
STATUTORY INSTRUMENTS

2001 No. 3083

**The Financial Services and Markets Act 2000
(Transitional Provisions and Savings) (Civil Remedies,
Discipline, Criminal Offences etc.) (No. 2) Order 2001**

PART 2

CIVIL REMEDIES

Remedial injunctions and restitution orders in respect of pre-commencement conduct

2.—(1) Any requirement, condition or prohibition 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 only if the contravention occurred before commencement 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 (12).

(3) The provisions specified by this paragraph are—

- (a) section 3 of the Financial Services Act (prohibition on 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)(1);
- (c) section 47 (misleading statements and practices), 56 (unsolicited calls)(2), 57 (restrictions on advertising)(3) or 59 (employment of prohibited persons)(4) of that Act;
- (d) section 47A of that Act (statements of principle);
- (e) section 50 of that Act (modification 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)(5);
- (f) section 58(3) of that Act (exceptions from restrictions on advertising);
- (g) 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(6);

(1) Relevant amendments and modifications are made by the Companies Act 1989 (c. 40) section 192 and 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.
(2) Amended by the Companies Act 1989 (c. 40) Schedule 23; and modified by S.I. 1992/3218. Functions transferred by S.I. 1987/942.
(3) Modified by S.I. 1992/3218 and S.I. 1995/3275. Functions transferred by S.I. 1987/942.
(4) Modified by S.I. 1992/3218 and S.I. 1995/3275. Functions transferred by S.I. 1987/942.
(5) 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.
(6) Amended by the Friendly Societies Act 1992 (c. 40) Schedule 18.

- (h) section 91(2) of that Act (directions to authorised unit trust schemes);
- (i) section 104(1) of that Act(7) (power to call for information);
- (j) section 130 of that Act (restriction on promotion of contracts of insurance);
- (k) section 183 of that Act(8) (reciprocal facilities for financial business) in reliance upon section 184(4) of that Act (partial restriction notices);
- (l) any rule or regulation made under Schedule 11 to that Act;
- (m) paragraph 24 of Schedule 11 to that Act (requirement to furnish information);
- (n) any rule (within the meaning of section 8(3) of that Act) of a recognised self-regulating organisation to which the person concerned was subject and which regulated the carrying on by him of investment business;
- (o) any rule of a recognised self-regulating organisation for friendly societies in relation to which the person concerned was a member society (within the meaning of Schedule 11 to that Act);
- (p) any rule (within the meaning of section 16(3) of that Act) of a recognised professional body to which the person concerned was subject and which regulated the carrying on by him of investment business;
- (q) a relevant rule of a recognised investment exchange or recognised clearing house;
- (r) regulation 18 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996(9); and
- (s) section 3 of the Banking Act (restriction on acceptance of deposits)(10).

(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)(p) or (q) 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 imposed under section 47A of the Financial Services Act.

(8) 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.

(9) 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.

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

(7) Amended by S.I. [1996/2827](#) and modified by S.I. [1992/3218](#), S.I. [1994/1696](#) and S.I. [1995/3275](#). Functions transferred by S.I. [1987/942](#).

(8) Modified by S.I. [1992/3218](#) and S.I. [1995/3275](#). Functions transferred by S.I. [1997/2781](#).

(9) S.I. [1996/2827](#); to which there are amendments not relevant to this Order.

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

in accordance 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.

(11) Paragraph (12) 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.

(12) 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.

(13) In paragraph (3)(q), “relevant rule” means—

- (a) any rule of a recognised investment exchange (within the meaning of section 36(2) of the Financial Services Act) or rule of a recognised clearing house (within the meaning of section 38(2) of that Act) to which the person concerned was subject and which regulated the carrying on by him of investment business; or
- (b) any rule of a recognised investment exchange or recognised clearing house which related to the matters mentioned in Schedule 21 to the Companies Act 1989⁽¹¹⁾ (additional requirements for recognition).

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—
 - (i) he failed to comply with any of the provisions specified in rule 1.3.1(6) of the PIA rules (cases in which a member is liable to disciplinary action);
 - (ii) he committed an act of misconduct within the meaning of rule 7.23A(3) of the SFA rules; or
 - (iii) he committed a relevant IMRO contravention;
- (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 failure, misconduct or 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 conduct of the person concerned) but had not exercised that power; and
- (d) the Authority is satisfied that one or more persons has suffered loss or been otherwise adversely affected as a result of the conduct specified by sub-paragraph (b).

(2) The Authority may, subject to paragraph (3), exercise the power in subsection (5) of section 384 in relation to that conduct as if it were a case within paragraph (b) of subsection (1) of that section.

⁽¹¹⁾ 1989 c. 40; amended by S.I. 1991/880 and S.I. 1998/1748.

(3) The Authority may exercise the power in section 384(5) in relation to conduct comprising an act of misconduct for the purposes of the SFA rules 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.

(4) In exercising, or deciding whether to exercise, its powers under section 384(5) in relation to any conduct of the kind specified by paragraph (1)(b), the Authority must have regard to any statement made by the relevant recognised self-regulating organisation or recognised self-regulating organisation for friendly societies which was in force when the conduct in question took place with respect to its policy on the taking of disciplinary action and the award of, and amount of, restitution (whether issued as guidance, contained in the rules of that organisation or otherwise).

Injunctions to prevent disposal of assets

4.—(1) Any restriction or 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 only if the contravention occurred before commencement 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 (false statements as to authorised status), 19 (directions), 32 (advertisement regulations), 34 (unsolicited calls), 35 (fraudulent inducement to make a deposit), 67 (restriction on use of banking names), 69 (restrictions on use of banking descriptions), 71 (notices relating to names of institutions), 77 (notices relating to names of overseas institutions) or 80 (regulations imposing requirements on overseas-based banks) of the Banking Act(12); and
- (b) 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 (agreements made by unauthorised persons) 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 (agreements made through unauthorised persons) 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” means 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 the repeal of that Act).

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

(12) These provisions (except section 18) were amended by the Bank of England Act 1998 (c. 11) Schedule 5; sections 3, 18, 69 and 71 were modified by S.I. 1992/3218 and sections 3 and 32 were modified by S.I. 1995/1442.

- (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 the Financial Services 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—
- (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 person 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.”.