

# FINANCIAL SERVICES ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### Part 5 – Inquiries and Investigations

##### Inquiries

##### *Section 68: Cases in which Treasury may arrange independent inquiries*

527. *Section 68* enables the Treasury to appoint a person to carry out an inquiry. The power is exercisable where events have occurred which give rise to concern and which relate to collective investment schemes, the carrying out of regulated activities, the issue of listed securities, recognised clearing houses or recognised inter-bank payment systems, and these events may not have occurred but for a serious failure in the legislative regime for regulation or its operation.

##### *Section 69: Power to appoint person to hold an inquiry*

528. Where this section applies (see *section 68*), the Treasury may appoint a person to hold an inquiry. The Treasury may, under *subsection (2)*, give a direction to that person on a range of matters including the postponement or suspension of the inquiry.

##### *Section 70: Powers of appointed person and procedure*

529. *Section 70* makes provision for the procedure to be followed on an inquiry and for the person holding the inquiry to be able to obtain information and documents and require the attendance of witnesses which are relevant to the inquiry.

##### *Section 71: Conclusion of inquiry*

530. *Subsection (1)* requires the person holding the inquiry to provide to the Treasury a written report at the end of the inquiry. The duty of the Treasury to publish the report is dealt with in *section 82* (see below).

##### *Section 72: Obstruction and contempt*

531. *Section 72* makes provision about those persons who have obstructed an inquiry such as by failing to comply with a request by the person holding the inquiry (for example, a request to provide information or documents). If the person's behaviour would have amounted to contempt of court (if the inquiry had been court proceedings), a court may deal with the person as if in contempt.

##### Investigations

##### *Section 73: Duty of FCA to investigate and report on possible regulatory failure*

532. *Section 73* requires the FCA to investigate events and to report to the Treasury on the result of the investigation. The duty applies where events have occurred which relate to

those who are regulated by the FCA or within its regulatory remit (see *subsection (5)*), which have or may have caused serious harm to the values underpinning the FCA's operational objectives (the appropriate degree of protection for consumers, the integrity of the UK financial system, effective competition in the interests of consumers), and where those events may not have occurred but for a serious failure in the legislative regime for regulation or its operation. The duty applies where the FCA itself is satisfied that the test is met (unless the Treasury directs the FCA that an investigation is not required) or where the Treasury direct the FCA that the test is met.

#### ***Section 74: Duty of PRA to investigate and report on possible regulatory failure***

533. *Section 74* requires the PRA to investigate events and to report to the Treasury on the result of the investigation. The duty applies where events have occurred which relate to PRA-authorized persons, which have or may have caused serious harm to the values underpinning the PRA's objectives (the safety and soundness of those persons or the adequate degree of protection for policyholders) or where relevant public expenditure (as defined in *section 75*) has been incurred in respect of a PRA-authorized person, and where those events may not have occurred but for a serious failure in the legislative regime for regulation or its operation. The duty applies where the PRA itself is satisfied that the test is met (unless the Treasury directs the PRA that an investigation is not required) or where the Treasury direct the PRA that the test is met.

#### ***Section 75: Interpretation of section 74***

534. *Section 75* defines terms for the purposes of *section 74*, including "relevant public expenditure". "Relevant public expenditure" is incurred for these purposes in three cases: where the Treasury or Secretary of State have provided financial assistance to or in respect of a PRA-authorized person for financial stability reasons (for example where the Treasury have provided a guarantee in respect of a PRA-authorized person); where the Treasury have incurred expenditure in relation to a PRA-authorized person in connection with the exercise of powers under Parts 1 to 3 of the Banking Act 2009 (for example, by giving an indemnity to the Bank in connection with the operation of a bridge bank); or where the scheme manager of the Financial Services Compensation Scheme has received a loan from the National Loans Fund or financial assistance from the Treasury for the purposes of funding expenses incurred in connection with a PRA-authorized person.

#### ***Section 76: Modification of section 74 in relation to Lloyd's***

535. *Section 76* modifies the application of *section 74* in so far as it applies to Lloyd's. These modifications are necessary as Lloyd's members are not authorized persons and so *section 74* would not, without modification, apply in an appropriate manner in relation to the exercise by the PRA of its functions in relation to Lloyd's.

#### ***Section 77: Power of Treasury to require FCA or PRA to undertake investigation***

536. *Section 77* provides that the Treasury must require the FCA or PRA to carry out an investigation and provide the Treasury with a report if the Treasury consider that it is in the public interest to do so and it does not appear to the Treasury that the regulator has undertaken or is undertaking such an investigation. The investigation must relate to "relevant events" as defined by *subsections (3) and (4)*.

#### ***Section 78: Conduct of investigation***

537. *Section 78* provides that it is for the regulator carrying out the investigation to decide how it is to be carried out, subject to any direction given by the Treasury under *subsection (5)*. The regulator in carrying out an investigation, and the Treasury in exercising the power to direct the conduct of the investigation, must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation

may have on the exercise by the regulator of any of its other functions. For example, a regulator might postpone the start of the investigation until enforcement action being carried out by the regulator has been completed, where an investigation might adversely affect the carrying out of the enforcement action. *Subsection (3)* enables the regulator to postpone the start of, or suspend an investigation if it considers it necessary to do so to avoid a material adverse effect on the exercise by it of its functions. The regulator must notify the Treasury that it has done so and indicate when the investigation will begin or resume. Such notification may be given in general terms such as “when the Tribunal has made a determination and the period for an appeal against the Tribunal’s determination has expired”.

### ***Section 79: Conclusion of investigation***

538. *Section 79* provides that on the conclusion of the investigation, the regulator must provide to the Treasury a written report setting out the result of the investigation, any lessons it (the regulator) has learnt and any recommendations it wishes to make. Publication of the report is dealt with in *section 82*.

### ***Section 80: Statements of policy***

539. *Section 80* requires each regulator to prepare and publish a statement of policy as to how it intends to discharge its duties under sections 73 to 79. *Subsection (4)* requires that the regulators seek the consent of the Treasury before issuing this policy statement.

### ***Section 81: publication of directions***

540. *Section 81* requires the Treasury to lay before Parliament and to publish a direction given to the regulators under Part 5. The duty to publish and to lay before Parliament does not apply where the Treasury consider that publication would be against the public interest.

## **Publication of Reports**

### ***Section 82: publication of reports of inquiries and investigations***

541. *Section 82* deals with the publication of reports made to the Treasury under section 71 or 79. In each case the Treasury must lay the report before Parliament and publish it in full subject to a power to withhold matters on the grounds specified in *subsections (3) and (4)*. Where the Treasury fail to publish the report in full, they must lay before Parliament and publish a statement explaining their reasons.

## **Supplementary**

### ***Section 83: Interpretation and supplementary provision***

542. *Section 83* contains definitions relevant to Part 5.