

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Xxvi: Notices

677. Various provisions of the Act relate to the Authority taking decisions, for example as to whether to grant, or to withdraw, authorisations and approvals, or whether to take other regulatory action, such as imposing financial penalties or making public statements. The relevant provisions of the Act require the Authority in some cases to give warning and decision notices, and in others to give other kinds of notice. This Part is concerned with the Authority's procedures during, before and after the process of serving these notices as well as the information which they are to include. In particular, the Part requires the Authority to act in accordance with a published set of procedures.

Section 387: Warning notices

678. This section provides that a warning notice must be in writing and must set out the reasons for the proposed course of action. It must also state whether section 394 (Access to Authority material) applies.

679. *Subsection (2)* gives any person who receives a warning notice an opportunity to make representations to the Authority. The Authority may specify the period available for representations, provided it allows a minimum of 28 days from the date of the notice. The Authority must then decide whether to give the person a decision notice within a reasonable period.

Section 388: Decision notices

680. A decision notice must be in writing and must set out the reasons for the course of action. It also requires the Authority to explain a right of access to Authority material under section 394 and rights to refer the case to the Tribunal (including the procedure for doing so).

681. If a decision notice follows a warning notice, the action proposed in it must be action the Authority has powers to take under the same Part of the Act. The Authority can issue a further decision notice altering the action proposed in an earlier notice, but only with the consent of the person concerned.

Section 389: Notices of discontinuance

682. This section requires a "notice of discontinuance" to be issued when the Authority decides not to proceed with action proposed in a warning notice (section 387) or in relation to which a decision notice (section 388) was given.

683. However a notice of discontinuance does not have to be given if the effect is purely to grant an application made by the person in question. In such cases the Act generally

contains express provision requiring written notice to be given of the grant of the application.

Section 390: Final notices

684. This section requires a “final notice” to be issued to confirm and give effect to an action proposed in a decision notice (and to require payment in the case of a penalty) whenever the period for referring a matter to the Tribunal has expired, or if it has been referred, whenever the matter has been finally determined by the Tribunal or the higher courts. If the matter was referred to the Tribunal then the final notice will give effect to the directions of the Tribunal (or the higher courts if there has been an appeal).
685. *Subsection (7)* requires the final notice to set out details of the action which is being taken and the date when it is to be taken. Particular requirements for certain categories of case are given in *subsections (3) to (6)*. For example the notice must include the terms of any public statement which is to be made and details of the manner and date of publication, or the amount of any financial penalty and details of how and when it is to be paid. The period for making payments must not be less than 14 days beginning with the date on which the final notice is given, after which the Authority may recover any outstanding amount as a debt owed to it.
686. A similar 14 day minimum period must be allowed for making restitution as required under section 384, after which any outstanding obligations are enforceable through an application by the Authority to the courts (for an injunction in England and Wales and Northern Ireland or, in Scotland, for an order under section 45 of the Court of Session Act 1988).

Section 391: Publication

687. This section establishes common rules on publication of decisions which:
- prevent the Authority from publishing details about warning and decision notices;
 - enable the Authority to publish appropriate details of a discontinued decision, but only if the person to whom the notice is given consents; and
 - require the Authority to publish appropriate information about a final notice, but omitting information which would be unfair to the person to whom the notice relates or prejudicial to the interests of consumers.
688. The provision for publishing details of a final notice applies equally to a supervisory notice (as defined in section 395) but only when such a notice takes effect. The procedure on giving a supervisory notice is set out under the description of section 53 above. If the notice so states, it may take effect immediately, or on a particular date. Otherwise it will take effect only once it is no longer “open to review”. *Subsection (8)* of this section provides that a supervisory notice is “open to review” until after the period for referring the matter to the Tribunal has expired and until any reference or further appeal has been finally determined.

Section 392: Application of sections 393 and 394

689. [Sections 393](#) and [394](#), described below, confer additional procedural rights relating to third parties and to disclosure of Authority material. However those rights apply only in cases, other than those involving the Authority responding to an application, which are governed by the warning notice and decision notice procedure. This section lists the particular sections of the Act where sections 393 and 394 apply.

Section 393: Third party rights

690. Where this section applies (see section 392 above) it confers rights on any person (a “third party”) who is identified in prejudicial terms in the reasons contained in a warning

notice or decision notice. Third parties are given the right to receive a copy of the notice, and to make representations or refer the matter to the Tribunal in the same way as the person who is the subject of the Authority's proposed action. However *subsections (2) and (6)* provide that a third party does not need to be given a copy of a notice which identifies him if a separate warning or decision notice has been given to him in relation to the same matter, and *subsection (7)* provides a further exception where it is impracticable to contact the third party.

691. *Subsection (13)* provides that third party notices must describe the rights which third parties also have under section 394 below. *Subsections (5) and (14)* provide a third party with rights to receive copies of subsequent notices in relation to the same matter.

Section 394: Access to Authority material

692. Where this section applies (see section 392 above), the Authority is required to give any person who is the subject of a warning or decision notice, or who has received a copy of such a notice as a third party, access to certain categories of material. *Subsection (1)(a)* requires access to be given to any material on which the Authority relied in taking the decision in question. *Subsection (1)(b)* requires access to be given to material which the Authority considers might undermine that decision.
693. The latter category does not apply to all material in the Authority's possession but only to material which the Authority considered in reaching its decision, or which it obtained in connection with, that is in investigation of, the matter in question (see the definition of "secondary material" in *subsection (6)*).
694. The right of access to Authority material is subject to the following exceptions. First, the Authority may refuse access to material relating to a different case which was taken into account only for the purposes of comparison with the case in question. Secondly, it may refuse access to "excluded material", defined as covering "protected items" as defined in section 413, and material intercepted under (or indicating the existence of) a warrant for the interception of communications. If access to material is refused on the grounds that it is subject to legal professional privilege, the Authority must give written notice to the person concerned.
695. Finally the Authority can refuse access to material which it would not be in the public interest to disclose (that is, material subject to public interest immunity) or to commercially sensitive material which it would not be fair to disclose. In these cases the Authority must notify the person and give its reasons for refusing.

Section 395: The Authority's procedures

696. This section concerns the Authority's decision-making procedures. It is for the Authority to decide on its procedures but *subsection (2)* requires that, to avoid prejudice, they should be designed to ensure that the task of deciding whether to issue a warning, decision or supervisory notice and the task of collecting relevant information should be carried out by different people. However, *subsections (3) and (4)* provide that the procedures can provide for this requirement to be waived for supervisory notices (as defined in *subsection (13)*) if necessary to protect the interests of consumers, so long as the decision is taken by a person at an appropriate level of seniority given the importance of the decision.
697. The Authority is required by *subsections (5) and (6)* to issue and publish a statement describing its procedures. It must be published in a way appearing to the Authority best calculated to bring it to the attention of the public and a reasonable fee may be charged for providing a copy. A copy of the statement must also be given without delay to the Treasury. The Authority must also publish a revised statement if it decides to change the procedures. Under *subsection (9)* the Authority must act in accordance with its published procedures. *Subsection (11)* ensures that the validity of any notices given

*These notes refer to the Financial Services and Markets Act
2000 (c.8) which received Royal Assent on 14 June 2000*

in such a case is not affected by any failure to do so. However, *subsection (12)* makes clear that the Tribunal can take into account any failure to follow the procedures.

Section 396: Statements under section 395

698. This section makes provision about consultation arrangements. These are similar to those in other equivalent provisions of the Act, such as under section 70 to the issuing of a statement under section 395.