

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part IV: Permission to Carry on Regulated Activities

97. This Part governs the way in which a person can obtain permission to carry on regulated activities. It is through obtaining permission that authorisation is generally obtained under section 31(1). However, this route to authorisation does not apply to those EEA firms who qualify for authorisation by virtue of Schedule 3 or those Treaty firms who qualify by virtue of Schedule 4. These provisions only apply to EEA and Treaty firms to the extent that they have obtained additional permissions beyond those that they obtained under those Schedules.

Section 40: Application for permission

98. This sets out the type of person who can be given permission and therefore who can be authorised by this route. Permission can be applied for and granted to individuals, bodies corporate, partnerships and unincorporated associations. In the case of some regulated activities, however, there are specific constraints on the type of person which may be given permission under the threshold conditions in Schedule 6.
99. Permission may cover a number of regulated activities. Permission is only given once, after that it is simply changed. Thus, *subsection (2)* rules out an application for the grant of permission to an authorised person where he already has permission under this Part. Therefore, if a person wishes to carry on additional activities, he would need to apply for a variation of permission under section 44.

Section 41: The threshold conditions

100. This section requires the Authority to satisfy itself in giving or varying a Part IV permission, or imposing or varying any requirement, that the person concerned will satisfy the threshold conditions set out in Schedule 6 in relation to all the regulated activities covered by his permission. However, this does not prevent the Authority from taking such steps in relation to an authorised person as it considers necessary to secure its regulatory objective of the protection of consumers.

Section 42: Giving permission

101. Having received an application for permission, the Authority must consider it in the light of its duty under section 41. The Authority has discretion to grant permission for all the activities applied for, or just some of them.
102. The Authority can also frame the permission it grants so as to cover activities which are wider or narrower than the activities as described in the application, and may thus impose its own limitations on the way in which an activity may be carried on. This allows the Authority to design the permission in order to be satisfied that the threshold

conditions are met in circumstances where it would not be satisfied if it granted the permission sought in full. The ability to grant a wider permission than was applied for would enable the Authority, if it so chose, to have standard types of permission that it granted. However, the Act does not require the Authority to operate in this way.

103. If the applicant is exempt for certain regulated activities by virtue of being a recognised investment exchange or a recognised clearing house, or by virtue of membership of a professional body designated under Part XX, his application, and any resulting permission, is not to be regarded as covering those exempt activities. For other exempt persons, an application under this section will be regarded as covering their exempt activities.

Section 43: Imposition of requirements

104. When granting permission, the Authority may impose what it considers to be appropriate requirements. Such requirements might include requirements on the authorised person to act, or refrain from acting, in a certain way. *Subsection (5)* allows the Authority to specify a period during which such requirements have effect. Thus the Authority might impose a limit on the amount of a certain type of business the person may conduct during the first five years after receiving the permission. This would enable the Authority to continue the current practice adopted by the insurance supervisors of restricting the premium income that can be received by an insurer in the period following its authorisation to undertake a new form of insurance business.
105. Under *subsection (3)*, such requirements may also be imposed in respect of unregulated activities. For instance, the Authority might have misgivings about the way in which a regulated activity might be carried on in conjunction with an unregulated activity that the person already carries on, or which he proposes to carry on. Those misgivings may not justify preventing the person from commencing the regulated activity because the Authority may not consider that the unregulated activity, of itself, casts doubt about the person's fitness to carry on the regulated one. It may, however, be concerned that the juxtaposition of the two activities could be confusing to consumers, or that the manner in which the unregulated activity was carried on might pose a threat to their interests. Therefore, the Authority could place limitations on the way in which the unregulated activity was carried on for a period after the granting of the new permission in order that it could observe how the activities were carried on, or related to each other, in practice. *Subsection (4)* enables the Authority to take account of the person's membership of a wider group (as defined in section 421).

Section 44: Variation etc at request of authorised person

106. The Authority may vary the permission, including cancelling it completely, at the request of the authorised person, subject to being satisfied that the person will satisfy the threshold conditions for any resulting permission in accordance with section 41. If it is not satisfied, it may refuse the request outright, grant a more limited permission than the one requested, or grant the requested permission, but subject to new requirements. The Authority may also refuse to grant a request for variation on the grounds that refusal is in the interests of consumers or potential consumers.
107. If as a result of the variation, the authorised person would no longer have permission to carry on any regulated activity, the Authority must consider whether it is still necessary for the person to hold a permission at all (and therefore continue to be an authorised person). If it is not necessary, the Authority should cancel the permission.

Section 45: Variation etc on the Authority's own initiative

108. This section gives the Authority the power to revoke or vary the terms of an authorised person's permission on its own initiative (referred to as its "own initiative power"). The power is exercisable on three grounds. These are where it appears to the Authority that:

- the person is failing, or likely to fail, to meet the threshold conditions in relation to the existing permission;
- the person has failed to make use of the permission to carry on a particular regulated activity for a year or more;
- it is desirable to do so in order to protect the interests of consumers or potential consumers.

109. As with the previous section, if as a result of the variation the authorised person no longer has permission to carry on any regulated activity, the Authority must consider whether it is necessary for that person to continue to hold a permission and be an authorised person. If it is not necessary, the Authority should cancel the permission.

Section 46: Variation of permission on acquisition of control

110. The Authority may also impose a new requirement or vary an existing one if:
- someone “acquires control” over the UK authorised person within the meaning of Part XII; and
 - the result is that although the Authority does not consider that it has grounds to object to the acquisition, it nevertheless considers that there is some significant uncertainty about the impact of the acquisition, or further acquisition, of control on the conduct of the authorised person’s business.

Section 47: Exercise of power in support of overseas regulator

111. This section enables the Authority to cancel or vary a permission on its own initiative on behalf of an overseas regulatory authority. The section gives the Treasury power to prescribe by regulations the sort of overseas authority that the Authority to help. The functions that it is proposed should be prescribed in this way are functions corresponding to those of:

- the Authority itself under this Act;
- the competent authority for listing;
- the Secretary of State under the Companies Act; and
- the prosecuting authorities for insider dealing and money laundering.

112. However, even where the overseas regulator and the provisions they are seeking to enforce meet these requirements, the Authority is not obliged to act in accordance with the request. The Authority must act reasonably, as it must in discharging any of its functions, but it is also directed to consider certain factors in particular. First among these is whether EC law obliges the Authority, as the competent authority under one of the single market directives or otherwise, to assist the overseas authority. Unless there is an EC obligation to act the Authority must consider the further factors listed in *subsection (4)* which include the seriousness of the case and the public interest. The Authority is also able to charge a contribution towards the costs of taking the enforcement action, and to make this a condition of exercising the power. (*Note: The reference to subsection (4) in the definition of “request” in subsection (7) is an error. It should only refer to subsection (5).*)

Section 48: Prohibitions and restrictions

113. Among the requirements which the Authority can impose on an authorised person when acting under this Part are:
- restrictions on the use or disposal of the authorised person’s assets; or

- requirements to transfer its assets or assets it holds on behalf of investors to a trustee approved by the Authority.
114. The purpose of these types of restriction is to prevent an authorised person disposing of particular assets or making certain types of investment, in circumstances where the Authority is concerned about a person's solvency or where it wishes to investigate suspected fraudulent behaviour.
115. Where an authorised person's assets are held by a third party, for example by a bank, *subsection (4)* enables the Authority to give the institution notice of any restrictions it has placed on the authorised person's assets. This notice might state, for example, that a bank should not allow any payments to be made from the authorised person's account without the permission of the Authority. *Subsection (5)(a)* provides that if the institution refuses to comply with a request to make a payment from the account of an authorised person who is subject to a restriction notice, it is not to be taken as a breach of its contract with the authorised person. However, if the institution were to allow a payment to be made from such an account, in breach of a restriction, under *subsection (5)(b)* it would be liable to pay the same amount of money to the Authority.
116. *Subsections (6) to (11)* are concerned with the transfer of an authorised person's assets to a trustee approved by the Authority.
117. *Subsection (6)* requires a trustee not to deal with or release any of the assets transferred to them unless the Authority agrees. If the trustee does release assets without the Authority's consent, he is guilty of an offence under *subsection (9)*. However *subsection (11)* protects the position of the persons who are beneficiaries of the trust by preserving all the remedies they would normally have under trust law. The beneficiaries of the trust are the owners of the assets transferred to the trustee. This will be either the authorised person or, where the assets transferred include assets the authorised person was holding or controlling on behalf of other investors, those investors.
118. *Subsection (7)* makes void any charge that the authorised person makes over his assets while they are held by a trustee. Any charges arranged before the assets were transferred to a trustee remain valid. The effect of this is that were the authorised person to enter into a contractual arrangement which gave a third person a right ahead of existing creditors or a liquidator to any of his assets which, as a result of a requirement made by the Authority under *subsection (3)(b)*, were held by a trustee, that contract would be void and the rights of the liquidator and existing creditors to the assets would be upheld.

Section 49: Persons connected with an applicant

119. *Subsection (1)* of this section makes it clear that, in deciding whether to approve an application for permission, the Authority may also have regard to other relevant persons who are related to the applicant in some way. What constitutes a relevant relationship is not defined, but is left to the Authority to interpret in the particular circumstances of the case.
120. The Authority is obliged under *subsection (2)* to consult with the home State regulator of an EEA firm before granting an application from a person who is a subsidiary undertaking of that firm or the subsidiary undertaking of a parent undertaking of that firm.

Section 50: Authority's duty to consider other permissions etc.

121. An EEA firm, Treaty firm or recognised collective investment scheme may have a Part IV permission in addition to a permission as such a firm or scheme. In considering the exercise of its own initiative power in relation to such an additional permission, the Authority must take account of the relevant EC law and of the home State authorisation of the person concerned. Such consideration may inform the Authority's view on whether the firm or scheme is fit and proper to continue to hold the additional

permissions in question, or its view on whether the cancellation or variation it proposes is appropriate in light of the wider assessment of the firm which the home State regulator is responsible for making.

Section 51: Applications under this Part

122. This section sets out the minimum information that must be included in an application for a permission. It also enables the Authority to specify the manner in which an application may be made, for example whether applications by e-mail will be accepted, and such other things that should be included as the Authority considers necessary or appropriate. The Authority can require additional information after the application is received, and can require the applicant to verify any of the information supplied.

Section 52: Determination of applications

123. The Authority is required to determine an application within 6 months of receiving the completed application. The Authority has discretion whether to determine incomplete applications, but it must determine even incomplete applications within 12 months of the initial receipt of the application. The Authority may, of course, refuse an application on the grounds that it is incomplete where it is appropriate to do so. Under *subsection (3)* an applicant may withdraw an undetermined application at any time.
124. Once the Authority has determined an application it must give written notice of its decision and, if the application to be granted, the date upon which the authorisation takes effect and from which the relevant activities may commence. If the Authority proposes to refuse all or part of the application, or impose an additional requirement, it must proceed by way of a warning and decision notice.

Section 53: Exercise of own initiative power: procedure

125. This section set out the procedure the Authority must follow when it proposes to exercise its own-initiative power to vary an authorised person's Part IV permission. If, having regard to the ground on which it is exercising the power, the Authority considers it necessary, the variation may take effect immediately or on a specified date. If no date is specified in this way the variation will take effect only after the time for referring the matter to the Tribunal has expired and any reference (and further appeal) has been finally determined (see the definition of "open to review" in section 391(8)). The Authority must give the authorised person a written notice which gives the details of the variation, the date on which it takes effect, the reasons for the imposing the variation and for the choice of date. The notice must also inform the person of his right to make representations to the Authority within a specified period, and to refer the matter to the Tribunal.
126. *Subsections (7) to (10)* require the Authority to give further written notice of its response to any representations which are made. This can be a decision not to proceed with the variation (or to cancel it if it has already taken effect), to propose a different variation (in which case the original notice procedure must be repeated), or to proceed with the variation (in which case the person concerned has a further right to refer the matter to the Tribunal).

Section 54: Cancellation of Part IV permission: procedure

127. This section requires the Authority to serve warning and decision notices when cancelling a Part IV permission on its own initiative, under section 45. Warning and decision notices given under this section also attract the rights set out in sections 393 and 394 by virtue of section 392.

Section 55: Right to refer matters to the Tribunal

128. This section confers a right to refer to the Tribunal a decision of the Authority to vary or cancel a permission on its own initiative. It also applies to decisions of the Authority in relation to applications under Part IV, such as a decision to refuse an applications for permission, to impose conditions or to vary a permission other than in the way requested.