

2017 No. 488

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017

Made - - - - *28th March 2017*

Coming into force in accordance with article 1(2)

The Treasury make the following Order in exercise of the powers conferred by sections 21(5), (9), (10) and (15), 22(1) and (5), 137D(1)(b), 419 and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000(a).

In the opinion of the Treasury one of the effects of the following Order is that an activity which is not a regulated activity (within the meaning of the Financial Services and Markets Act 2000) will become a regulated activity.

In accordance with sections 137E(1)(a) and 429(1), (3) and (4) of, and paragraph 26(2) of Schedule 2 to, the Financial Services and Markets Act 2000, a draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017.

(2) This Order comes into force—

(a) on 1st April 2017 for the purposes of—

(i) enabling applications to be made for a Part 4A permission, for a variation of a Part 4A permission or for an approval under section 59 of the Act(b), or

(ii) enabling such applications to be determined,

in relation to any specified activity or any specified investment amended or inserted by this Order;

(b) on 1st April 2017 for the purposes of article 16; and

(c) on 3rd January 2018 for all other purposes.

(3) In this Order—

“the Act” means the Financial Services and Markets Act 2000;

(a) 2000 c.8. Sections 137D and 137E were inserted by section 24 of the Financial Services Act 2012 (c.21). Paragraph 25 of Schedule 2 was amended, and paragraph 26 was substituted, by section 8 of the Financial Services Act 2012.

(b) Section 59 was amended by section 14 of, and paragraph 3 of Schedule 5 to, the Financial Services Act 2012 and section 18 of and paragraph 1 of Schedule 3 to the Financial Services (Banking Reform) Act 2013 (c.33) and S.I. 2012/1906 and 2013/1773. It is prospectively amended by paragraph 2 of Schedule 4 to the Bank of England and Financial Services Act 2016 (c.14).

“the Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a).

Amendments to article 3 of the Order: interpretation

2.—(1) Article 3(1) of the Order(b) (interpretation) is amended as follows.

(2) In the definition of “the Commission Regulation” for “1287/2006 of 10 August 2006” substitute “Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive”(c).

(3) In the definition of “credit institution”—

(a) in paragraph (a), for “(the text of which is set out in Schedule 3)” substitute “(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)”;

(b) in paragraph (b), after “markets in financial instruments directive” insert “read with any directly applicable EU regulation made under Article 2.3 or 2.4 of that directive”.

(4) In the definition of “financial instrument” for “Chapter VI” substitute “Articles 5 to 8, 10 and 11”.

(5) In the definition of “home Member State” for “Article 4.1.20” substitute “Article 4.1.55(a)”.

(6) In the definition of “investment firm”—

(a) in paragraph (a), for “(the text of which is set out in Schedule 3)” substitute “(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)”;

(b) in paragraph (c), after “that directive” insert “read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive”.

(7) In the definition of “investment services and activities”, in paragraph (a) for “Article 52 of Commission Directive 2006/73/EC of 10 August 2006” substitute “Article 9 of the Commission Regulation”.

(8) In the definition of “market operator”—

(a) for “Article 4.1.13” substitute “Article 4.1.18”;

(b) in paragraph (a), for “(the text of which is set out in Schedule 3)” substitute “(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)”;

(c) in paragraph (b), after “that directive” insert “read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive”.

(9) In the definition of “multilateral trading facility” for “Article 4.1.15” in both places substitute “Article 4.1.22”.

(a) S.I. 2001/544.

(b) The definition of “the Commission Regulation” was inserted by S.I. 2006/3384. The definitions of “credit institution”, “financial instrument”, “investment firm”, “market operator” and “multilateral trading facility” were inserted by S.I. 2006/3384. The definition of “home Member State” was inserted by S.I. 2006/3384 and amended by S.I. 2013/3115 and 2015/910. The definition of “investment services and activities” was inserted by S.I. 2006/3384 and substituted by S.I. 2012/1906. The definition of “overseas person” was amended by S.I. 2003/1475 and 1476, 2006/2383 and 3384, 2009/1342 and 2013/1773.

(c) The Commission Delegated Regulation has been adopted but has not yet been published in the Official Journal of the European Union. A copy is available at http://ec.europa.eu/finance/securities/docs/isd/mifid/160425-delegated-regulation_en.pdf.

(10) In the definition of “overseas person” after “25D,” insert “25DA,”.

(11) In the definition of “security” after “82” insert “or by article 82B”.

(12) At the appropriate places insert—

““alternative investment fund managers directive” means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers(a);

“markets in financial instruments directive” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast)(b);

“markets in financial instruments regulation” means Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments(c);

“organised trading facility” means—

(a) an organised trading facility (within the meaning of Article 4.1.23 of the markets in financial instruments directive) operated by an investment firm, a credit institution or a market operator; or

(b) a facility which—

(i) is operated by an investment firm, a credit institution or a market operator which does not have a home Member State; and

(ii) if its operator had a home Member State, would be an organised trading facility within the meaning of Article 4.1.23 of the markets in financial instruments directive;

“structured deposit” means a deposit which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as—

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;

(b) a financial instrument or combination of financial instruments;

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or

(d) a foreign exchange rate or combination of foreign exchange rates;”.

Organised trading facility

3. After article 25D of the Order(d) (operating a multilateral trading facility), insert—

“Operating an organised trading facility

25DA.—(1) The operation of an organised trading facility on which non-equity MiFID instruments are traded is a specified kind of activity.

(2) In paragraph (1) a “non-equity MiFID instrument” means any investment—

(a) of the kind specified by article 77, 77A, 78, 79, 80, 81, 82B, 83, 84 or 85; or

(b) of the kind specified by article 89 so far as relevant to an investment falling within sub-paragraph (a),

(a) OJ L174, 1/7/2011, p.1.

(b) OJ L173, 12/6/2014, p.349.

(c) OJ L173, 12/6/2014, p.84.

(d) Article 25D was inserted by S.I. 2006/3384.

that is a bond, a structured finance product (within the meaning of Article 2.1.28 of the markets in financial instruments regulation(a)), an emission allowance, or a derivative (within the meaning of Article 2.1.29 of the markets in financial instruments regulation).”.

Structured deposits

4.—(1) In article 21(1) of the Order(b) (dealing in investments as agent), after “securities” insert “, structured deposits”.

(2) In article 25 of the Order (arranging deals in investments)—

(a) in paragraph (1)—

(i) omit “or” at the end of sub-paragraph (b);

(ii) after sub-paragraph (c) insert—

“, or

(d) a structured deposit,”;

(b) in paragraph (2), for “or (c)” substitute “, (c) or (d)”.

(3) In article 37(a) of the Order (managing investments), after “security” insert “, structured deposit”.

(4) In article 53(1)(b)(i) of the Order (advising on investments) after “security” insert “, structured deposit”.

Amendments to article 72 of the Order: overseas persons

5.—(1) Article 72(c) of the Order (overseas persons) is amended as follows.

(2) In paragraphs (1), (2), (3) and (4) for “or 25D” substitute “, 25D or 25DA”.

(3) After paragraph (10) insert—

“(11) This Article does not apply where the overseas person is—

(a) a third-country firm, as defined by Article 4.1.57 (“definitions”) of the markets in financial instruments directive (“third country firm”);

(b) established in a country subject to an equivalence decision; and

(c) carrying on an activity a third country firm established in that third country may carry on by virtue of the equivalence decision under—

(i) Article 46.1 of the markets in financial instruments regulation (general provisions) if it is registered by ESMA in the register of third country firms established in accordance with Article 48 of that Regulation (register);

(ii) Article 47.3 of the markets in financial instruments regulation (equivalence decision) if it has a branch in an EEA State other than the United Kingdom and is authorised in that State in accordance with Article 39 of the markets in financial instruments directive (establishment of a branch); or

(iii) Article 46.5 of the markets in financial instruments regulation.

(12) For the purposes of paragraph (11)—

(a) “equivalence decision” means a decision adopted by the Commission in relation to a country under Article 47.1 of the markets in financial instruments regulation which has not been withdrawn by a subsequent decision adopted by the Commission under that Article; and

(a) OJ L173, 12/6/2014, p.84.

(b) Articles 21 and 25 were amended by S.I. 2003/1476 and 2006/3384. Article 53 was amended by S.I. 2003/1476 and 2016/392.

(c) Article 72(1) to (4) was amended by S.I. 2006/3384 and paragraph (10) was inserted by S.I. 2015/910.

- (b) a country is subject to an equivalence decision if a period of more than three years has elapsed since the adoption of the decision by the Commission, beginning on the day after the date of the adoption of the decision.”.

Emission allowances

6. After article 82A of the Order(a) (greenhouse gas emissions allowances), insert—

“Emission allowances

82B.—(1) Subject to paragraph (2), emission allowances consisting of any units recognised for compliance with the requirements of the emission allowance trading directive.

(2) Paragraph (1) only applies to emission allowances in relation to which—

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis;
- (b) a management company is providing, in accordance with Article 6.3 of the UCITS directive, the investment services specified in paragraph 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex 1 to the markets in financial instruments directive;
- (c) a market operator is providing the investment service specified in paragraph 8 or 9 of Section A of Annex 1 to the markets in financial instruments directive; or
- (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”.

Amendments to article 83 of the Order: options

7.—(1) Article 83 of the Order(b) (options) is amended as follows.

(2) In paragraph (1)(e)—

- (a) after “directive” insert “read with Articles 5, 6, 7 and 8 of the Commission Regulation”;
- (b) for “the text of which is set out in Part I” substitute “the texts of which are set out in Parts 1 and 2”.

(3) In paragraph (2)(d)—

- (a) in paragraph (i), after “Schedule 2” insert “(read with Articles 5 and 6 of the Commission Regulation)”;
- (b) in paragraph (ii), for “38” substitute “7”.

(4) In paragraph (3)(c), after “with” insert “Articles 7 and 8 of”.

(5) In paragraph (4)—

- (a) omit “or” at the end of sub-paragraph (b);
- (b) in sub-paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;

(a) Article 82A was inserted by S.I. 2012/1906.

(b) Article 83 was amended by S.I. 2006/3384 and 2011/1613.

- (c) after sub-paragraph (c) insert—
 - “, or
 - (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”.

Amendments to article 84 of the Order: futures

8.—(1) Article 84 of the Order(a) (futures) is amended as follows.

(2) In paragraph (1A)(d), after “directive” insert (read with Articles 5 and 6 of the Commission Regulation)”.

(3) In paragraph (1B)(d), for “38” substitute “7”.

(4) In paragraph (1C)(c), after “with” insert “Articles 7 and 8 of”.

(5) After paragraph (1C), insert—

“(1CA) Subject to paragraph (1D), any other derivative contract, relating to currencies to which paragraph 4 of Section C of Annex 1 to the markets in financial instruments directive read with Article 10 of the Commission Regulation (the texts of which are set out in Parts 1 and 2 of Schedule 2) applies.”.

(6) In paragraph (1D)—

(a) for “and (1C)” substitute “, (1C) and (1CA)”;

(b) for “or forwards” substitute “, forwards or derivative contracts”;

(c) omit “or” at the end of sub-paragraph (b);

(d) in sub-paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;

(e) after sub-paragraph (c) insert—

“, or

(d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”.

(7) In paragraph (1E), for “(IC)” substitute “(1CA)”.

Amendments to article 85 of the Order: contracts for differences

9.—(1) Article 85 of the Order(b) (contracts for differences etc.) is amended as follows.

(2) In paragraph (4)—

(a) omit “or” at the end of sub-paragraph (b);

(b) in sub-paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;

(c) after sub-paragraph (c) insert—

“, or

(d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”.

(a) Article 84 was amended by S.I. 2006/3384 and 2011/1613.

(b) Article 85 was amended by S.I. 2006/3384 and 2011/1613.

(3) After paragraph (4) insert—

“(4A) Subject to paragraph (4B), a derivative contract of a binary or other fixed outcomes nature—

- (a) to which paragraph (1) does not apply;
- (b) which is settled in cash; and
- (c) which is a financial instrument to which paragraph 4, 5, 6, 7 or 10 of Section C of Annex I to the markets in financial instruments directive read with Articles 5 to 8 and 10 of the Commission Regulation (the texts of which are set out in Parts 1 and 2 of Schedule 2) applies.

(4B) Paragraph (4A) only applies to derivatives in relation to which—

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
- (b) a management company is providing, in accordance with Article 6.3 of the UCITS directive, the investment service specified in paragraph 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive,
- (c) a market operator is providing the investment service specified in paragraph 8 or 9 of Section A of Annex I to the markets in financial instruments directive,
- (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive, or
- (e) a person is carrying on the activity specified by article 25(2).”.

Amendments to Schedule 2 to the Order

10.—(1) Schedule 2 to the Order(a) (Sections A and C of Annex I to the markets in financial instruments directive and related Community subordinate legislation) is amended as follows.

(2) In the heading, for “Community” substitute “EU”.

(3) In Part 1 of Schedule 2 (Section C of Annex I to the markets in financial instruments directive)—

- (a) in paragraph 4, after “or yields,” insert “emission allowances”;
- (b) in paragraph 5—
 - (i) for “forward rate agreements” substitute “forwards”;
 - (ii) for “otherwise” substitute “other”;
- (c) in paragraph 6—
 - (i) for “contracts” substitute “contract”;
 - (ii) for “and/or an MTF” substitute “, an MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled”;
- (d) for paragraph 7 substitute—

“7. Option, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;”;

(a) Schedule 2 was substituted by S.I. 2006/3384.

(e) for paragraph 10 substitute—

“**10.** Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;”;

(f) after paragraph 10 insert—

“**11.** Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC(a) (Emissions Trading Scheme).”.

(4) For Part 2 of Schedule 2 (Chapter VI of the Commission Regulation) substitute—

“PART 2

Articles 5 to 8, 10 and 11 of the Commission Regulation

Article 5

Wholesale energy products that must be physically settled

1. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, a wholesale energy product must be physically settled where all the following conditions are satisfied:

- (a) it contains provisions which ensure that parties to the contract have proportionate arrangements in place to be able to make or take delivery of the underlying commodity; a balancing agreement with the Transmission System Operator in the area of electricity and gas shall be considered a proportionate arrangement where the parties to the agreement have to ensure physical delivery of electricity or gas.
- (b) it establishes unconditional, unrestricted and enforceable obligations of the parties to the contract to deliver and take delivery of the underlying commodity;
- (c) it does not allow either party to replace physical delivery with cash settlement;
- (d) the obligations under the contract cannot be offset against obligations from other contracts between the parties concerned, without prejudice to the rights of the parties to the contract, to net their cash payment obligations.

For the purposes of point (d), operational netting in power and gas markets shall not be considered as offsetting of obligations under a contract against obligations from other contracts.

2. Operational netting shall be understood as any nomination of quantities of power and gas to be fed into a gridwork upon being so required by the rules or requests of a Transmission System Operator as defined in Article 2(4) of Directive 2009/72/EC of the European Parliament and of the Council for an entity performing an equivalent function to a Transmission System Operator at the national level. Any nomination of quantities based on operational netting shall not be at the discretion of the parties to the contract.

3. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, force majeure shall include any exceptional event or a set of circumstances which are outside the control of the parties to the contract, which the parties to the contract could not have reasonably foreseen or avoided by the exercise of appropriate and reasonable due diligence and which prevent one or both parties to the contract from fulfilling their contractual obligations.

(a) OJ L275, 25/10/2003, p.32.

4. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU bona fide inability to settle shall include any event or set of circumstances, not qualifying as force majeure as referred to in paragraph 3, which are objectively and expressly defined in the contract terms, for one or both parties to the contract, acting in good faith, not to fulfil their contractual obligations.

5. The existence of force majeure or bona fide inability to settle provisions shall not prevent a contract from being considered as ‘physically settled’ for the purposes of Section C(6) of Annex I to Directive 2014/65/EU.

6. The existence of default clauses providing that a party is entitled to financial compensation in the case of non- or defective performance of the contract shall not prevent the contract from being considered as ‘physically settled’ within the meaning of Section C(6) of Annex I to Directive 2014/65/EU.

7. The delivery methods for the contracts being considered as ‘physically settled’ within the meaning of Section C(6) of Annex I to Directive 2014/65/EU shall include at least:

- (a) physical delivery of the relevant commodities themselves;
- (b) delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned;
- (c) other methods of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of goods without physically delivering them including notification, scheduling or nomination to the operator of an energy supply network, that entitles the recipient to the relevant quantity of the goods.

Article 6

Energy derivative contracts relating to oil and coal and wholesale energy products

1. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, energy derivative contracts relating to oil shall be contracts with mineral oil, of any description and petroleum gases, whether in liquid or vapour form, including products, components and derivatives of oil and oil transport fuels, including those with biofuel additives, as an underlying.

2. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, energy derivative contracts relating to coal shall be contracts with coal, defined as a black or dark-brown combustible mineral substance consisting of carbonised vegetable matter, used as a fuel, as an underlying.

3. For the purposes of Section C(6) of Annex I to Directive 2014/65/EU derivative contracts that have the characteristics of wholesale energy products as defined in Article 2(4) of Regulation (EU) 1227/2011 of the European Parliament and Council shall be derivatives with electricity or natural gas as an underlying, in accordance with points (b) and (d) of Article 2(4) of that Regulation.

Article 7

Other derivative financial instruments

1. For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not a spot contract in accordance with paragraph 2 and which is not for commercial purposes as laid down in paragraph 4 shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions:

- (a) it meets one of the following criteria:
 - (i) it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;
 - (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue;

(iii) it is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms;

(b) it is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

2. A spot contract for the purposes of paragraph 1 shall be a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

(a) 2 trading days;

(b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period referred to in paragraph 2.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EU, a derivative contract relating to an underlying referred to in that Section or in Article 8 of this Regulation shall be considered to have the characteristics of other derivative financial instruments where one of the following conditions is satisfied:

(a) it is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;

(b) it is traded on a regulated market, an MTF, an OTF, or a third country trading venue that performs a similar function to a regulated market, MTF or an OTF;

(c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, where the following conditions are both met:

(a) it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network,

(b) it is necessary to keep in balance the supplies and uses of energy at a given time, including the case when the reserve capacity contracted by an electricity transmission system operator as defined in Article 2(4) of Directive 2009/72/EC is being transferred from one prequalified balancing service provider to another prequalified balancing service provider with the consent of the relevant transmission system operator.

Article 8

Derivatives under Section C(10) of Annex I to Directive 2014/65/EU

In addition to derivative contracts expressly referred to in Section C(10) of Annex I to Directive 2014/65/EU, a derivative contract shall be subject to the provisions in that Section where it meets the criteria set out in that Section and in Article 7(3) of this Regulation and it relates to any of the following:

(a) telecommunications bandwidth;

(b) commodity storage capacity;

(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity;

- (d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except if the contract is already within the scope of Section C(4) of Annex I to Directive 2014/65/EU;
- (e) a geological, environmental or other physical variable, except if the contract is relating to any units recognised for compliance with the requirements of Directive 2003/87/EC of the European Parliament and of the Council;
- (f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- (g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation;
- (h) an index or measure based on actuarial statistics.

Article 10

Characteristics of other derivative contracts relating to currencies

1. For the purposes of Section C (4) of Annex I to Directive 2014/65/EU, other derivative contracts relating to a currency shall not be a financial instrument where the contract is one of the following:

- (a) a spot contract within the meaning of paragraph 2 of this Article,
- (b) a means of payment that:
 - (i) must be settled physically otherwise than by reason of a default or other termination event;
 - (ii) is entered into by at least a person which is not a financial counterparty within the meaning of Article 2(8) of Regulation (EU) No. 648/2012 of the European Parliament and of the Council;
 - (iii) is entered into in order to facilitate payment for identifiable goods, services or direct investment; and
 - (iv) is not traded on a trading venue.

2. A spot contract for the purposes of paragraph 1 shall be a contract for the exchange of one currency against another currency, under the terms of which delivery is scheduled to be made within the longer of the following periods:

- (a) 2 trading days in respect of any pair of the major currencies set out in paragraph 3;
- (b) for any pair of currencies where at least one currency is not a major currency, the longer of 2 trading days or the period generally accepted in the market for that currency pair as the standard delivery period;
- (c) where the contract for the exchange of those currencies is used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking, the period generally accepted in the market for the settlement of that transferable security or a unit in a collective investment undertaking as the standard delivery period or 5 trading days, whichever is shorter.

A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the currency is to be postponed and not to be performed within the period set out in the first subparagraph.

3. The major currencies for the purposes of paragraph 2 shall only include the US dollar, Euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone, Mexican peso, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish złoty and Romanian leu.

4. For the purposes of paragraph 2, a trading day shall mean any day of normal trading in the jurisdiction of both the currencies that are exchanged pursuant to the contract for the

exchange of those currencies and in the jurisdiction of a third currency where any of the following conditions are met:

- (a) the exchange of those currencies involves converting them through that third currency for the purposes of liquidity;
- (b) the standard delivery period for the exchange of those currencies references the jurisdiction of that third currency.

Article 11

Money-market instruments

Money-market instruments in accordance with Article 4(1)(17) of Directive 2014/65/EU, shall include treasury bills, certificates of deposits, commercial papers and other instruments with substantively equivalent features where they have the following characteristics:

- (a) they have a value that can be determined at any time;
- (b) they are not derivatives;
- (c) they have a maturity at issuance of 397 days or less.”.

(5) In Part 3 of Schedule 2 (Section A of Annex I to the markets in financial instruments directive)—

- (a) in paragraph 8, for “Multilateral Trading Facilities” substitute “an MTF”;
- (b) after paragraph 8 insert—

“9. Operation of an OTF.”.

(6) For Part 4 of Schedule 2 (Article 52 of Commission Directive 2006/73/EC) substitute—

“PART 4

Article 9 of the Commission Regulation

Article 9

Investment advice

For the purposes of the definition of ‘investment advice’ in Article 4(1)(4) of Directive 2014/65/EU, a personal recommendation shall be considered a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation shall be presented as suitable for that person, or shall be based on a consideration of the circumstances of that person, and shall constitute a recommendation to take one of the following sets of steps:

- (a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;
- (b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation shall not be considered a personal recommendation if it is issued exclusively to the public.”.

Substitution of Schedule 3 to the Order

11. For Schedule 3 to the Order(a) (Article 2 of the markets in financial instruments directive) substitute—

“SCHEDULE 3

Article 3(1)

Article 2 of the Markets in Financial Instruments Directive and related subordinate legislation

PART 1

Article 2 of the Markets in Financial Instruments Directive

Article 2

Exemptions

1. This Directive shall not apply to:

- (a) insurance undertakings or undertakings carrying out the reinsurance and retrocession activities referred to in Directive 2009/138/EC when carrying out the activities referred to in that Directive;
- (b) persons providing investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;
- (d) persons dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in financial instruments other than commodity derivatives or emission allowances or derivatives thereof unless such persons:
 - (i) are market makers;
 - (ii) are members of or participants in a regulated market or an MTF, on the one hand, or have direct electronic access to a trading venue, on the other hand, except for non-financial entities who execute transactions on a trading venue which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their groups;
 - (iii) apply a high frequency algorithmic trading technique; or
 - (iv) deal on own account when executing client orders;Persons exempt under points (a), (i) or (j) are not required to meet the conditions laid down in this point in order to be exempt.
- (e) operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, provided that those persons do not apply a high frequency algorithmic trading technique;

(a) Schedule 3 was substituted by S.I. 2006/3384.

- (f) persons providing investment services consisting exclusively in the administration of employee participation schemes;
- (g) persons providing investment services which only involve both the administration of employee participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (h) the members of the ESCB and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international financial institutions established by two or more Member States which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems;
- (i) collective investment undertakings and pension funds whether coordinated at Union level or not and the depositaries and managers of such undertakings;
- (j) persons:
 - (i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or
 - (ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business;
 provided that:
 - for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market maker in relation to commodity derivatives,
 - those persons do not apply a high frequency algorithmic trading technique; and
 - those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;
- (k) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;
- (l) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;
- (m) ‘agenti di cambio’ whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998;
- (n) transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks.

That exemption shall apply to persons engaged in the activities set out in this point only where they perform investment activities or provide investment services relating to commodity derivatives in order to carry out those activities. That

exemption shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights;

- (o) CSDs except as provided for in Article 73 of Regulation (EU) No 909/2014 of the European Parliament and of the Council.

2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the ESCB performing their tasks as provided for by the TFEU and by Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

3. The Commission shall adopt delegated acts in accordance with Article 89 to clarify for the purposes of point (c) of paragraph 1 when an activity is provided in an incidental manner.

4. ESMA shall develop draft regulatory technical standards to specify, for the purposes of point (j) of paragraph 1, the criteria for establishing when an activity is to be considered to be ancillary to the main business at a group level.

Those criteria shall take into account at least the following elements:

- (a) the need for ancillary activities to constitute a minority of activities at a group level;
- (b) the size of their trading activity compared to the overall market trading activity in that asset class.

In determining the extent to which ancillary activities constitute a minority of activities at a group level ESMA may determine that the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business is to be considered. However, that factor shall in no case be sufficient to demonstrate that the activity is ancillary to the main business of the group.

The activities referred to in this paragraph shall be considered at a group level.

The elements referred to in the second and third subparagraphs shall exclude:

- (a) intra-group transactions as referred to in Article 3 of Regulation (EU) No 648/2012 that serve group-wide liquidity or risk management purposes;
- (b) transactions in derivatives which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity;
- (c) transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

PART 2

Article 4 of the Commission Regulation

Article 4

Provision of investment service in an incidental manner

For the purpose of the exemption in point (c) of Article 2(1) of Directive 2014/65/EU, an investment service shall be deemed to be provided in an incidental manner in the course of a professional activity where the following conditions are satisfied:

- (a) a close and factual connection exists between the professional activity and the provision of the investment service to the same client, such that the investment service can be regarded as accessory to the main professional activity;
- (b) the provision of investment services to the clients of the main professional activity does not aim to provide a systematic source of income to the person providing the professional activity; and
- (c) the person providing the professional activity does not market or otherwise promote his ability to provide investment services, except where these are disclosed to clients as being accessory to the main professional activity.”.

Minor and consequential amendments to the Order

12.—(1) The Order is further amended as follows.

(2) In article 4(a) (specified activities: general), in paragraph (4)(b)—

(a) after “16,” insert “18,”;

(b) after “29,” insert “34,”.

(3) In articles 14(2)(b) (dealing in investments as principal), 21(2) (dealing in investments as agent) and 25(3) (arranging deals in investments) after “25D” insert “or 25DA”.

(4) In article 18(c) (issue by a company of its own shares etc), after paragraph (2) insert—

“(3) This article is subject to article 4(4).”.

(5) In article 25D(2)(a), after “81,” insert “82B,”.

(6) In article 34 (arrangements for the issue of shares etc), after paragraph (2) insert—

“(3) This article is subject to article 4(4).”.

(7) In article 64(d) (agreeing to carry on specified kinds of activity) after “25D,” insert “25DA,”.

(8) In article 72H(e) (insolvency practitioners) after paragraph (2)(d) insert—

“(da) article 25DA (operating an organised trading facility);”.

FCA general rules: product intervention and the integrity objective

13.—(1) The integrity objective applies for the purposes of section 137D of the Act(f) (FCA general rules: product intervention).

(2) For the purposes of this article, “the integrity objective” means the integrity objective in section 1D(g) of the Act (the integrity objective).

(a) Article 4(4) was substituted by S.I. 2006/3384.

(b) Article 14 was amended by S.I. 2006/3384.

(c) Article 18 was amended by S.I. 2001/3544 and 2010/86.

(d) Article 64 was amended by S.I. 2002/682, 2006/3384, 2009/1389 and 2013/1773 and 1881.

(e) Article 72H was inserted by S.I. 2014/366.

(f) Section 137D was inserted by section 24 of the Financial Services Act 2012.

(g) Section 1D was inserted by section 6 of the Financial Services Act 2012.

Amendments to other legislation

14. The Schedule, which makes consequential amendments to primary and secondary legislation, has effect.

Applications for permission or approval and variation of permission or approval

15.—(1) Where a person makes a completed application before 3rd July 2017 under Part 4A of the Act^(a) for a permission or a variation of permission in relation to any specified activity or any specified investment amended or inserted by this Order, section 55V(1) of the Act (applications to be determined by the appropriate regulator within six months) does not apply to the application.

(2) Where a person makes a completed application before 3rd July 2017 under section 60 of the Act^(b) (applications for approval) for an approval, or under section 63ZA of the Act^(c) (variation of approval) for a variation of an approval, in relation to any specified activity or any specified investment amended or inserted by this Order, section 61(3)^(d) of the Act (determination of applications) does not apply to the application.

(3) If the appropriate regulator has not determined an application to which paragraph (1) or (2) applies before the end of the period of six months beginning on the date on which it received the completed application it must inform the applicant of the progress being made on the application.

(4) In any event the appropriate regulator must determine an application to which paragraph (1) or (2) applies before 3rd January 2018.

(5) In this article the “appropriator regulator” has the same meaning as in—

- (a) section 55U(6)^(e) of the Act in the case of an application for a permission under Part 4A of the Act; or
- (b) section 60(9) of the Act in the case of an application for an approval under section 60 of the Act.

Transitional provision: structured deposits

16.—(1) Notwithstanding article 15, paragraph (2) applies where—

- (a) a person (“P”) gives notice to the appropriate regulator before 3rd January 2018, in such form as the appropriate regulator directs, that P wishes to carry on a permitted activity in relation to structured deposits,
- (b) the appropriate regulator acknowledges receipt of the notice in writing, and
- (c) immediately before 3rd January 2018 P had a Part 4A permission to carry on the permitted activity to which the notice under sub-paragraph (a) relates.

(2) P’s Part 4A permission is to be treated, from 3rd January 2018 (or the date of acknowledgement of receipt, if later), as including permission to carry on any permitted activity to which the notice under paragraph (1)(a) relates in relation to structured deposits.

(3) In this article “appropriate regulator” means—

- (a) in respect of a PRA-authorized person, the PRA; and
- (b) in respect of all other persons, the FCA;

“permitted activity” means an activity of the kind specified by article 21, 25, 37 or 53 of the Order.

(a) Part 4A was inserted by section 11 of the Financial Services Act 2012 (and includes section 55U and 55V).
(b) Section 60 was amended by paragraph 4 of Schedule 5 to the Financial Services Act 2012, section 20 of the Financial Services (Banking Reform) Act 2013 and is prospectively amended by paragraph 4 of Schedule 4 to the Bank of England and Financial Services Act 2016.
(c) Section 63ZA was inserted by section 26 of the Financial Services (Banking Reform) Act 2013 and amended by section 23 of, and paragraph 9 of Schedule 4 to, the Bank of England and Financial Services Act 2016.
(d) Section 61(3) was amended by paragraph 5 of Schedule 5 to the Financial Services Act 2012.
(e) Section 55U(6) was inserted by section 11(2) of the Financial Services Act 2012.

Review

17.—(1) The Treasury must from time to time—

- (a) carry out a review of articles 2 to 16,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Treasury must, so far as is reasonable, have regard to how Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast)(a) (which is implemented in part by means of articles 2 to 16) is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory provision made by articles 2 to 16,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this article must be published before the end of the period of five years beginning with 1st April 2017.

(5) Reports under this article are afterwards to be published at intervals not exceeding five years.

David Evennett

Guto Bebb

28th March 2017

Two of the Lords Commissioners of Her Majesty's Treasury

SCHEDULE

Article 14

Consequential amendments to primary and secondary legislation

Amendment to the Fair Trading Act 1973

1. In section 118 of the Fair Trading Act 1973(b) (trading schemes to which Part 11 applies), in subsection (6A), after paragraph (ba) insert—

“(bb) operating an organised trading facility;”.

Amendment to the Companies Act 1989

2. In section 176 of the Companies Act 1989(c) (power to make provision about other charges), in subsection (8), after paragraph (ba) insert—

“(bb) operating an organised trading facility;”.

(a) OJ L173, 12/6/2014, p.349.

(b) 1973 c.41; section 118(6A) was inserted by S.I. 2001/3649 and paragraph (ba) was inserted by S.I. 2006/3384.

(c) 1989 c.40; section 176(8) was inserted by S.I. 2001/3649 and paragraph (ba) was inserted by S.I. 2006/3384.

Amendment to the Terrorism Act 2000

3. In Schedule 6 to the Terrorism Act 2000(a) (financial information), in paragraph 6(1A), after paragraph (ba) insert—

“(bb) operating an organised trading facility.”

Amendment to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001

4. In the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001(b) (arrangements not amounting to a collective investment scheme)—

- (a) in paragraph 5(2)(a), after “25D (operating a multilateral trading facility),”, insert “25DA (operating an organised trading facility),”;
- (b) in paragraph 9(5), in the definition of “specified business”, after “25D,” insert “25DA,”.

Amendment to the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001

5. After article 3(2)(ca) of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001(c) (investment business) insert—

“(cb) article 25DA (operating an organised trading facility);”.

Amendments to the Financial Services and Markets Act 2000 (Exemption) Order 2001

6.—(1) The Financial Services and Markets Act 2000 (Exemption) Order 2001(d) is amended as follows.

(2) In article 5(1) (persons exempt in respect of particular regulated activities), after sub-paragraph (ca) insert—

“(cb) article 25DA (operating an organised trading facility);”.

(3) In the Schedule—

- (a) in paragraph 42 (gas industry)—
 - (i) in sub-paragraph (1)—
 - (aa) for “or 25D” substitute “, 25D or 25DA”;
 - (bb) for “or operating a multilateral trading facility” substitute “, operating a multilateral trading facility or operating an organised trading facility”;
 - (ii) in sub-paragraph (2)—
 - (aa) for “or 25D” substitute “, 25D or 25DA”;
 - (bb) for “or operating a multilateral trading facility” substitute “, operating a multilateral trading facility or operating an organised trading facility”;
- (b) in paragraph 49 (electricity industry)—
 - (i) in sub-paragraph (1)—
 - (aa) after “25D” insert “, 25DA”;
 - (bb) after “operating a multilateral trading facility” insert “, operating an organised trading facility”;
 - (ii) in sub-paragraphs (2), (4) and (5) for “or 25D” substitute “, 25D or 25DA”;

(a) 2000 c.11; paragraph 6(1A) of Schedule 6 was inserted by S.I. 2001/3649 and paragraph (ba) was inserted by S.I. 2006/3384.

(b) S.I. 2001/1062 amended by S.I. 2006/3384 and 2008/1641; there are other amendments but none is relevant.

(c) S.I. 2001/1177. Article 3(2)(ca) was inserted by S.I. 2006/3384. There are other amendments but none is relevant.

(d) S.I.2001/1201. Article 5 and paragraphs 42 and 49 of the Schedule were amended by S.I. 2007/125. There are other amendments but none is relevant.

(iii) in sub-paragraph (3) after “25D” insert “, 25DA”.

Amendments to the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001

7.—(1) The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001(a) are amended as follows.

(2) In regulation 1(2) (citation, commencement and interpretation), in the definition of “buy”, “sell”, “security”, “qualifying contract of insurance” and “relevant investment”, for “and “relevant investment”” substitute “, “relevant investment” and “structured deposit””.

(3) In regulation 2 (descriptions of business for which appointed representatives are exempt)—

- (a) in paragraph (1)(a) for “or relevant investments” substitute “, relevant investments or structured deposits”;
- (b) in paragraph (1A), in sub-paragraphs (a) and (b) after “financial instruments” insert “or structured deposits”.

Amendments to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001

8.—(1) The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001(b) is amended as follows.

(2) In article 2(1) (interpretation), at the appropriate place insert—

““structured deposit” has the meaning given by article 3(1) of the Regulated Activities Order;”.

(3) In articles 5(1) (managing investments) and 6(2)(b) and (c)(i) (advising on investments), for “security or contractually based investment” substitute “security, contractually based investment or structured deposit”.

Amendments to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005

9.—(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005(c) is amended as follows.

(2) In article 2(1) (interpretation), at the appropriate place insert—

““structured deposit” means a deposit which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as—

- (a) an index or combination of indices excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;
- (b) a financial instrument or combination of financial instruments;
- (c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or
- (d) a foreign exchange rate or combination of foreign exchange rates;”.

(3) In article 22(1) (deposits: non-real time communications), after “Schedule 1” insert “except where that controlled activity relates to a structured deposit”.

(a) S.I. 2001/1217, amended by S.I. 2001/2508, 2003/1476, 2004/453 and 2006/3414. There are other amendments but none is relevant.

(b) S.I. 2001/1227. Articles 2, 5 and 6 were amended by S.I. 2003/1476. There are other amendments but none is relevant.

(c) S.I. 2005/1529. Paragraph 4A of Schedule 1 was inserted by S.I. 2006/3384. Paragraph 7 of Schedule 1 was amended by S.I. 2016/392. Paragraph 15A of Schedule 1 was inserted by S.I. 2010/86. Paragraph 21 of Schedule 1 was amended by S.I. 2006/3384 and 2011/1613. Paragraphs 22 and 23 of Schedule 1 were amended by S.I. 2006/3384. There are other amendments but none is relevant.

(4) In article 23 (deposits: real time communications), after “Schedule 1” insert “except where that controlled activity relates to a structured deposit”.

(5) In article 37 (financial markets) —

(a) in paragraph (3)(a), for “or 23” substitute “, 23 or 23A”;

(b) in paragraph (4)(b), omit “II,”.

(6) In article 41(4)(b) (bearer instruments: promotions required or permitted by market rules), omit “II or”.

(7) In article 67(2)(b) (promotions required or permitted by market rules), omit “II or”.

(8) In article 68 (promotions in connection with admission to certain EEA markets), omit paragraph (2)(b), and the “or” preceding it.

(9) In the definition of “relevant market” in article 69(1) (promotions of securities already admitted to certain markets), omit “II or”.

(10) In Schedule 1 (controlled activities and controlled investments)—

(a) in paragraph 3(1) (dealing in securities and contractually based investments) after “securities” insert “, structured deposits”;

(b) in paragraph 4 (arranging deals in investments)—

(i) after sub-paragraph (1)(a), insert—

“(aa) a structured deposit;”;

(ii) in sub-paragraph (2), after “(1)(a),” insert “(aa),”;

(c) after paragraph 4A (operating a multilateral trading facility), insert—

“Operating an organised trading facility

4AA. Operating an organised trading facility on which non-equity MiFID instruments are traded is a controlled activity.”;

(d) in paragraph 5(a) (managing investments), after “security” insert “, structured deposit”;

(e) in paragraph 7(1)(b)(i) (advising on investments), after “security” insert “, structured deposit”;

(f) in paragraph 15A (alternative finance investment bonds), in paragraph (2)(f)(ii) for “Article 4.1(14) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments” substitute “Article 4.1.21 of the markets in financial instruments directive”;

(g) in paragraph 21 (options)—

(i) in sub-paragraph (1)(e), after “directive” insert “(read with Articles 5, 6, 7 and 8 of the Commission Regulation)”;

(ii) in sub-paragraph (2)(d)—

(aa) in sub-paragraph (i), after “directive” insert “(read with Articles 5 and 6 of the Commission Regulation)”;

(bb) in sub-paragraph (ii), for “38” substitute “7”;

(iii) in sub-paragraph (3)(c), after “with” insert “Articles 7 and 8 of”;

(iv) in sub-paragraph (4)—

(aa) omit “or” at the end of paragraph (b);

(bb) in sub-paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;

(cc) after sub-paragraph (c) insert—

“, or

(d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of

Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”;

- (h) in paragraph 22 (futures)—
 - (i) in sub-paragraph (1A)(d), after “directive” insert (read with Articles 5 and 6 of the Commission Regulation”);
 - (ii) in sub-paragraph (1B)(d), for “38” substitute “7”;
 - (iii) in sub-paragraph (1C)(c), after “with” insert “Articles 7 and 8 of”;
 - (iv) after sub-paragraph (1C) insert—

“(1CA) Subject to sub-paragraph (1D), any other derivative contract, relating to currencies to which paragraph 4 of Section C of Annex 1 to the markets in financial instruments directive read with Article 10 of the Commission Regulation applies.”;
 - (v) in sub-paragraph (1D)—
 - (aa) for “and (1C)” substitute “, (1C) and (1CA)”;
 - (bb) for “or forwards” substitute “, forwards or derivative contacts”;
 - (cc) in paragraph (b), for “5(3)” substitute “6(3)”;
 - (dd) omit “or” at the end of paragraph (b);
 - (ee) in paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;
 - (ff) after paragraph (c) insert—

“, or
 - (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”;
 - (vi) in sub-paragraph (1E), for “(IC)” substitute “(1CA)”;
- (i) in paragraph 23 (contracts for differences etc.)—
 - (i) in sub-paragraph (4)—
 - (aa) in paragraph (b), for “5(3)” substitute “6(3)”;
 - (bb) omit “or” at the end of paragraph (b);
 - (cc) in paragraph (c), for “paragraph 8” substitute “paragraph 8 or 9”;
 - (dd) after paragraph (c) insert—

“, or
 - (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”;
 - (ii) after sub-paragraph (4) insert—

“(4A) Subject to sub-paragraph (4B), a derivative contract of a binary or other fixed outcomes nature—

 - (a) to which sub-paragraph (1) does not apply;
 - (b) which is settled in cash; and
 - (c) which is a financial instrument to which paragraph 4, 5, 6, 7 or 10 of Section C of Annex I to the markets in financial instruments directive read with Articles 5 to 8 and 10 of the Commission Regulation applies.
- (4B) Sub-paragraph (4A) only applies to derivatives in relation to which—
 - (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,

- (b) a management company is providing, in accordance with Article 6.3 of the UCITS directive, the investment service specified in paragraph 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive,
 - (c) a market operator is providing the investment service specified in paragraph 8 or 9 of Section A of Annex I to the markets in financial instruments directive,
 - (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive, or
 - (e) a person is carrying on the controlled activity referred to in paragraph 4(2).”;
- (j) after paragraph 23 insert—

“Emission allowances

23A.—(1) Subject to sub-paragraph (2), emission allowances consisting of any units recognised for compliance with the requirements of the emission allowance trading directive.

(2) Sub-paragraph (1) only applies to emission allowances in relation to which—

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis;
- (b) a management company is providing, in accordance with Article 6.3 of the UCITS directive, the investment services specified in paragraph 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex 1 to the markets in financial instruments directive;
- (c) a market operator is providing an investment service specified in paragraph 8 or 9 of Section A of Annex 1 to the markets in financial instruments directive; or
- (d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.”;

(k) in paragraph 28 (interpretation)—

(i) in the appropriate places, insert—

““AIFM” has the meaning given in the Regulated Activities Order;

“markets in financial instruments directive” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast)(a);

“non-equity MiFID instrument” has the meaning given in article 25DA of the Regulated Activities Order;

“organised trading facility” has the meaning given in the Regulated Activities Order;”;

(ii) in the definition of “Commission Regulation”, for “means Commission Regulation 1287/2006 of 10 August 2006” substitute “has the meaning given in the Regulated Activities Order”;

(iii) in the definition of “security”, after “20” insert “or 23A”.

(11) In Schedule 3 (markets and exchanges) omit Part 2 (certain investment exchanges operating relevant EEA markets).

(a) OJ L173, 12/6/2014, p.349.

Amendment to the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008

10. In Schedule 3 to the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008(a) (excepted contracts), in paragraph 8(1)(a) after sub-paragraph (iii) insert—

“(iiiia) operating an organised trading facility;”.

(a) S.I. 2008/1816.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (“the RAO”) to transpose parts of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) (OJ L173, 12/6/2014, p.349) (“MiFID 2”).

The RAO specifies kinds of activities and investments for the purposes of the Financial Services and Markets Act 2000 (“the Act”) (c.8). When an activity of a specified kind is carried on by way of business in relation to an investment of a specified kind, it is a “regulated activity” for the purposes of the Act. Section 19 of the Act prohibits persons from carrying on any regulated activity in the United Kingdom unless they are authorised or exempt.

Article 3 provides that the operation of an organised trading facility is a specified activity. A definition of “organised trading facility” is inserted by article 2.

Article 4 extends the specified activities of dealing in investments as agent (article 21 of the RAO), arranging deals in investments (article 25 of the RAO), managing investments (article 37 of the RAO) and advising on investments (article 53 of the RAO) in relation to structured deposits. A definition of “structured deposit” is inserted by article 2.

Article 5 amends article 72 of the RAO (overseas persons’ exclusion), which excludes certain activities from being categorised as regulated activities under RAO provisions including articles 14, 21, 25, 25D and 53, if they are carried out by overseas persons in specific circumstances. The amendments suspend the exclusion under article 72 where Title VIII of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (OJ L173 12/6/2014, p.84) gives overseas persons the right to carry out the same activities in order to make United Kingdom law compatible with that Regulation.

Article 6 provides that emission allowances are a specified investment. Article 2 amends the definition of “securities” in the RAO to include emission allowances, and the effect of this change is that specified activities such as dealing in investments as a principal (article 14 of the RAO) and dealing in investments as agent (article 21 of the RAO), which apply in relation to “securities”, will extend to emission allowances.

Articles 7 to 9 amend articles 83 (options), 84 (futures) and 85 (contracts for differences) of the RAO. Certain derivatives relating to currencies and binary contracts are added as new specified investments. Amendments also transpose in part Article 6 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (OJ L174, 1/7/2011, p.1).

Article 10 amends Schedule 2 to the RAO to set out the investment services and activities and financial instruments in Annex I to MiFID 2 and related provision in the Commission Delegated Regulation of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (“the Commission Regulation”). Article 11 replaces Schedule 3 to the RAO with a new Schedule 3 containing the text of Article 2 of MiFID 2 (exemptions) and related provision in the Commission Regulation.

Article 13 applies the Financial Conduct Authority’s integrity objective to the purposes for which the Authority may make product intervention rules under section 137D of the Act.

Article 15 makes transitional provision in respect of applications for a permission or an approval (or variations of a permission or an approval) under the Act in relation to a specified activity or a specified investment amended or inserted by this Order. If the application is made before 3rd July 2017, the regulator need not determine such application within the statutory period (normally 3 or 6 months) but must keep the applicant informed of progress and must determine the application before 3rd January 2018.

Article 16 is a transitional provision for persons already holding permissions to undertake the specified activities of dealing in investments as agent (article 21 of the RAO), arranging deals in investments (article 25 of the RAO), managing investments (article 37 of the RAO) or advising on investments (article 53 of the RAO). Article 15 enables such persons to have their existing permission varied to permit them to undertake those activities in relation to structured deposits provided they notify the appropriate regulator of their wish to do so.

Article 17 requires the Treasury to review this Order every five years.

The Schedule makes consequential amendments to other legislation. In particular it makes amendments to the controlled activities and controlled investments in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) similar to the amendments to the corresponding specified activities and specified investments in the RAO.

A transposition note setting out how MiFID 2 is transposed into UK law is available from HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ.

A full impact assessment of the effect that this Order will have on the costs of business and the voluntary sector is available from HM Treasury, 1 Horse Guards Road, London SW1A 2HQ or on www.gov.uk and is published alongside the Order on www.legislation.gov.uk.

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