EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) ORDER 2025

2025 No. 1205

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Treasury and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Lucy Rigby, Economic Secretary to the Treasury, confirms that this Explanatory Memorandum meets the required standard.

2.2 Tom Duggan, Deputy Director for Securities and Markets, at the Treasury confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 David Cormack at the Treasury (Capital.Markets@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (RAO) to give the Financial Conduct Authority (FCA) a rule-making power to set the criteria that firms must use to determine whether they can trade in commodity derivatives and emissions allowances (including derivatives of those instruments) without having to be authorised as an investment firm by the FCA. Providing the FCA with such a rule-making power will allow the regulator to set the relevant criteria to determine whether firms need authorisation.

4.2 As part of this, the instrument amends the RAO to allow the FCA to introduce a test that excludes firms whose trading falls below a specific monetary value. This will simplify how firms determine whether they are exempt from the requirement to be authorised as an investment firm.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland, and Northern Ireland.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland, and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The RAO provides for an exclusion from authorisation as investment firms for firms that deal in commodity derivatives, emissions allowances, or derivatives of emissions allowances as an ancillary activity to their main business. This exclusion is known as the Ancillary Activities Exemption (AAE) and was transposed from EU law. Firms must meet the requirements of the Ancillary Activities Test (AAT), as set out in assimilated law, to be eligible for the AAE. Together with separate commencement regulations, this instrument provides for a new ancillary activities regime.

5.2 This instrument amends the AAE in the RAO to apply two options for determining whether a person carrying out the activities specified is excluded from the need for authorisation. Option 1 is whether the activity is ancillary to a person's main business at group level. Option 2 is whether the activity is below an annual threshold determined by the FCA. This instrument also provides the FCA with a power to make rules to specify the criteria in relation to the application of options 1 and 2. It also makes consequential amendments to give effect to the new AAE.

5.3 The Financial Services and Markets Act 2023 (Commencement No. 11 and Saving Provisions) Regulations 2025 revoke the existing power to make technical standards and AAT in assimilated law, which will be replaced with the new FCA rule-making power and FCA rules. These commencement provisions also provide for a staged revocation of the exemption in Article 72J of the RAO, which caters to firms who cannot perform the market share test (one of the quantitative tests set out in assimilated law). This will provide 12 months of transitional relief, supporting firms as they move from the old regime to the new one.

What was the previous policy, how is this different?

5.4 In 2021, the Treasury launched the Wholesale Markets Review (WMR) to improve the UK's regulation of secondary markets. Feedback to the WMR found that the quantitative criteria set out in the existing AAT was particularly burdensome, requiring firms to perform complex calculations. The previous government therefore committed to revoke the existing AAT and to replace it with a simpler and more proportionate test. As the expert independent regulator, the FCA is best placed to design this new, more proportionate assessment, drawing on their day-to-day experience supervising financial services firms.

5.5 Previously, the wording of the AAE prevented an annual threshold test from being added to the criteria that firms use to assess their eligibility for the AAE. This is because the AAE referred specifically to activity being ancillary to a firm's main business. Consequently, an annual threshold test – which simply looks at the levels of trading carried out by a firm, rather than what its main business is – would not have been consistent with the AAE. By amending the AAE in the RAO to allow for an annual threshold, this instrument allows for a simpler test that will exempt firms trading in commodity derivatives and emissions allowances below a specific monetary value from authorisation.

5.6 Prior to these changes, the FCA was able to make technical standards amending the AAT and could provide guidance on the test. However, since the parameters and methodology of the tests were limited by legislation, the FCA was unable to set the quantitative criteria in the form of an annual threshold. By providing the FCA with a power to make rules in relation to the AAT and an annual threshold, the FCA will be able to provide greater certainty to firms relying on the AAE. These changes also provide the FCA with the flexibility to update the criteria to respond to changes in market circumstances where appropriate.

5.7 In May 2023 – and following the WMR – the Treasury legislated to revoke the existing AAT and to replace it with a qualitative test, set out in FCA guidance (S.I. 2023/548). However, industry raised significant concerns that this approach would not provide legal certainty. To provide time to consider and address these concerns, the Treasury paused the implementation of these legislative changes in May 2024 (S.I. 2024/719). By giving the FCA a power to make legally binding rules in relation to the AAT and an annual threshold, this instrument gives firms relying on the AAE greater legal certainty when trading in commodity derivatives and emissions allowances.

6. Legislative and Legal Context

How has the law changed?

6.1 This instrument makes changes to the scope of the AAE to include an annual threshold determined by the FCA and gives the FCA a rule-making power to determine both the criteria for the AAT and an annual threshold. It also makes consequential amendments to the RAO to extend the FCA's ability to direct how, where applicable, information is provided to it by firms about their calculations in both ancillary activities and annual threshold cases and removes references to assimilated law that the FCA's rules will replace.

6.2 As part of giving the FCA rule-making powers to implement a new regime, the Treasury also commences the revocation of the current legislative regime. This includes revoking Article 72J, which was designed to remove the need for firms to perform the market share test if they were unable to access the relevant data from an official source. This will not be required under the new regime, but the Treasury will retain certain paragraphs of Article 72J until 1 January 2027 and 1 January 2028, providing a transitional period to firms.

Why was this approach taken to change the law?

6.3 This instrument gives the FCA a power to make legally binding rules in relation to the AAT and an annual threshold. This will allow the expert regulator to introduce a more streamlined and proportionate regime and provide legal certainty to firms seeking to rely on the AAE.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Treasury undertook a formal consultation on these issues as part of the WMR and the response was published on 1 March 2022.[1] Respondents were in favour of revoking the existing AAT and replacing it with a simpler and more proportionate test.

7.2 In July 2025, the Treasury published a draft instrument and welcomed technical comments on matters such as significant oversights in the legal drafting that would mean that the legislation would not achieve the desired outcomes.[2]

7.3 The Treasury received two responses to the draft instrument, both of which aimed to clarify the legal drafting to ensure it meets the policy intent. Comments on the draft instrument were carefully considered by the Treasury and addressed in the final instrument where appropriate.

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[1] https://assets.publishing.service.gov.uk/media/621debdfd3bf7f4f0743dc58/Wholesale_Markets_Review_Consultation_Response.pdf

[2] https://www.gov.uk/government/publications/ancillary-activities-exemption-draft-legislation

7.4 Alongside the Treasury's publication of the draft instrument, the FCA consulted on its draft rules in July 2025.[3] The FCA will publish a Policy Statement setting out its final rules in due course.

8. Applicable Guidance

8.1 No guidance accompanies this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because in line with Better Regulation guidance, the Treasury considers that the net impact of this instrument on business will be less than £10m Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis Impact Assessment has been prepared and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation applies to all businesses that currently or subsequently intend to rely on the AAE to trade in commodity derivatives and emissions allowances without full authorisation from the FCA, including small or micro businesses.

9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Treasury's approach to monitoring this legislation will be through ongoing engagement with the financial services industry to monitor its initial and ongoing impact.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Lucy Rigby, Economic Secretary to the Treasury made the following statement:

10.3 "It is not proportionate to include a review clause in this instrument because the estimated annual net direct cost to business is less than £10 million."

[3] https://www.fca.org.uk/publications/consultation-papers/cp25-19-ancillary-activities-test

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

12.2 "In my view the provisions of The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to the withdrawal of the United Kingdom from the European Union because this instrument amends assimilated law.