

EXPLANATORY MEMORANDUM

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) (No. 1) ORDER 2003

Introduction

This instrument is made in exercise of the powers conferred on the Treasury by sections 22(1) and (5), 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 the activities of arranging regulated mortgage contracts and advising on regulated mortgage contracts. It also makes various amendments to legislation made under FSMA which relate to mortgage mediation.

Timetable for implementation

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.

Part 2 – Amendments to the Regulated Activities Order

The range of activities for 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”). Articles 4 and 13 of this Order amend the RAO so as to specify “arranging regulated mortgage contracts” and “advising on regulated mortgage contracts”. “Regulated mortgage contract” is defined by article 61 of the RAO.

Exclusions from the activity of arranging a regulated mortgage contract

Articles 5-12 provide for exclusions from the activity of arranging on regulated mortgage contracts. In some cases, exclusions from other activities which are already in the RAO have been extended to these activities. In some cases, new exclusions have been created, e.g. article 11 of this Order provides for a new exclusion from the activity of arranging regulated mortgage contracts in relation to introductions to authorised persons.

Exclusions from the activity of advising on a regulated mortgage contract

Article 14 of the RAO mortgages amendment order applies the exclusion in the RAO relating to advice given in the media, to mortgage advice.

Article 15 creates a new exclusion applying where regulated mortgage contracts have been securitised. It ensures that an unauthorised special purpose vehicle will not be treated as carrying on the regulated activity by virtue of anything done by an authorised person who administers those contracts pursuant to an arrangement with the special purpose vehicle.

Exclusion from various activities

Article 18 extends the exclusion in the RAO for trustees, nominees and personal representatives to the activities of arranging and advising on regulated mortgage contracts, and to the activity of entering into a regulated mortgage contract as lender. Article 19 similarly extends the exclusion for activities carried on in the course of a profession or non-investment business to mortgage arranging and mortgage advice.

The overseas persons exclusion

Article 20 applies the overseas persons exclusion to mortgage arranging and to the activities of entering into a regulated mortgage contract as lender and administering a regulated mortgage contract. This exclusion will apply where the activity is carried out by an overseas person in relation to a contract where the prospective borrower is not resident in the UK at the time the contract is entered into.

Part 3 – Amendments to the Consumer Credit Act

Articles 21 and 22 make consequential amendments to the Consumer Credit Act 1974. These amendments exclude mortgage broking and mortgage advice from the scope of ancillary credit business as defined by the Act. They also disapply section 155 of that Act (right to recover brokerage fees) in relation to introductions which relate to regulated mortgage contracts.

Part 4 – Amendments to other instruments made under FSMA

Appointed representatives of authorised persons can carry on regulated activities without being authorised provided the authorised person has accepted responsibility for the conduct of these regulated activities. Article 23 amends the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001¹ to apply the

¹ The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (S.I. 2001/1227)

appointed representatives regime to the activities of mortgage arranging and mortgage advising.

Members of **Designated Professional Bodies** (DPBs)², such as accountants and solicitors 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. This is known as “the DPB regime”.

Article 24 amends the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001 to specify that mortgage advice consisting of a recommendation to enter into a regulated mortgage contract with a particular person be excluded from the DPB regime.

FSMA provides that an activity is only regulated for the purposes of FSMA if it is carried on **by way of business**. The Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001³ specifies the circumstances in which a person is, or is not to be, taken as carrying on an activity by way of business. Article 25 amends this Order to provide that persons are to be regarded as carrying on regulated activities of mortgage arranging or mortgage advice only if they carry on the business of engaging in that activity.

Part 5 – Transitional Provisions

Part 5 of the Order makes certain transitional provisions in relation to applications for authorisation or approval of individuals which relate to mortgage arranging and mortgage advice.

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.

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

² 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.

³ The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) 2001 (S.I. 2001/1177)

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