

FINANCIAL SERVICES AND MARKETS BILL

Supplementary Memorandum from His Majesty's Treasury to the Delegated Powers and Regulatory Reform Committee

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Introduction

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Financial Services and Markets Bill (“the Bill”). The Bill was introduced in the House of Commons on 20 July 2022 and completed its progress in the House of Commons on 7 December 2022. The Bill was introduced in the House of Lords on 8 December 2022.
2. The Government has tabled amendments to the Bill for Report Stage in the House of Lords, some of which include new delegated powers. This memorandum supplements the memorandums which were published on 20 July 2022 and 8 December 2022, and identifies the amendments that confer powers to make delegated legislation or other delegated acts. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Delegated Powers

New Clause to be inserted after Clause 20: Sustainability Disclosure Requirements

- New sections 416A and 416B of the Financial Services and Markets Act 2000 (“FSMA 2000”) (sustainability disclosure requirements (“SDR”)) will set out the terms upon which HM Treasury may make a sustainability disclosure requirement policy statement to which the Financial Conduct Authority and the Prudential Regulation Authority must have regard to when making rules or issuing guidance.

Power conferred on: HM Treasury
Power exercised by: Policy statement
Parliamentary procedure: None

Context and Purpose

3. The purpose of the SDR clause is to provide a framework for HM Treasury to set out its policies concerning disclosure requirements in connection with “matters relating to sustainability”, to require the Financial Conduct Authority and the Prudential Regulation Authority to have regard to such a policy statement when making their rules or issuing guidance and to report annually about how they have done so.
4. “Matters relating to sustainability” is defined to “[include] matters relating to – (a) the environment, including climate change, (b) social, community and human rights issues, (c) tackling corruption and bribery, and (d) governance, so far as relevant to matters within (a) to (c).” This is a wide definition but similar to the definition contained in the Companies Act 2006 (section 414C(7)(b)) and in substance comparable to mandatory disclosure requirements on climate impact in regulations made under the Pensions Act 1995 (sections 41A and 41B, inserted by section 124 of the Pensions Schemes Act 2021)).
5. In preparing the statement, HM Treasury must consult the Financial Conduct Authority and/or the Prudential Regulation Authority. HM Treasury may require the Financial Conduct Authority or the Prudential Regulation Authority to provide a report on any matter in connection with preparing the statement.
6. There is no requirement on HM Treasury to make a SDR policy statement. However, if it chooses to do so, it must publish it and the Financial Conduct Authority and the Prudential Regulation Authority must have regard to it when making rules or issuing guidance.
7. Further, the Financial Conduct Authority and the Prudential Regulation Authority will be obliged to state in their annual reports to HM Treasury, laid before Parliament, how they have had regard to “any specified matters that are relevant to the making of the rules in question” (as per section 138EA(2) of FSMA 2000 (matters to consider when making rules) to be inserted by this Bill) or when issuing guidance.

Justification for taking the power

8. The purpose of the SDR clause is to facilitate HM Treasury developing government policy on SDR within the FSMA 2000 framework, to oblige the Financial Conduct Authority and the Prudential Regulation Authority to have regard to that when making rules or issuing guidance and to improve transparency and parliamentary scrutiny in this area.
9. HM Treasury has regular discussions with the Financial Conduct Authority and the Prudential Regulation Authority in relation to SDR. The Financial Conduct Authority has already introduced some elements of SDR through their Handbook and the Prudential Regulation Authority has already set some relevant supervisory expectations. The SDR clause will entitle HM Treasury to request relevant information from the Financial Conduct Authority and the Prudential Regulation Authority in

connection with its SDR policy statement and to oblige the Financial Conduct Authority and the Prudential Regulation Authority to have regard to its policy statement when making rules or issuing guidance in connection with matters relating to sustainability, including about mandatory or voluntary disclosure of information.

10. This approach allows for flexibility in what is a rapidly evolving space and to support collaboration and joined-up thinking between the Financial Conduct Authority and the Prudential Regulation Authority, HM Treasury and other government departments.

Justification for the procedure

11. There is no parliamentary procedure. The obligation on HM Treasury to publish any statement it makes is sufficient to provide transparency for the regulators, financial services firms and customers and for Parliament. No further procedure is appropriate.

New Clause to be inserted after Clause 44: Panel Reports

- This clause gives HM Treasury a power to make regulations to require annual reports to be produced by the statutory panels established under the Financial Services (Banking Reform) Act 2013 (“FSBRA”) and the Financial Services and Markets Act 2000 (“FSMA 2000”), and to make provision about the content of such a report.

Power conferred on: HM Treasury

Power exercised by: Statutory Instrument

Parliamentary procedure: Negative Procedure

Context and Purpose

12. The Financial Conduct Authority and the Prudential Regulation Authority are required to make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with the regulator’s general duties. The Payment Systems Regulator is required to make and maintain effective arrangements for consulting participants in regulated payment systems.
13. In order to satisfy these requirements, the Financial Conduct Authority, the Prudential Regulation Authority and the Payment Systems Regulator have a number of statutory panels. These panels are established under sections 1N to 1Q and 2M of FSMA 2000 and section 103(3) of FSBRA. The Bill establishes new statutory panels in sections 1QA, 2MA, 138IA and 138JA of FSMA 2000.
14. Statutory panels established under sections 1N to 1Q and 2M of FSMA 2000 and section 103(3) of FSBRA have their own Terms of Reference which include a commitment for the panel to publish an annual report. The Terms of Reference include that the statutory panels of the Financial Conduct Authority and the Prudential Regulation Authority must provide their annual reports to the associated regulator. The

Payment Systems Regulator’s panel must provide its annual report to the Payment Systems Regulator’s Board.

15. The clause includes a power for HM Treasury to make regulations to require a statutory panel of the Financial Conduct Authority, Prudential Regulation Authority or the Payment Systems Regulator to produce an annual report on the work that the panel has done over the course of the previous year, on any other information specified by HM Treasury in the statutory instrument and to provide this report to HM Treasury. Once the annual report has been provided to HM Treasury, HM Treasury will lay this report before Parliament and the panel in question will publish it.

Justification for taking the power

16. Providing HM Treasury with the power to impose a statutory requirement for a statutory panel to publish an annual report will increase and futureproof the transparency of the work that the statutory panels of the Financial Conduct Authority, Prudential Regulation Authority and Payment Systems Regulator undertake. Enabling HM Treasury to use a statutory instrument to determine when a particular panel should be required to undertake this process allows for flexibility and a targeted approach to be taken, and the requisite scrutiny of both the requirement for, and contents of, such a report.

Justification for the procedure

17. The power will be exercised via a statutory instrument which will mean that Parliament has a role in the process of the power being exercised. The statutory instrument will be subject to the negative procedure. The power will not be used to amend legislation and it will only have a direct effect on the panel to which it relates.

New Clause to be inserted after Clause 59: The Ombudsman Scheme

- This clause gives HM Treasury a power to make regulations to add to the list of persons to whom the Financial Ombudsman Service (“the FOS”) can charge case fees.

Power conferred on: HM Treasury

Power exercised by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative

Context and Purpose

18. The constraints on whom the FOS can charge case fees via its scheme rules are set out in paragraph 15 of Schedule 17 to the Financial Services and Markets Act 2000 (“FSMA 2000”). The FOS can currently only make rules to charge respondents to a case, meaning only firms who are subject to a complaint.

19. HM Treasury intends to expand the scope of entities who can be charged fees under FSMA 2000 and FOS scheme rules, including to enable the FOS to charge Claims Management Companies (“CMCs”) and other professional representatives carrying out claims management activities for bringing cases to the FOS.
20. HM Treasury is clear that eligible complainants, including individual consumers, should not be charged case fees and so the Bill explicitly exempts them from being included in the regulations.
21. The clause seeks to address concerns about poor behaviour from some CMCs. In particular, as CMCs are not currently charged case fees, there is no financial risk to them in bringing a large number of potentially unmeritorious complaints to the FOS.

Justification for taking the power

22. HM Treasury has considered it appropriate to take a power to make regulations in the future which would allow it to specify the categories of persons which can be charged fees by the FOS beyond respondents. This will allow HM Treasury to clearly define in regulations which entities are covered, including where there may be other bodies which are analogous to CMCs.
23. HM Treasury wants to ensure that it maintains the flexibility to amend the list of specified firms in the future if needed, for example if different models of CMCs emerge in the future.
24. This proposed approach is in line with the existing legislative approach under FSMA 2000 where the government sets out through legislation who the FOS is able to charge and the FOS then sets the detail of those case fee rules, including when these firms should be charged, for example from the first case or after a certain number. This change does not seek for HM Treasury to prescribe the specific approach the FOS would have to take in charging CMCs. The FOS would be required to consult on any changes to its approach to charging case fees and those changes would require approval from the Financial Conduct Authority. HM Treasury has sought to narrow the power appropriately by specifying that regulations cannot be made to enable the FOS to charge eligible complainants.

Justification for the procedure

25. It is considered appropriate due to potential financial impact on entities that the power should be subject to the affirmative procedure to provide Parliament with the opportunity for full scrutiny and debate. In addition, HM Treasury will have a duty to consult the FOS on any regulations made and the FOS will ultimately be responsible for setting any fees through its rules, which it will also consult on and will be subject to Financial Conduct Authority approval.

New Clause to be inserted after Clause 71: Arrangements for the investigation of complaints

- New section 87(9B)(f) of the Financial Services Act 2012 provides for HM Treasury to have a power to direct the Financial Regulators Complaints Commissioner to include certain, specified information in the annual report of the Complaints Commissioner prepared under section 87(9A)(a).

Power conferred on: HM Treasury

Power exercised by: direction

Parliamentary procedure: none

Context and Purpose

26. Under Part 6 of the Financial Services Act 2012, the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England must establish and maintain a complaints scheme, overseen by an independent person known as the Complaints Commissioner, to investigate certain complaints made against them.
27. The complaints scheme must provide for the Complaints Commissioner to produce an annual report on its investigations under the complaints scheme. Section 87(9B) of the Financial Services Act 2012 provides a list of information which the Complaints Commissioner must include in their annual report, for example, information concerning any general trends emerging from the investigations undertaken during the period to which the annual report relates. This annual report is laid before Parliament by HM Treasury, alongside regulator responses to the report. This ensures that there is effective oversight of the operation of the complaints scheme.
28. To further strengthen these existing mechanisms, the Bill will create a new power for HM Treasury to direct the Complaints Commissioner to include additional information in their annual report which is relevant to the complaints scheme. This will ensure that the report can be required to include any additional relevant policy issues that the government considers are important to support the scrutiny of the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England.

Justification for taking the power

29. This power will enable HM Treasury to ensure that matters of particular importance from a policy perspective which are relevant to the complaints scheme are included in the annual report. This is in line with existing similar powers in relation to the annual reports of the Financial Conduct Authority and the Prudential Regulation Authority.
30. A power of direction will allow for necessary flexibility so that matters which develop and are of public importance in a particular reporting period can be included in the next annual report.

Justification for the procedure

31. The provision is a power of direction which is limited in scope to directing some of the contents of the Complaints Commissioner's annual report. It is envisaged that this power will be used only where HM Treasury believes that a particular matter relevant to the complaints scheme, but which is not currently listed in section 87(9B) of the Financial Services Act 2012, should be reported on.
32. HM Treasury therefore consider that it is unnecessary to provide for a Parliamentary procedure to apply. There is precedent for this approach in relation to HM Treasury's power to direct the regulators to include specified matters in their annual reports under paragraph 11(1)(j) of Schedule 1ZA to FSMA 2000 and paragraph 19(1)(g) of Schedule 1ZB to FSMA 2000.

New Clause to be inserted after Clause 71: Politically Exposed Persons: money laundering and terrorist financing

- This clause will require HM Treasury to amend the Money Laundering Regulations 2017 (S.I. 2017/692) ("the MLRs") within twelve months of the Bill receiving Royal Assent.

Power conferred on: HM Treasury
Power exercised by: Statutory Instrument
Parliamentary procedure: Negative

Context and Purpose

33. The clause will require HM Treasury to amend the MLRs, within twelve months of the Bill receiving Royal Assent, to explicitly distinguish between domestic and other (non-domestic) Politically Exposed Persons ("PEPs"), and to make clear that domestic PEPs should be treated as inherently lower risk than other PEPs, unless other high-risk factors are present.
34. The intention of the amendment to the MLRs is to give firms which are regulated under the MLRs greater legal grounding for varying their approach to PEP customers depending on whether they are a domestic PEP or not.
35. The clause allows for the regulations amending the MLRs to be made under the negative procedure rather than the affirmative procedure required by the Sanctions and Anti-Money Laundering Act 2018.

Justification for taking the power

36. The required change to the MLRs that the clause mandates will require careful drafting and significant engagement with industry to achieve the policy objective set out by the

amendment. It would therefore not be appropriate for the Bill to directly amend the MLRs.

37. Instead, the requirement to amend the MLRs within the policy set out by the clause is delegated to Treasury Ministers, to take place after precise drafting and technical discussion with industry has taken place.

Justification for the procedure

38. The powers to make regulations under the negative procedure will apply only to the specific change mandated by the clause and set out above. The amendment itself is precise as to the policy outcome that must be achieved through regulations.
39. The policy objective behind the amendment will therefore have been considered by Parliament during the passage of the Bill and it would be duplicative to maintain the affirmative procedure and require Parliament to again approve the technical detail of this specific policy change.