

## **EXPLANATORY MEMORANDUM**

### **THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) (NO. 2) ORDER 2003**

#### **Introduction**

This instrument is made in exercise of the powers conferred on the Treasury by sections 22(1) and (5), 192(a), 426, 427 and 428(3) of, and paragraph 25 of Schedule 2 to the Financial Services and Markets Act 2000 (“FSMA”). As one of the effects of the Order is that an activity which is not a regulated activity for the purposes of FSMA will become a regulated activity, this Order must be laid before Parliament after being made and ceases to have effect at the end of the relevant period unless it is approved by a resolution of each House of Parliament.

#### **Background**

This Order gives the Financial Services Authority (FSA) responsibility for regulating various activities relating to the sale and administration of general insurance products, whether carried on by intermediaries or insurers. This together with other instruments<sup>1</sup> will implement in part the Insurance Mediation Directive (IMD)<sup>2</sup> in the United Kingdom. It also makes various amendments to FSMA and to legislation made under FSMA which relate to insurance mediation.

#### **Timetable for implementation**

Article 1 provides that the new regulatory regime will come into force in relation to long-term care insurance on 31 October 2004 and in relation to other contracts of insurance on 14 January 2005.

#### **Part 2 – regulated activities in relation to contracts of insurance**

The activities in relation to which individuals and firms need FSA authorisation to carry on, are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the RAO”)<sup>3</sup>. Mediation of contracts of life insurance which have an investment element to them is already included in the RAO<sup>4</sup>. The amendments in the Order proceed by extending certain existing activities of the RAO

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<sup>1</sup> The Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2003 (“ECA Regulations”)

<sup>2</sup> European Parliament and Council Directive 2002/92/EC on insurance mediation (“the Insurance Mediation Directive”)

<sup>3</sup> See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544 – the “RAO”)

<sup>4</sup> The mediation of “contractually based investments” is already regulated. This term is defined in article 3 of the RAO to include “rights under a qualifying contract of insurance”. In broad terms, this equates to a contract of life (or long-term insurance) which has an investment element.

to apply them to all contracts of insurance. Article 4 applies the activity of “dealing in investments as agent”, article 5 applies the activity of “arranging deals in investments” and article 9 applies the activity of “advising on investments”.

Article 7 creates a new activity of “assisting in the administration and performance” of a contract of insurance. This is an activity which the IMD requires the UK to regulate.

## **Exclusions**

Part II of the Order adapts the exclusions that already exist in the RAO to ensure that they are compatible with the IMD. In addition the Order creates new, free standing exclusions from the insurance mediation activities where permitted by the Directive. For example the Order excludes from regulation travel insurance sold as part of a package with the holiday, implementing the equivalent exclusion in the IMD. And Article 11 excludes from regulation the provision of information in the course of carrying on a profession which does not otherwise consist of regulated activities (article 72C of the RAO).

### Large risk contracts where the risk is situated outside the EEA

The IMD applies only to contracts of insurance where the risk is situated in the EEA. However the Government does not intend to exclude non-commercial risks outside the EEA, but does intend to exclude mediation of contracts for large risks<sup>5</sup> outside the EEA from regulation.

## **Part 3 – insurance mediation activities carried on by unauthorised persons**

Part 3 of the Order relates to the carrying on of insurance mediation activities by persons who are not authorised under FSMA. Under FSMA **appointed representatives** of FSA authorised persons can carry on regulated activities without being authorised provided the authorised person has accepted contractual responsibility for the conduct of those regulated activities. Members of **Designated Professional Bodies (DPBs)** such as accountants and solicitors<sup>6</sup> can carry on certain regulated activities where those activities are incidental to their main profession, without being authorised by the FSA. Such persons must comply with the rules of their DPB.

Article 13 amends the RAO so as to require the FSA to include a record of appointed representatives and members of DPBs who carry on insurance mediation activities. This reflects the requirement imposed by the IMD that each member state maintain a register of all insurance intermediaries for whom it is the “home Member State”.

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<sup>5</sup> “large risks” are defined as having the same meaning as Article 5(d) of the First Non Life Insurance Directive 73/239/EEC

<sup>6</sup> See section 327 FSMA. The DPBs are currently the Law Society, the Law Society of Scotland, the Law Society of Northern Ireland, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants in Scotland, the Institute of Chartered Accountants in Ireland, the Association of Chartered Certified Accountants and the Institute of Actuaries.

#### **Part 4 – amendments to other secondary legislation made under FSMA.**

The Order provides for amendments to the following statutory instruments made under FSMA.

The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001<sup>7</sup> are amended to ensure that appointed representatives can carry on insurance mediation activities provided that the appointed representative is included in the FSA's record of insurance intermediaries.

The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001<sup>8</sup> is amended to ensure that members of the DPBs can carry on certain insurance mediation activities, provided that the member of the DPB is included in the FSA's record of insurance intermediaries.

The Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001<sup>9</sup>. FSMA provides that the making of misleading statements and practices which relate to activities specified by the Misleading Statements and Practices Order is a criminal offence. This Order is amended to extend the misleading statements and practices regime to any contract of insurance.

The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by way of Business) Order 2001<sup>10</sup>. FSMA provides that an activity is only regulated for the purposes of FSMA if it is carried on by way of business. The By Way of Business Order specifies the circumstances in which a person is, or is not to be, taken as carrying on an activity by way of business. Article 18 of this Order provides that, a person is not to be taken as carrying on an insurance mediation activity unless he takes up or pursues that activity for remuneration.

The Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001<sup>11</sup> are amended by article 15 so as to provide that EEA firms who exercise their right to establish a branch, or to provide services, in the UK pursuant to the Directive are not automatically subject to the UK Financial Services Compensation Scheme (FSCS).

#### **Part V – Miscellaneous provisions**

Part V makes a series of technical amendments to FSMA in relation to insurance mediation activities.

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<sup>7</sup> (S.I. 2001/1227)

<sup>8</sup> (S.I. 2001/1335)

<sup>9</sup> (S.I. 2001/3645)

<sup>10</sup> (S.I. 2001/1177)

<sup>11</sup> (S.I. 2001/1783)

## **Part 6 – Transitional Provisions**

Part 6 makes transitional provisions in relation to the applications for authorisation/approval of individuals in relation to insurance mediation activities

### **Regulatory Impact**

This and the other Orders to implement the IMD extend the scope of regulation as they specify the activities of insurance mediation as regulated activities under FSMA. This meets the Government's obligation under European Community law to implement the Directive into UK law. The Chief Secretary to the Treasury is satisfied that the benefits of this Order justify the costs. A Regulatory Impact Assessment accompanies this 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