

EXPLANATORY MEMORANDUM

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (FINANCIAL PROMOTION) (AMENDMENT) ORDER 2003

Introduction

This instrument is made in exercise of the powers conferred on the Treasury by section 21(5), (9) and (10) and section 428(3) of the Financial Services and Markets Act 2000. As this Order adds activities to those that are controlled activities for the purposes of section 21 of that Act, the Order may not be made unless a draft of the Order has been laid before Parliament and approved by resolution of each House.

Background

The Financial Services and Markets Act 2000 (“FSMA”) financial promotion regime restricts the communication of “an invitation or inducement to engage in investment activity”. Entering into an agreement, the making or performance of which (by either party) constitutes a “controlled activity”, amounts to “engaging in investment activity” for these purposes. The “controlled activities” to which the financial promotions regime applies are specified in the Financial Promotion Order¹.

Such communications must be made by, or approved by, a person who is authorised under FSMA. In addition, the Treasury may specify (in the Financial Promotion Order) circumstances in which the financial promotion restriction does not apply.

Promotions by authorised persons are not subject to the financial promotion restriction, but instead are governed by Financial Service Authority (FSA) rules. However the FSA cannot impose restrictions on authorised persons that are greater than those imposed on unauthorised persons.

The changes made by this Order are made in parallel with amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001² by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.1) Order 2003 which bring arranging regulated mortgage contracts and advising on regulated mortgage contracts within the scope of FSA regulation.

Policy objectives

This Order, together with other orders laid concurrently, brings mortgage mediation within the scope of FSA regulation.

Timetable for implementation

¹ The Financial Services and Markets Act 2000 (“Financial Promotion”) Order 2001 (S.I. 2001/1335)

² The Financial Services and Markets Act 2000 (“Regulated Activities”) Order 2001 (S.I. 2001/544)

Article 1 provides that the new regulatory regime will come into force for all the regulated activities in relation to mortgages on 31 October 2004.

New controlled activities

Article 5 of this Order inserts new provisions into the Financial Promotion Order specifying the arranging of qualifying credit and advising on qualifying credit as controlled activities. This means that promotions relating to the activities of arranging or advising on the provision of regulated mortgage contracts will fall within the financial promotion regime.

Exemptions

The Financial Promotion Order provides for various exemptions from the financial promotion regime in certain circumstances.

Article 3 of the Financial Promotion Mortgages Amendment Order adds a new exemption to the financial promotion restriction. This article exempts real time communications (e.g. a personal visit or telephone conversation) which relate to providing, arranging, or advising on regulated mortgages and which are made for the purposes of introducing the recipient to an authorised person, an appointed representative, or an overseas person who carries on the controlled activity to which the communication relates.

The exemption will only apply if the person making the communication complies with specified conditions. The first condition is that the maker of the communication does not handle client money, and the second is that he discloses specified information to the recipient.

Article 4 expands certain existing exemptions in the Financial Promotion Order so that they cover communications relating to the new controlled activities of arranging regulated mortgage contracts and advising on regulated mortgage contracts. The exemptions expanded include those relating to solicited real time communications made by overseas communicators, and to communications on regulated mortgage contracts directed at corporate bodies.

Regulatory Impact

The Chief Secretary to the Treasury is satisfied that the benefits of this Order justify the costs. A Regulatory Impact Assessment for mortgage regulation accompanies this Order and the Regulated Activities Mortgages Amendment Order

ECHR compatibility

The Chief Secretary to the Treasury considers that, in his view, the provisions of this Order are compatible with the Convention rights.

Applicability to Wales and Scotland

This Order applies to the whole of the UK.

Declaration

This Memorandum has been approved by the Chief Secretary to the Treasury.

Her Majesty's Treasury

4 June 2003