

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED
ACTIVITIES) (AMENDMENT) ORDER 2022

2022 No. 466

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 The memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument supplements the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 (SI 2021/90) (“the 2021 Order”) and relates to the regulation of the pre-paid funeral plans sector by the Financial Conduct Authority (“FCA”). The 2021 Order amended the regulatory framework for providers of pre-paid funeral plan contracts so that, from 29 July 2022, firms will generally need to be appropriately authorised by the FCA under the Act in order to enter into or carry out funeral plan contracts.
- 2.2 This instrument makes further changes to that framework by amending the Financial Services and Markets Act 2000 (“the Act”), such that FCA will be permitted to make rules in relation to how the Financial Services Compensation Scheme (“FSCS”) will operate for the pre-paid funeral plans sector. These amendments will allow greater protection for consumers who hold pre-paid funeral plans in the event of the failure of a regulated funeral plan provider. In particular, they will allow for the FSCS to secure continuity of provision for those consumers as an alternative to making compensatory payments. These amendments will also ensure that the FSCS can more effectively seek recovery of the funds it pays out from the trust assets and insurance policies backing funeral plans, which will mitigate the impact on other FSCS levy payers.
- 2.3 This instrument makes other amendments to the Act relating to the role of insolvency practitioners, such that they are required to co-operate with the FSCS – if so requested – in the event of the failure of a regulated funeral plan provider.
- 2.4 This instrument also makes provision in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the RAO”) to ensure that where a provider agrees to take responsibility for another provider’s funeral plan contracts, that new provider can be deemed to be carrying out those contracts for regulatory purposes. The purpose of making this provision is to ensure that a provider who has agreed to assume another provider’s obligations under a funeral plan contract falls within the FCA’s regulatory remit, notwithstanding that the process for transferring the contract may still be ongoing and that the old provider and the customers may retain rights and duties under that contract.
- 2.5 Finally, this instrument amends the 2021 Order to provide a transitional regime such that the deadline by which funeral plan providers are required to have obtained FCA authorisation to continue carrying out funeral plan contracts is extended, from 29 July

2022 to 31 October 2022, for firms that meet certain conditions on 29 July in relation to the timing and status of their application for authorisation to the FCA.

- 2.6 The purpose of the provisions referred to in paragraphs 2.4 and 2.5 is to help manage the sector's transition into regulation by addressing barriers to the transfer of funeral plan contracts by those who are exiting the market. These measures aim to ensure that the funeral plan sector can secure continuity of provision for the maximum number of consumers during the transition into regulation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Article 5 of this instrument makes a correction to the 2021 Order by revoking article 3 of the 2021 Order (which made a minor consequential amendment to secondary legislation relating to collective investment schemes) and replacing it with a slightly different amendment in article 3 (see paragraph 6.6 of this Explanatory Memorandum). HM Treasury considered whether it ought to apply the procedure for free issue, but concluded that this should not be necessary in this case as the correction to the 2021 Order is a comparatively minor component of the instrument. HM Treasury has complied with the requirement in paragraph 4.7.6 of Statutory Instrument Practice (5th edition) to consult with the SI Registrar on this issue.
- 3.2 Article 5 of this instrument also modifies the application of article 1(3) of the 2021 Order, which brings into force the new provisions in the 2021 Order, by inserting a new article 1A in the 2021 Order. This is to introduce the transitional regime referred to in paragraph 2.5 and the provision is explained further at paragraphs 7.29 and 7.33 of this Explanatory Memorandum. This provision will apply only in relation to a limited population of funeral plan providers, and HM Treasury considers that it is a proportionate approach to mitigating risks to consumers which have been identified since the making of the 2021 Order.

4. Extent and territorial application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is in the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Economic 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 (Regulated Activities) (Amendment) Order 2022 are compatible with the Convention rights.”

6. Legislative context

- 6.1 The RAO specifies kinds of activities and investments for the purposes of the Act. 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 either authorised or exempt, and this is known in the Act as the “General Prohibition”.

- 6.2 Following further consideration, it became clear to HM Treasury that further legislative changes were required to ensure that the FSCS can operate most effectively for the consumers of pre-paid funeral plans should a regulated funeral plan provider fail. This instrument therefore makes amendments to the regulatory framework for funeral plan contracts in consequence of the 2021 Order. The 2021 Order amended the RAO such that, from 29 July 2022, funeral plan providers will generally need to be appropriately authorised to enter into funeral plan contracts. The 2021 Order also introduced the new regulated activity of carrying out of a funeral plan contract as provider which is specified in article 59(1A) of the RAO. This new regulated activity will apply in relation to both existing and new funeral plan contracts from 29 July 2022 or, in certain limited circumstances provided for in this instrument and explained in this Explanatory Memorandum (paragraphs 6.7, 7.29 and 7.33), from 31 October 2022.
- 6.3 Article 2 of this instrument makes supplemental amendments to article 59 of the RAO which, if certain conditions are met, may result in a funeral plan provider being treated for regulatory purposes as if they were carrying out another provider’s funeral plan contracts.
- 6.4 Article 2 also amends the RAO to exclude from the General Prohibition the specified activity of carrying out a funeral plan contract as provider, when that activity is carried on by a person acting as an insolvency practitioner.
- 6.5 The Financial Services and Markets Act 2000 (Exemption) Order 2001 (“the Exemption Order”) provides for certain persons to be exempt from the General Prohibition. Article 4 of this instrument amends the Exemption Order to exempt from the General Prohibition a person acting as the official receiver and liquidator of a company where that person carries on the specified activity of carrying out a funeral plan contract as provider.
- 6.6 The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (“the CIS Order”) prescribes particular arrangements which do not amount to collective investment schemes for the purposes of section 235(5) of the Act. Section 235 provides that a collective investment scheme is any arrangement with respect to property of any description, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in, or receive profits or income arising from, the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. Article 3 of this instrument makes a minor amendment to the CIS Order to ensure that a funeral plan contract does not amount to a collective investment scheme (for the purposes of legislation that applies to such schemes).
- 6.7 Article 5 of this instrument also makes an amendment to the 2021 Order, to delay the application of article 2(4)(a) of the 2021 Order (which inserted the new regulated activity of carrying out a funeral plan contract as provider in article 59(1A) of the Regulated Activities Order and comes into force on 29 July 2022) to 31 October 2022 for funeral plan providers meeting certain conditions.
- 6.8 The FSCS was established under Part 15 of the Act to provide compensation to clients of authorised financial services firms who are unable, or are likely to be unable, to meet the claims made against them, in accordance with rules made by the FCA and the Prudential Regulation Authority.

- 6.9 Article 6 of this instrument amends Part 15 of the Act to make provision relating to funeral plan providers. This includes amendments: to section 215, relating to the FSCS’s recovery rights in respect of trust or insurance arrangements backing funeral plans; to section 219, concerning the FSCS’s powers to require information from authorised firms and persons connected with such firms; and a consequential amendment to section 223 which sets out the definition of FSCS “management expenses”. Article 6 also makes provision about the exercise by the FSCS of its functions in the pre-paid funeral plans sector by inserting new sections 215A and 215B. New section 215A confers additional rulemaking powers on the FCA, so that the FCA can give certain powers to the FSCS (to arrange continuity of cover for funeral plan holders, and to meet certain costs incurred by insolvency practitioners in assisting the FSCS). New section 215B imposes a duty on certain insolvency practitioners to cooperate with the FSCS in certain circumstances.
- 6.10 Part 11 of the Act includes provision about the FCA’s information gathering powers. Article 6 of this instrument amends the powers in sections 165 and 166 of the Act so that the FCA may require information from persons who are or were at a relevant time involved in the administration of trust arrangements underpinning a provider’s funeral plan contracts, as well as from the provider itself.

7. Policy background

What is being done and why?

The 2021 Order

- 7.1 In January 2021, HM Treasury legislated (by way of the 2021 Order) to bring all¹ pre-paid funeral plan providers and intermediaries within the regulatory remit of the FCA.
- 7.2 This means that all funeral plan providers will need to be authorised by the FCA in order to enter into or carry out funeral plan contracts. Those who intermediate sales of funeral plans (e.g. those who advise on or arrange plans) will need to either apply for FCA authorisation or consider whether it would be appropriate and possible to carry on business as an appointed representative under the responsibility of an authorised principal.
- 7.3 In their March 2021 consultation paper, *CP21/4 Funeral Plans: proposed approach to regulation*, the FCA proposed requirements for funeral plan firms to protect funeral plan consumers from potential firm failures, including by introducing FSCS protection for certain funeral plan activities from July 2022.

HM Treasury’s consultation on pre-paid funeral plans and the FSCS

- 7.4 Following further consideration, it was clear that additional legislative changes were required in relation to FSCS protection. In July 2021, HM Treasury launched its own consultation on its proposals for protecting consumers in the event of an authorised firm failing. The aim of these proposed changes was to ensure that the FCA could most effectively oversee an orderly wind down of a failed regulated funeral plan provider, thus protecting consumers from the risks posed by a disorderly exit from the market and mitigating the impact on FSCS levy payers.

¹ Save for those which benefit from an exemption, such as local authorities.

- 7.5 HM Treasury received six responses to the consultation. All respondents supported or strongly supported HM Treasury’s proposals for protecting consumers in the event of a firm failing.

Amendments allowing the FSCS to operate most effectively

- 7.6 Having considered the responses to the consultation, HM Treasury decided to bring forward secondary legislation to make supplemental amendments to the Act, by which the FCA will be enabled to make rules which will allow the FSCS to operate most effectively in the event of a failure of a regulated funeral plan provider.
- 7.7 This approach will ensure that consumers are protected from the risks posed by a regulated firm exiting the market in a disorderly manner, thereby also mitigating the effect on FSCS levy payers by reducing overall FSCS costs.
- 7.8 Part 3 of this instrument makes supplemental amendments to Part 11 of the Act concerning the regulators’ powers to require information. It also makes supplemental amendments to Part 15 of the Act, which establishes the FSCS, to provide the FCA with certain rule-making powers in relation to the FSCS and make certain other provisions, including provision to ensure that insolvency practitioners involved in a funeral plan provider failure will cooperate effectively with the FSCS. The provisions relating to insolvency practitioners (which were not included in HM Treasury’s July 2021 consultation) are explained in paragraphs 7.20 to 7.26 of this Explanatory Memorandum.

Ensuring that the FCA can request relevant information

- 7.9 Section 165 of the Act gives the FCA a power to require information from firms authorised by the FCA and from certain persons connected with such firms. This instrument modifies section 165 such that persons “connected with” an authorised firm include any persons involved in any trust arrangement relating to a funeral plan contract entered into or carried out by an FCA-authorised funeral plan provider.
- 7.10 Section 166 of the Act gives the FCA a power to require information or documents to be provided by an authorised person. This instrument modifies section 166 such that the FCA can request a skilled person report from any person who is or has at any relevant time been involved in any trust arrangement relating to a funeral plan contract entered into or carried out by an FCA-authorised funeral plan provider.
- 7.11 These amendments will support the FCA’s exercise of its supervisory and enforcement functions in the pre-paid funeral plans sector, by ensuring that its information gathering powers extend to persons involved in the provision of funeral plan contracts other than just the authorised funeral plan provider, namely trustees of trusts backing funeral plan contracts.

Ensuring that the FSCS can more effectively seek recoveries of sums paid out

- 7.12 HM Treasury is of the view that, if a regulated funeral plan provider fails, then the FSCS may not be able to effectively seek recovery of the sums it pays out as monetary compensation to consumers or secure continuity of cover for funeral plan holders.
- 7.13 This is because the trust deeds and insurance policies underpinning funeral plans may not have clearly or sufficiently defined the consumer’s rights, or there may be no consumer right to those funds.

- 7.14 This instrument modifies section 215 to provide the FCA with the power to make rules allowing the FSCS to seek recoveries from a person other than the funeral plan provider (such as a trustee or insurer involved in that provider’s funeral plans) in circumstances where the funeral plan provider is unable, or likely to be unable, to satisfy claims against it. This will reduce the burden on other levy-payers by reducing overall FSCS costs.

Enabling the FSCS to obtain information from third parties

- 7.15 Section 219 of the Act provides that the FSCS may, by providing a notice in writing, require specified information from certain persons, primarily failed firms in relation to which the FSCS is exercising its functions.
- 7.16 This instrument modifies section 219 such that the FSCS will also be able to require information from third parties (e.g. trustees and insurers) who were at any relevant time involved in the provision of a failed regulated funeral plan provider’s plans, for the purposes of determining claims made by consumers against that provider.

Enabling the FSCS to secure the continuity of funeral plan contracts

- 7.17 HM Treasury is of the view that in many cases funeral plan holders would be better served through continuity of cover than they would through receiving monetary compensation and the consumer having to purchase a new funeral plan. This would mean a funeral plan contract being either transferred from one provider to another or replaced by a new contract with another provider.
- 7.18 This instrument inserts a new section 215A to provide the FCA with the power to make rules to allow the FSCS to secure the continuity of funeral plan contracts where a regulated provider fails.
- 7.19 This instrument also makes a consequential amendment to section 223 of the Act, so that costs incurred by the FSCS in securing continuity of funeral plan contracts under new section 215A will not be treated as “management expenses” of the FSCS.

Placing a duty of co-operation with the FSCS on insolvency practitioners

- 7.20 In addition to the proposals outlined in the July 2021 consultation, HM Treasury has further decided to place a statutory duty of cooperation on insolvency practitioners, requiring them to cooperate with the FSCS should a regulated funeral plan provider fail.
- 7.21 Part 3 inserts a new provision in Part 15 of the Act to require certain insolvency practitioners to provide any assistance identified by the FSCS as being necessary to enable to FSCS to administer the compensation scheme or to secure continuity of cover of funeral plan contracts of a failed funeral plan provider.
- 7.22 In February 2022, HM Treasury conducted a 4-week targeted consultation on this duty with three stakeholders in the insolvency practitioner sector.
- 7.23 No respondents disagreed with the government’s proposed objective to place a duty of cooperation on insolvency practitioners.
- 7.24 HM Treasury considers that placing a statutory duty of cooperation on insolvency practitioners will maximise the chances of the FSCS being able to provide continuity of cover, rather than monetary compensation, for the customers of a failed regulated funeral plan provider.

- 7.25 This instrument therefore places a duty upon certain insolvency practitioners by inserting a new section 215B in the Act, such that they are required to provide any assistance identified by the FSCS as being necessary for enabling the FSCS to administer the compensation scheme by paying compensation or securing continuity of cover of funeral plan contracts of a failed funeral plan provider.
- 7.26 HM Treasury recognises that co-operation with the FSCS may come at a monetary cost to insolvency practitioners. This instrument therefore also gives the FCA, by the insertion of new subsection 215A(5), the power to make rules to allow the FSCS to meet reasonable expenses which have been incurred by these insolvency practitioners. Such expenses must have been incurred exclusively for the purposes of complying with their duty to assist the FSCS in securing continuity or administering the compensation scheme under section 215B.

Amendments addressing barriers to the transfer of funeral plan contracts by those exiting the market

- 7.27 As not all current providers of funeral plans will become authorised, it is likely to be necessary for some providers to transfer their contracts to other providers. In addition, it may be necessary in the future for regulated providers to transfer contracts; for example, in cases where a provider wishes to wind down its business. It has become apparent that barriers exist which would hinder funeral plan providers seeking to transfer their plans in circumstances where express consent cannot be obtained from the affected funeral plan holders.
- 7.28 HM Treasury therefore intends to mitigate such barriers by making provision in article 2 of this instrument to allow plans to be treated, for regulatory purposes, as if they had been transferred in certain specified circumstances. Provided that certain conditions are met, this will ensure that holders of such transferred plans have recourse to the FSCS should their new provider fail.
- 7.29 HM Treasury also intends to allow some providers a temporary and limited transition period for the regulated activity of carrying out funeral plan contracts as provider. HM Treasury will therefore delay the application of FCA regulation for providers meeting specified conditions for the purpose of allowing such providers additional time to achieve FCA authorisation, wind down, or find another provider to take on their plans without risking their funeral plan contracts being frustrated. Such providers will not be permitted to sell new plans during this time.

Deemed transfer of plans for regulatory purposes

- 7.30 This instrument amends Article 59 of the RAO such that a funeral plan will be treated for regulatory purposes as if it had been transferred between funeral plan providers where certain conditions are met. These conditions are that:
- (a) a funeral plan contract exists between a provider (“Provider A”) and a customer;
 - (b) another provider (“Provider B”) intends to take responsibility for that contract by undertaking to provide a funeral for the customer (or another person named in the contract) on equivalent or similar terms;
 - (c) both providers intend that Provider B’s undertaking will replace Provider A’s;
 - (d) either one of two further conditions (set out in paragraphs 7.31 and 7.32 of this Explanatory Memorandum) is satisfied; and

(e) the two providers have notified the FCA.

The notification to the FCA must confirm that they consider all these conditions to be met, and the date (which must be on or after 29 July 2022) on which they intend to regard Provider B's undertaking as having replaced Provider A's. This provision takes effect from the day after the date specified by the providers in their notification to the FCA.

- 7.31 The first of the further conditions referred to in paragraph 7.30(d) will be satisfied where Provider A has taken "reasonable steps" to secure the customer's express consent for the transfer, but the customer has not responded or objected within a reasonable timeframe. This provision will be a permanent fixture of the new regulatory framework, because HM Treasury considers that it will be appropriate for regulated funeral plan providers to be able to rely on it in the future, when a provider wishes or needs to transfer plans but barriers to contractual transfers remain.
- 7.32 The second of the further conditions referred to in paragraph 7.30(d) will be satisfied where it appears to the providers that it would not be reasonably practicable for Provider A's contract to pass to B (whether contractually or by operation of law) nor for the alternative condition (Provider A taking "reasonable steps" to secure customer consent) to be met in the time available before Provider A needs FCA authorisation to continue carrying out that contract without breaching the General Prohibition. This provision will be a temporary fixture of the new regulatory framework because HM treasury considers that in future, where firms have sufficient time to seek consumer consent, it is right that they should do so.

Limited extension of transition period

- 7.33 This instrument inserts a new article 1A in the 2021 Order so that providers who meet specified conditions will be able to continue carrying out funeral plan contracts without breaching the General Prohibition until 31 October 2022. This amendment will therefore give certain providers a longer transition period - in limited circumstances - for the purposes of giving them more time to achieve FCA authorisation, wind down their business or find an authorised provider to take on their funeral plans. It is intended to reduce the risk that a provider that has applied for FCA authorisation by a certain date (1 March 2022), but whose application has either been refused or withdrawn before 29 July 2022 or has not yet been determined by the FCA at that date, will see its funeral plan contracts frustrated when regulation commences on 29 July 2022, in circumstances where a transfer of those contracts could otherwise still be achieved. This outcome would be detrimental to the individuals holding contracts with the provider, as it would make it more difficult for those contracts to be successfully transferred to another (authorised) provider whether that is contractually, by operation of law, or for regulatory purposes under article 59 of the RAO (as amended by this instrument).

Implementation period

- 7.34 In order to allow sufficient time for the FCA to consult on and finalise the relevant architecture for the new regulatory regime, this instrument comes into force from 16th May 2022 for the purposes of enabling the FCA to make rules and give guidance.
- 7.35 This instrument will come fully into force on 29th July 2022, at the same time as the provisions commenced under article 1(3) of the 2021 Order.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 HM Treasury does not propose to consolidate any legislation in consequence of this instrument.

10. Consultation outcome

10.1 HM Treasury issued a consultation paper entitled “Pre-paid funeral plan providers and the Financial Services Compensation Scheme” on 5th July 2021. This related to the amendments set out at paragraphs 7.6 to 7.19 of this Explanatory Memorandum. The consultation period closed on 3rd September 2021 and six responses were received. All respondents supported or strongly supported HM Treasury’s proposals for protecting consumers in the event of a firm failing.

10.2 HM Treasury has also published a response to this consultation entitled “Regulation of pre-paid funeral plans – the role of the Financial Services Compensation Scheme where a regulated funeral plan provider fails” on 21st April 2022. The consultation response can be found at the following location:
<https://www.gov.uk/government/consultations/pre-paid-funeral-plan-providers-and-the-financial-services-compensation-scheme>.

10.3 In February 2022, HM Treasury conducted a 4-week targeted consultation on the duty of co-operation for insolvency practitioners with three stakeholders in the insolvency practitioner sector. This related to the amendments set out at paragraphs 7.24 to 7.26 of this Explanatory Memorandum. No respondents disagreed with the government’s proposed objective to place a duty of cooperation on insolvency practitioners. Some respondents provided feedback on the proposed mechanisms for achieving this objective.

10.4 Insolvency is part-devolved for Scotland and devolved for Northern Ireland; HM Treasury therefore informed these Devolved Administrations of the policy proposal relating to insolvency practitioners. Neither administration raised any concerns.

11. Guidance

11.1 HM Treasury does not propose to issue guidance on the content of this instrument. The FCA and FSCS are likely to issue operational guidance.

12. Impact

12.1 There will be some impact on certain businesses, including insolvency practitioners. Namely, there will be one-off and ongoing impacts arising from the costs of insolvency practitioners needing to familiarise themselves and comply with FCA rules, which are expected to be prepared by the FCA under the Act. As any rules will be subject to further cost-benefit analysis, these impacts have not been considered further at this stage in line with Better Regulation guidance.

12.2 There is no impact on charities or voluntary bodies.

12.3 There is no significant impact on the public sector.

12.4 A full impact assessment has not been prepared for this instrument because, in line with Better Regulation guidance, HM Treasury considers that the net impact of this instrument on businesses will be less than net £5 million Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis impact assessment has been carried out, a copy of which is published alongside this Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses to the extent that funeral providers will additionally be required to comply with requests for information by the FSCS in the event of their firm failing. In addition, insolvency practitioners will be required to cooperate with the FSCS in the event of a regulated funeral plan provider failing.

13.2 HM Treasury considers that the additional costs and regulatory requirements on funeral plan providers and insolvency practitioners are likely to be negligible.

14. Monitoring and review

14.1 A statutory review clause is included in this instrument which provides that HM Treasury must keep under review and publish a report setting out the conclusions of the review. The first report must be published within five years of the date on which this instrument first comes into force. Subsequent reports must be published at intervals not exceeding five years.

15. Contact

15.1 Michael Ash at the Treasury (email: michael.ash@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Anna Harvey, Deputy Director for Personal Finances and Funds, at the Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Glen MP, Economic Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.