services are conducted independently of any other services.
- (10) In this section “credit institution” means—
- (a) a credit institution authorised under the banking consolidation directive; or
 - (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA State.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Financial Services and Markets Act 2000 (c.8) (“FSMA”) in order to give effect to Directive 2007/44/EC of the European Parliament and Council (O.J. L 247, 21.9.07, p.1.) (“the Acquisitions Directive”) and for related purposes. The Acquisitions Directive concerns the prudential assessment procedure and criteria to be applied where a decision has been taken to acquire a substantial holding in a financial services firm. The Acquisitions Directive amends EC Directives relating to credit institutions, investment firms, insurance and reinsurance firms and UCITS management companies.

The Regulations implement the Acquisition Directive by substituting new provisions for provisions in Part 12 of FSMA (control over authorised persons). They also substitute a new Chapter 1A of Part 18 of FSMA (control over recognised investment exchanges) and provisions in section 422 of FSMA (controller) so that these provisions are consistent with the new provisions in Part 12. The new provisions, set out in Schedules 1 to 3 to these Regulations and other consequential changes to FSMA, are incorporated into FSMA by virtue of regulations 3 to 7.

Regulation 8 provides for transitional arrangements so that any notice given under the FSMA before the date these Regulations come into force is to be considered under the provisions which were previously in force.

Regulation 9 repeals a provision in the Civil Partnership Act 2004 (c. 33) which amended section 442 of the Act and revokes provisions in the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126) which introduced Chapter 1A of Part 18 into FSMA.

Schedule 1 contains the new provisions for Part 12 of FSMA. These are sections 178 to 191M. Any person who decides to acquire or increase control over a UK authorised person (i.e. a UK financial services firm) must notify the Financial Services Authority (“the Authority”) before making the acquisition. The new provisions include notice requirements and the procedure that the Authority must follow when considering the notice and determining whether to grant approval or to oppose. Any person who decides to reduce their holding in a UK authorised person, having previously held control must also notify the Authority, but in that case there is no requirement for approval.

Sections 191A to 191C provide for certain enforcement measures, including power for the Authority to object to a person’s control, power for the Authority to issue a restriction notice, restricting matters such as the exercise of voting power, and power for the court to order sale of shares or disposition of voting power.

Decisions of the Authority under the new provisions may be challenged by way of an application to the Financial Services and Markets Tribunal. Requirements are enforced by way of criminal offences.

Schedule 2 contains the new provisions for Chapter 1A of Part 18 of FSMA, similar to those in Part 12. Chapter 1A was inserted into FSMA pursuant to Directive 2004/39/EC of the European Parliament and Council of 21st April 2004 on markets in financial instruments (O.J. L 145, 30.4.2004, p.1.). It relates to control over investment exchanges

An impact assessment of the effect of this instrument on the costs of business may be obtained from the Financial Services Strategy Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is available on the Treasury’s website (www.hm-treasury.gov.uk).

© Crown copyright 2009

Printed and published in the UK by The Stationery Office Limited under the authority and superintendence of Carol Tullo, Controller of Her Majesty’s Stationery Office and Queen’s Printer of Acts of Parliament.

£5.00