

FSA may add further sanctions to its already extensive "toolkit"

July 2008

The Regulatory Enforcement and Sanctions Act 2008 ("the Act") was published on 22 July 2008 by the Office of Public Sector Information.

The Act applies to a wide range of regulators (including the FSA) and is intended to implement recommendations from the Hampton Report 2005 (Reducing Administrative Burdens: Effective Inspection and Enforcement)¹ and the Macrory Review 2006 (Regulatory Justice: Making Sanctions Effective)².

Part 3 of the Act (Civil Sanctions) is intended to provide a so-called "extended sanctions toolkit". The new tools in question are a range of sanctions for dealing with regulatory breaches which constitute offences and which therefore give rise to the possibility of criminal proceedings. The new sanctions will be available to take the place of such criminal proceedings, easing the cost of regulation (for the regulator at least) and reducing the burden on the criminal courts. The relevant offences in the financial services field will include breach of the general prohibition, money laundering offences and breaches of restrictions on financial promotions and communications.

The Act itself does not confer any new powers. All it does is provide that secondary legislation may be passed to give new powers to the FSA and specify certain procedures and requirements with which any such powers, once conferred, must comply.

It is no surprise, however, to find that the FSA has many of these powers (or very similar ones) in its already very extensive toolkit. There is no immediate headline-grabbing change in powers under the Act. So firms and their in-house legal and compliance teams should not allow themselves to be distracted from the FSA's TCF (Treating Customers Fairly) and MPBR (More Principles-based Regulation) initiatives which, in the current climate, are likely to lead to swift and potentially painful intervention by the FSA.

Nonetheless, keep your eyes open for the possibility of a couple of new types of sanction which might interest the FSA.

At present, the FSA does not have a general power to accept enforcement undertakings from non-compliant firms. This is a power which is available under the Act. If conferred, it would enable the FSA to accept an undertaking to secure that an offence does not continue or occur; or that the position be restored to what it would have been if an offence had not been committed; or that a payment be made to benefit any person affected by the offence; or to take action of a prescribed description. The use of undertakings in this way is likely to be of particular interest to the FSA because of its flexibility since the terms of the undertaking can be tailored to the specific circumstances of case.

Secondly, a power could be conferred under the Act on the FSA to issue stop notices on approved persons. This would amount to a power of the FSA to suspend approved persons, for example pending the cessation of certain conduct. Currently the FSA does not have this power. It would be able only to impose a fine or withdraw approval of the approved person.

The FSA may well express an interest in these new powers. The Act then requires consultation with affected persons before secondary legislation can be passed to confer the powers.

If you require further information, please contact:



Tim Pope
Associate

Tel: +44(0)117 939 2230
Mobile: +44(0)7968 225 096
Email: tim.pope@burges-salmon.com



Thomas Webb
Solicitor

Tel: +44(0)117 307 6976
Mobile: +44(0)7794 030 898
Email: thomas.webb@burges-salmon.com

¹ Published on 16 March 2005. http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

² Published in November 2006. <http://www.berr.gov.uk/files/file44593.pdf>

© Burges Salmon LLP 2008. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.

Burges Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
Chancery Exchange, 10 Furnival Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266
www.burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

