

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (MARKET ABUSE)
REGULATIONS 2009

2009 No. 3128

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 These Regulations extend the sunset clauses in the Financial Services and Markets Act 2000 (“FSMA”), which would otherwise cease on 31 December 2009 so that subsections (4) and (8) of section 118 of the Act and related ancillary provisions will remain in force until 31 December 2011.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

4. **Legislative Context**

4.1 These Regulations amend sections 118 and 118A of FSMA which were substituted, together with sections 118B and 118C, for the original section 118 by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005, as from 1 July 2005. Such Regulations implemented, in part, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (“the Market Abuse Directive”). These sections were subsequently amended by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2008 (S.I. 2008/1439) (“the 2008 Regulations”).

4.2 Subsections 118(4), 118(8), 118A(2) and 118A(3) of FSMA retain definitions of market abuse which are broader than those in Articles 1 to 5 of the Market Abuse Directive and were already in the original section 118. Section 118(9) (as amended by the 2008 Regulations) provides that the provisions in section 118 will cease to have effect on 31 December 2009; section 118A(6) does the same for the related provisions in section 118A.

4.3 Regulations 2(2) and 2(3) amend sections 118(9) and 118A(6) of FSMA; they change the date on which the provisions affected by those sections will cease to have effect. The result of these amendments is that subsections (4) and (8) of section 118 of FSMA and related ancillary provisions will remain in force until 31 December 2011.

5. **Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Services Secretary to the Treasury has made the following statement regarding Human Rights:

In my view the provisions of the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2009 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 The United Kingdom currently has a wider definition of market abuse than that established in the EU's 2003 Market Abuse Directive. When the Treasury transposed the Directive, the main challenge was to decide how much change was appropriate to the civil market abuse regime that had been put in place as part of FSMA in 2000. The FSMA regime and the Market Abuse Directive cover similar ground but adopt a slightly different approach to prohibiting abusive behaviour. The original FSMA regime defined market abuse in fairly broad terms and then qualified it by the requirement that behaviour is only abusive if it is likely to be regarded as such by a 'regular user' of the market. The Directive set out more specific descriptions of the type of behaviour that is to be prohibited.

7.2 On balance, it was decided to retain the scope of the existing market abuse prohibitions to the extent that these go beyond the prohibitions in the Directive (the new sections 118(4) and 118(8) of FSMA) but to make them subject to a sunset clause whereby the provisions would expire after a period of three years pending the outcome of a review by HM Treasury to assess whether they remain justified.

7.3 It was initially decided to extend the sunset clauses until 31 December 2009 until the outcome of the EU's review of the Market Abuse Directive became known. This was done in the 2008 Regulations. The EU's review of the Market Abuse Directive was subsequently delayed. The call for evidence was only launched on 20 April 2009, and the Commission has not yet published proposals to amend the Directive. It has therefore been decided to extend the sunset clauses further until 31 December 2011.

- *Consolidation*

7.2 There are no current plans to consolidate the Financial Services and Markets Act 2000. Commercial publishers produce consolidated versions of the Act, and a free consolidated version will be available on the Statute Law Database.

8. Consultation outcome

8.1 The Treasury held a three-month consultation between February and May 2008 to review whether the superequivalences remain justified and to seek views on whether the sunset clauses should be retained in the United Kingdom's civil market abuse regime. The consultation also noted that the EU is currently reviewing the Market Abuse Directive, which could result in revisions to it. In light of these factors it was proposed that we extend the sunset clauses for a short period until the outcome of the EU review is known to avoid two sets of changes in short order and to allow wider consideration of the benefits of the superequivalences.

8.2 16 responses were received to the consultation and the majority supported a short extension to the sunset clauses until the outcome of the EU review is known. Details of the comments and the Treasury's response are summarised in the feedback statement on the consultation on HM Treasury's website (www.hm-treasury.gov.uk).

8.3 The intention to extend the sunset clause until 31 December 2011 was outlined in our July 2009 consultative paper *Reforming Financial Markets*. No further consultation has been carried out since 2008, as the reason for extending the sunset clauses remains the same. As there is an ongoing review of the Market Abuse Directive by the EU it is considered appropriate to extend the sunset clauses until the outcome of this review becomes known. This would help minimize transition costs for the industry. It remains our intention that the UK fully align with the EU regime in this area in due course – if the review of the Market Abuse Directive provides satisfactory solutions in both maintaining a robust UK regime and minimizing cross-border costs for UK companies.

9. Guidance

9.1 The FSA's Market Conduct sourcebook (MAR) contains the Code of Market Conduct and applies to all persons seeking guidance on the market abuse regime. MAR is available on the FSA website www.fsa.gov.uk

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument. See *Final Impact Assessment on the sunset clauses* (June 2008) for a summary of the costs and benefits of extending the sunset clauses. This impact assessment can be found on HM Treasury's website (www.hm-treasury.gov.uk).

11. Regulating small business

11.1 The legislation applies to small business, but like other businesses should not affect them as the aim of the Regulations is to preserve the current legislative requirements.

12. Monitoring & review

12.1 This policy will be subject to review in 2011.

13. Contact

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Fiona.c.henderson@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.