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Shearman & Sterling LLP has created this comparison of relevant sections of the Financial Services Act 2012 (FSA) to show proposed changes to the FSA under the Financial Services and Markets Bill as tabled by Lord Lilley on 23 January 2023.

## Financial Services Act 2012

### 84 Arrangements for the investigation of complaints

- (1) The regulators must—
  - (a) make arrangements (“the complaints scheme”) for the investigation of complaints arising in connection with—
    - (i) the exercise of, or failure to exercise, any of their relevant functions (see section 85), and/or
    - (ii) whether they have exercised, or failed to exercise, their general functions in a way which is incompatible with—
      - (A) in the case of the FCA, the FCA’s strategic, operational or secondary objectives under FSMA 2000, and
      - (B) in the case of the PRA, the PRA’s general, insurance and secondary objectives, and any additional objectives, under FSMA 2000,

including complaints by authorised persons and senior managers regarding the regulators’ supervision of them, and
  - (b) appoint an independent person (“the investigator”) to be responsible for the conduct of investigations in accordance with the complaints scheme.
- (2) For the purposes of this Part “the regulators” are the FCA, the PRA and the Bank of England, and references to a regulator are to be read accordingly.
- (3) The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly.
- (4) The Treasury’s approval is required for the appointment or dismissal of the investigator.
- (5) The terms and conditions on which the investigator is appointed must be such as, in the opinion of the regulators, are reasonably designed to secure—
  - (a) that the investigator will be free at all times to act independently of the regulators, and
  - (b) that complaints will be investigated under the complaints scheme without favouring the regulators.
- (6) In this Part –
  - (a) “authorised person” has the same meaning as in FSMA 2000.

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(b) “senior manager” has the same meaning as in FSMA 2000.

(c) “general functions” has the same meaning as in sections 1B or 2J, as applicable, of FSMA 2000.

## **85 Relevant functions in relation to complaints scheme**

- (1) This section has effect for the interpretation of the reference in section 84(1)(a) to the relevant functions of the regulators.
- (2) The relevant functions of the FCA or the PRA are—
  - (a) its functions conferred by or under FSMA 2000, other than its legislative functions and its standards review functions, and
  - (b) such other functions as the Treasury may by order provide.
- (3) The relevant functions of the Bank of England are—
  - (a) its functions under Part 18 of FSMA 2000 (recognised clearing houses and CSDs) or under Part 5 of the Banking Act 2009 (payment systems)[ or Part 5A of that Act (wholesale cash distribution)]<sup>1</sup>, other than its legislative functions, and
  - (b) such other functions as the Treasury may by order provide.
- (4) For the purposes of subsection (2)(a), the following are the FCA’s legislative functions—
  - (a) making rules under FSMA 2000;
  - (b) issuing codes under section 119 of FSMA 2000;
  - (c) issuing statements under—
    - (i) section 63ZD63C, 69, 88C, 89S, 93, 124, 131J, 138N, 192H, 192N, 210 or 312J of FSMA 2000,
    - (ii) section 345D of FSMA 2000 (whether as a result of section 345(2) or 345A(3) or section 249(1) or 261K of that Act), or
    - (iii) section 80 of the Financial Services Act 2012;
  - (d) giving directions under section 316, 318 or 328 of FSMA 2000;
  - (e) issuing general guidance, as defined in section 139B(5) of FSMA 2000;
  - (f) making technical standards in accordance with Chapter 2A of Part 9A of FSMA 2000;
  - (g) making EU Exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.

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<sup>1</sup> Words inserted by Financial Services and Markets Bill 2022-23 (HL Bill 80) Sch.9(3) para.14(2) (Lords’ Second Reading, January 10, 2023)

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- (4A) For the purposes of subsection (2)(a), the FCA’s standards review functions are the FCA’s functions under section 9(2) of the Financial Guidance and Claims Act 2018 (approving and reviewing standards set by Money and Pensions Service).
- (5) For the purposes of subsection (2)(a), the following are the PRA’s legislative functions—
- (a) making rules under FSMA 2000;
  - (b) issuing statements under—
    - (i) section 63ZD63C, 69, 192H, 192N, 210 or 345D of FSMA 2000, or
    - (ii) section 80 of the Financial Services Act 2012;
  - (c) giving directions under section 316 or 318 of FSMA 2000;
  - (d) issuing guidance under section 2I of FSMA 2000;
  - (e) making technical standards in accordance with Chapter 2A of Part 9A of FSMA 2000;
  - (f) making EU Exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.
- (6) For the purposes of subsection (3)(a), the following functions of the Bank of England under Part 18 of FSMA 2000 are legislative functions—
- (a) making rules;
  - (b) issuing statements—
    - (i) under section 312J, or
    - (ii) by virtue of the application by Schedule 17A of a provision mentioned in subsection (5)(c)(i) of this section.
- (7) For the purposes of subsection (3)(a), the following functions of the Bank of England under [Parts 5 and 5A of the Banking Act 2009]<sup>2</sup> are legislative functions—
- (a) publishing principles or codes of practice under [sections 188, 189, 206K and 206L]<sup>3</sup>;
  - (b) preparing statements under [section 198(3) and 206T(3)]<sup>4</sup>.
- (8) For the purposes of subsection (2), sections 1A(6) and 2AB(3) of FSMA 2000 do not apply.

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<sup>2</sup> Words substituted by Financial Services and Markets Bill 2022-23 (HL Bill 80) Sch.9(3) para.14(3)(a) (Lords’ Second Reading, January 10, 2023)

<sup>3</sup> Words substituted by Financial Services and Markets Bill 2022-23 (HL Bill 80) Sch.9(3) para.14(3)(b) (Lords’ Second Reading, January 10, 2023)

<sup>4</sup> Words inserted by Financial Services and Markets Bill 2022-23 (HL Bill 80) Sch.9(3) para.14(3)(c) (Lords’ Second Reading, January 10, 2023)

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## **86 Consultation in relation to, and publication of, complaints scheme**

(1) Before making the complaints scheme, the regulators must publish a draft of the proposed scheme in the way appearing to them to be best calculated to bring it to the attention of the public.

(1A) The complaints scheme shall not include any provision that limits, excludes or caps the regulators' liability under the complaints scheme.

(2) The draft complaints scheme must be accompanied by notice that representations about it may be made to any of the regulators within a specified time.

(3) Before making the proposed complaints scheme, the regulators must have regard to any representations made to any of them in accordance with subsection (2).

(4) If the regulators make the proposed complaints scheme, they must publish an account, in general terms, of—

- (a) the representations made to any of them in accordance with subsection (2), and
- (b) their response to the representations.

(5) If the complaints scheme differs from the draft published under subsection (1) in a way which is, in the opinion of the regulators, significant the regulators must (in addition to complying with subsection (4)) publish details of the difference.

(6) The regulators must publish up-to-date details of the complaints scheme including, in particular, details of—

- (a) the provision made under section 87(5), and
- (b) the powers which the investigator has to investigate a complaint.

(7) Those details must be published in the way appearing to the regulators to be best calculated to bring them to the attention of the public.

(8) The regulators must notify the Treasury of the publication of details under subsection (6).

(9) A regulator may charge a reasonable fee for providing a person with a copy of—

- (a) a draft published under subsection (1), or
- (b) details published under subsection (6).

(10) Subsections (1) to (5) and (9)(a) also apply to a proposal to alter or replace the complaints scheme.

## **87 Investigation of complaints**

(1) A regulator is not obliged to investigate in accordance with the complaints scheme a complaint which it reasonably considers would be more appropriately dealt with in another way (for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings).

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- (2) The complaints scheme must provide—
  - (a) for reference to the investigator of any complaint which a regulator is investigating,
  - (b) for the investigator—
    - (i) to have the means to conduct a full investigation of the complaint,
    - (ii) to report to the regulator to which the complaint relates and the complainant on the result of the investigator's investigation, and
    - (iii) to be able to publish the investigator's report (or part of it) if the investigator considers that it (or the part) ought to be brought to the attention of the public, and
  - (c) for the meeting by the regulators of the expenses of the scheme.
- (3) If a regulator has decided not to investigate a complaint, it must notify the investigator.
- (4) If the investigator considers that a complaint of which the investigator has been notified under subsection (3) ought to be investigated, the investigator may proceed as if the complaint had been referred to the investigator under the complaints scheme.
- (5) The complaints scheme must confer on the investigator the power ~~to recommend~~, if the investigator thinks it appropriate, ~~that the regulator to which a complaint relates takes~~ to take either or both of the following steps in relation to the regulator to which a complaint relates—
  - (a) ~~makes~~ recommend that the regulator make a compensatory payment to the complainant in such amount as the investigator in its discretion deems appropriate, or
  - (b) ~~remedies~~ to the extent that the remedy sought by the complainant or considered appropriate by the investigator does not involve the making of a compensatory payment to the complainant, recommend or require that the regulator remedy the matter complained of on any basis specified by the investigator or take other appropriate steps to rectify its conduct in that matter.
- (5A) There shall be no limit on the quantum of compensation that the investigator may recommend to be paid under subsection (5)(a).
- (5B) In determining the amount of any compensatory payment to be recommended under subsection (5)(a), the investigator should take into account:
  - (a) whether the regulator that is the subject of the complaint was the primary or secondary cause of loss. The fact that a regulator is found to be a secondary cause of loss may reduce but shall not absolve them from liability or responsibility under the complaints scheme; and
  - (b) the fact that any compensation payment recommended to a regulator under subsection (5)(a) must ultimately be funded by levies upon industry.
- (5C) Where the investigator requires that the regulator remedies a matter or takes a step under subsection (5)(b), the investigator shall be entitled to order the quashing of any declaration,

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decision or guidance, the revocation or issuance of any statement or the amendment of any rule, guidance or other publication and the relevant regulator shall follow such requirement, unless it successfully overturns the requirement pursuant to subsection (6).

- (6) ~~The complaints scheme must require the regulator to which a complaint relates, in~~ In a case where ~~the investigator~~ —
- (a) ~~has reported that the complaint is well founded~~ the investigator has made a manifest error in its decision under subsection (5), or
  - (b) ~~has criticised the regulator in a report~~ the investigation concerns a matter that is of particular importance for the market,

the complainant and the regulator to which a complaint relates shall be entitled to refer the investigator's decision to the Tribunal. In the case of a referral by a regulator, the costs of any such proceedings, including all the costs of the complainant, shall be borne entirely by the relevant regulator.

~~to inform the investigator and the complainant of the steps which it proposes to take in response to the report'.~~

~~(7) The investigator may require the regulator to which a complaint relates to publish the whole or a specified part of the response.~~

- (8) The investigator may appoint a person to conduct the investigation on the investigator's behalf but subject to the investigator's direction.
- (9) An officer or employee of any of the regulators may not be appointed under subsection (8).
- (9A) The complaints scheme must provide—
- (a) for the investigator to prepare an annual report on its investigations under the scheme, to publish it and send a copy of it to each regulator and to the Treasury;
  - (b) for each regulator to respond to any recommendations or criticisms relating to it in the report, to publish the response and send a copy of it to the investigator and the Treasury;
  - (c) for the Treasury to lay the annual report and any response before Parliament.
- (9B) The complaints scheme may make provision about the period to which each annual report must relate ("the reporting period") and the contents of the report and must in particular provide for it to include—
- (a) information concerning any general trends emerging from the investigations undertaken during the reporting period;
  - (b) any recommendations which the investigator considers appropriate as to the steps a regulator should take in response to such trends;
  - (c) a review of the effectiveness during the reporting period of the procedures (both formal and informal) of each regulator for handling and resolving complaints which have been investigated by the investigator during the reporting period;

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- (d) an assessment of the extent to which those procedures were accessible and fair, including where appropriate an assessment in relation to different categories of complainant;
  - (e) any recommendations about how those procedures, or the way in which they are operated, could be improved.
- (10) Subsection (2) is not to be taken as preventing a regulator from making arrangements for the initial investigation of a complaint to be conducted by the regulator.

## **88 Exemption from liability in damages**

- (1) Neither the investigator appointed under section 84 nor a person appointed to conduct an investigation on the investigator's behalf under section 87(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of functions in relation to the investigation of a complaint.
- (2) Subsection (1) does not apply—
- (a) if the act or omission is shown to have been in bad faith, or
  - (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.