

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED
ACTIVITIES) (AMENDMENT) (No. 2) ORDER 2017

2017 No. 500

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This amendment will allow regulated firms to provide more help and guidance to their customers without inadvertently crossing the boundary into regulated financial advice. The instrument amends article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the RAO”), which specifies advising on investments as a regulated activity. The effect of the amendments is that a person who is authorised to carry on a regulated activity which is not the activity specified by article 53(1) of the RAO and is not the activity of agreeing to carry on that activity as specified by article 64 of the RAO will give investment advice only when providing a personal recommendation. The definition of “personal recommendation” in article 53(1A) follows that in Article 9 of 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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The RAO is secondary legislation made under the Financial Services and Markets Act 2000 (FSMA) and establishes the regulatory perimeter for the Financial Conduct Authority (FCA). Currently, under the RAO, a regulated firm is giving regulated investment advice if they give advice that relates to the merits of a person’s buying or selling certain investments. This is wider and less clear than the definition of investment advice under the Markets in Financial Instruments Directive 2014/65/EU (known as ‘MiFID II’), which involves providing a personal recommendation.

5. Extent and Territorial Application

- 5.1 This instrument extends to all of the United Kingdom.

5.2 The territorial application of this instrument is to all territories of the United Kingdom

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 In August 2015, the government launched the Financial Advice Market Review (FAMR) to explore how financial advice could work better for consumers. FAMR was a joint review between HM Treasury and the FCA. FAMR considered the regulatory and legal framework governing the provision of financial advice and guidance to consumers and its effectiveness in ensuring that all consumers have access to the help they need to make effective decisions about their finances.

7.2 Respondents to the FAMR Call for Input raised concerns about a lack of clarity regarding the point at which more general forms of consumer support become regulated advice under the current definition. As a result of these concerns, firms have said that they design their current guidance services to stop a ‘safe distance’ short of where they perceive the regulated advice boundary to be. This means that firms are providing less support to consumers.

7.3 Respondents said that the MiFID definition of advice as a personal recommendation is clearer than the RAO definition, and much easier for them to build into their compliance processes. Adopting this definition would allow firms to provide more useful guidance to support consumer decision making, reducing the risk of consumers making poor investment decision on their own.

7.4 FAMR therefore recommended that HM Treasury consult on bringing the definition of advice in the RAO into line with the MiFID definition of advice, so that only advice which makes a personal recommendation will be regulated.

Consolidation

7.5 The Department has no current plans to consolidate the RAO and the amendments made to it.

8. Consultation outcome

8.1 The government consulted on amending the definition of regulated advice to bring it into line with MiFID on 20 September 2016. The consultation ran for 8 weeks and received 63 responses.

8.2 In the consultation, the government set out a number of potential risks posed by moving the regulatory boundary for all firms. Whilst respondents were supportive of changing the definition of advice for regulated firms, a significant number of responses expressed concerns that fraudsters would attempt to deliver ‘advice’ that stops short of a personal recommendation, but is nevertheless intended to persuade an individual to purchase risky investment products. In those circumstances, the FCA might not then be able to take action against these fraudsters, as they would be unable to take enforcement action in relation to activities that they do not regulate.

- 8.3 Therefore, this amendment changes the definition of financial advice only for regulated persons with authorisation to carry out a regulated activity which is not advising on investments and is not agreeing to advise on investments. This means the majority of regulated firms will only be giving regulated advice when they provide a personal recommendation.
- 8.4 The amendment leaves the wider RAO definition of advice in place for unregulated firms. This limits the activities that can be undertaken by unregulated firms, some of whom may be fraudsters, without being subject to FCA regulation. This protects consumers from being scammed.

9. Guidance

- 9.1 The FCA now needs to make some consequential changes to their Handbook and Regulatory Guides. They intend to consult on changes later in 2017, with a view to making them so that they come into effect at the same time as this amendment comes into effect on 3 January 2018. They will also consult on updating their guidance on regulated advice and personal recommendations.

10. Impact

- 10.1 The impact on business is expected to be positive. The change to the definition of financial advice is a permissive measure; it allows most regulated firms to adapt their business models to offer more guidance, but does not compel them to do so. Firms may face small to negligible costs associated with familiarising themselves with the change, for example by consulting with compliance experts, and potentially making small wording changes to documentation such as disclosure forms. Our estimates range between approximately £600 and £4,000 per firm (for larger firms), with costs applying only in the first year. On our best estimates, firms who choose to take advantage of the amendment could save £69,125 per firm per annum, resulting from a reduction in compliance monitoring costs and external compliance/legal spend. There is no impact on charities or voluntary bodies that are not regulated. This is because the definition of advice remains the same for unregulated individuals and firms.
- 10.2 There is no impact on the public sector.
- 10.3 This is a deregulatory measure. An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 This is because the amendment is permissive and does not impose any requirements on small businesses. Small businesses would only incur small familiarisation costs, which are likely to be as low as £600 per firm, and would occur in the first year only.

12. Monitoring & review

- 12.1 HM Treasury and the FCA have committed to undertake a 3 year review of the Financial Advice Market Review in 2019.

13. Contact

- 13.1 Megan Blade at HM Treasury, Telephone: 02072704879 or email: Megan.Blade@HMTreasury.gsi.gov.uk can answer any queries regarding the instrument.