

*Order made by the Treasury, laid before Parliament under paragraph 26(2) to (5) of Schedule 2 to the Financial Services and Markets Act 2000, for approval by resolution of each House of Parliament within 28 days beginning with the day on which the Order was made (no account being taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days).*

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DRAFT STATUTORY INSTRUMENTS

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**200[3] No.**

**FINANCIAL SERVICES AND MARKETS**

**The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.\*) Order 200[3]**

*Made* - - - - 200[3]

*Laid before Parliament* 200[3]

*Coming into force in accordance with article 1*

Whereas, in the opinion of the Treasury, one of the effects of the following Order is that activities which are not regulated activities (within the meaning of the Financial Services and Markets Act 2000(a)) will become regulated activities (within the meaning of that Act);

The Treasury, in exercise of the powers conferred on them by sections 22(1) and (5) and 428(3) of, and paragraph 25 of Schedule 2 to, that Act, hereby make the following Order:

**Citation and commencement**

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.\*) Order 200[3], and comes into force on such a day as the Treasury may specify.

(2) The day specified under paragraph (1) shall be caused to be notified in the London, Edinburgh and Belfast Gazettes published not later than one week before that day.

**Interpretation**

2. In this Order, “the Regulated Activities Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(b).

**Meaning of “overseas person”**

3. In article 3 of the Regulated Activities Order (interpretation), in paragraph (a) of the definition of “overseas person” –

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(a) 2000 c. 8.

(b) S.I. 2001/544, amended by S.I. 2001/3544, S.I. 2002/682, S.I. 2002/1310 and S.I. 2002/1776. [NB – insert reference to any further amending instruments made between August 2002 and date when this Order is made.]

- (a) after “25,” insert “25A,”; and
- (b) for “and 53” substitute “, 53, 53A and 61”.

#### **Arranging regulated mortgage contracts**

4. After article 25 of the Regulated Activities Order insert –

##### **“Arranging regulated mortgage contracts**

**25A.** – (1) Making arrangements –

- (a) for another person to enter into a regulated mortgage contract as borrower; or
- (b) for another person to vary the terms of a regulated mortgage contract entered into by him as borrower after the coming into force of article 61, in such a way as to vary his obligations under that contract,

is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements entering into a regulated mortgage contract as borrower is also a specified kind of activity.

(3) In this article “borrower” has the meaning given by article 61(3)(a)(i).”.

#### **Exclusion of arrangements not causing a deal**

5. In article 26 of the Regulated Activities Order (arrangements not causing a deal), after “article 25(1)” insert “and article 25A(1)”.

#### **Exclusion where a person provides means of communication between parties**

6. In article 27 of the Regulated Activities Order (enabling parties to communicate), after “article 25(2)” insert “and article 25A(2)”.

#### **Exclusion where the arranger is a party to the contract**

7. After article 28 of the Regulated Activities Order insert –

##### **“Arranging contracts to which the arranger is a party**

**28A.** – (1) There are excluded from article 25A(1) any arrangements –

- (a) for a contract into which the person making the arrangements enters or is to enter; or
- (b) for a variation of a contract to which that person is (or is to become) a party.

(2) There are excluded from article 25A(2) any arrangements which a person makes with a view to contracts into which he enters or is to enter.”.

#### **Exclusion of arrangements where transaction is with or through an authorised person**

8. In article 29 of the Regulated Activities Order (arranging deals with or through authorised persons), in paragraph (1) –

- (a) after “article 25(1) and (2)” insert “and article 25A(1) and (2)”;
- and
- (b) in sub-paragraph (b), after “in his capacity as an investor” insert “or (as the case may be) a borrower under a regulated mortgage contract”.

#### **Exclusion of arrangements made in the course of administration by authorised person**

9. After article 29 of the Regulated Activities Order insert –

##### **“Arrangements made in the course of administration by authorised person**

**29A.** A person who is not an authorised person (‘A’) does not carry on an activity of the kind specified by article 25A(1)(b) as a result of –

- (a) anything done by an authorised person ('B') in relation to a regulated mortgage contract which B is administering pursuant to an arrangement of the kind mentioned in article 62(a); or
- (b) anything A does in connection with the administration of a regulated mortgage contract in circumstances falling within article 62(b)."

**Exclusion of arrangements which consist of introduction to an authorised person etc. for independent advice**

10. In article 33 of the Regulated Activities Order (introducing) –

- (a) after "article 25(2)" insert "and article 25A(2)";
- (b) in paragraph (b)(iii) –
  - (i) after "25," insert "25A," and
  - (ii) for "52 and 53" substitute "52, 53 and 53A".

**Exclusion of arrangements consisting of an introduction to an authorised person etc.**

11. After article 33 of the Regulated Activities Order insert –

**"Introducing to authorised persons etc.**

**33A – (1)** There are excluded from article 25A(2) arrangements where –

- (a) they are arrangements under which a client is introduced to a person ('N') who is –
  - (i) an authorised person who has permission to carry on a regulated activity of the kind specified by any of articles 25A (arranging regulated mortgage contracts), 53A (advising on regulated mortgage contracts), and 61(1) (entering into a regulated mortgage contract as lender),
  - (ii) an appointed representative who may carry on a regulated activity of the kind specified by either of articles 25A and 53A without contravening the general prohibition, or
  - (iii) an overseas person who carries on activities specified by any of articles 25A, 53A and 61(1); and
- (b) the conditions mentioned in paragraph (2) are satisfied.

(2) Those conditions are –

- (a) that the person making the introduction ('P') does not receive any money, other than money payable to P on his own account, paid by the client for or in connection with any transaction which the client enters into with or through N as a result of the introduction; and
- (b) that before making the introduction P discloses to the client such of the information mentioned in paragraph (3) as applies to P.

(3) That information is –

- (a) that P is a member of the same group as N;
- (b) details of any payment which P will receive from N, by way of fee or commission, for introducing the client to N;
- (c) an indication of any other reward or advantage received or to be received by P that arises out of his introducing clients to N.

(4) In this article, "client" means a borrower, within the meaning given by article 61(3)(a)(i), or a person who is or may be contemplating entering into a regulated mortgage contract as such a borrower (as the case may be)."

**Other exclusions**

12. In article 36 (other exclusions) –

- (a) the current text is numbered paragraph (1);
- (b) after paragraph (1) insert –
  - “(2) Article 25A is also subject to the exclusions in articles 66 (trustees etc.), 67 (profession or non-investment business) and 72 (overseas persons).”.

**Advising on regulated mortgage contracts**

13. After article 53 of the Regulated Activities Order insert –

**“Advising on regulated mortgage contracts**

**53A.** – (1) Advising a person is a specified kind of activity if the advice –

- (a) is given to the person in his capacity as a borrower or potential borrower; and
- (b) is advice on the merits of his doing any of the following -
  - (i) entering into a particular regulated mortgage contract, or
  - (ii) varying the terms of a regulated mortgage contract entered into by him after the coming into force of article 61 in such a way as to vary his obligations under that contract.

(2) In this article, “borrower” has the meaning given by article 61(3)(a)(i).”.

**Exclusion of advice given in print, electronic or broadcast media**

14.—(1) Article 54 of the Regulated Activities Order (advice given in newspapers etc.) is amended as follows.

(2) In paragraph (1), after “from article 53” insert “and article 53A”.

(3) In sub-paragraph (a) of that paragraph, after “in article 53” insert “or (as the case may be) article 53A”.

(4) For sub-paragraph (b) of that paragraph substitute -

“(b) that of leading or enabling persons –

- (i) to buy, sell, subscribe for or underwrite securities or contractually based investments, or (as the case may be)
- (ii) to enter as borrower into regulated mortgage contracts, or vary the terms of regulated mortgage contracts entered into by them as borrower.”.

(5) In paragraph (2), after “from article 53” insert “and article 53A”.

**Exclusion of advice given in the course of administration by authorised person**

15. After article 54 of the Regulated Activities Order insert –

**“Advice given in the course of administration by authorised person**

**54A.** A person who is not an authorised person (A) does not carry on an activity of the kind specified by article 53A by reason of –

- (a) anything done by an authorised person (B) in relation to a regulated mortgage contract which B is administering pursuant to arrangements of the kind mentioned in article 62(a); or
- (b) anything A does in connection with the administration of a regulated mortgage contract in circumstances falling within article 62(b).”.

**Other exclusions**

16. In article 55 of the Regulated Activities Order (other exclusions) –

- (a) the current text is numbered paragraph (1); and
- (b) after paragraph (1) insert –

“(2) Article 53A is also subject to the exclusions in articles 66 (trustees etc.) and 67 (profession or non-investment business).”.

### **Exclusion of trustees, nominees and personal representatives**

17. In article 66 of the Regulated Activities Order (trustees, nominees and personal representatives) –

- (a) in paragraph (2), for “article 25(1) and (2)” substitute “articles 25(1) and (2) and 25A(1) and (2)”;
- (b) in paragraph (6), for “article 53” substitute “articles 53 and 53A”;
- (c) after paragraph (6) insert –  
“(6A) – Subject to paragraph (7), a person acting as trustee or personal representative does not carry on an activity of the kind specified by article 61(1) or (2) where the borrower under the regulated mortgage contract in question is a beneficiary under the trust, will or intestacy.”.
- (d) In paragraph (7), for “(4) and (6)” substitute “(4), (6) and (6A)”.

### **Exclusion of activities carried on in the course of a profession or non-investment business.**

18. In paragraph (1) of article 67 of the Regulated Activities Order (activities carried on in the course of a profession or non-investment business) for “40 and 53” substitute “25A, 40, 53 and 53A”.

### **Overseas persons**

19. In article 72 of the Regulated Activities Order (overseas persons), after paragraph (5) insert –

“(5A) An overseas person does not carry on an activity of the kind specified by article 25A(1)(a) where each person who may be contemplating entering into a regulated mortgage contract as borrower is a non-resident individual.

(5B) There are excluded from article 25A(1)(b) arrangements made by an overseas person to vary the terms of a qualifying contract.

(5C) There are excluded from article 25A(2) arrangements made by an overseas person which are made solely with a view to non-resident individuals who participate in those arrangements entering as borrower into regulated mortgage contracts.

(5D) An overseas person does not carry on an activity of the kind specified by article 61(1) by entering into a qualifying contract.

(5E) An overseas person does not carry on an activity of the kind specified by article 61(2) where he administers a qualifying contract.

(5F) In paragraphs (5A) to (5E) –

(a) “non-resident individual” means an individual who is not normally resident in the United Kingdom; and

(b) “qualifying contract” means a regulated mortgage contract within the meaning of article 61(3)(a), the borrower or, as the case may be, each borrower under which is (or was) a non-resident individual at the time when he enters (or entered) into the contract.”.

**Exceptions from section 145**

**20.**—(1) In section 145 of the Consumer Credit Act 1974 (types of ancillary credit business)(a)

- (a) in subsection (2), after “section 146(5)” insert “and (5A)”;
- (b) in subsection (5), for “section 146(6)” substitute “section 146(5B) and (6)”;
- (c) in subsection (6), for “section 146(6)” substitute “section 146(5C) and (6)”.

(2) In section 146 of that Act (exceptions from section 145), after subsection (5) insert –

“(5A) It is not credit-brokerage for a person to effect the introduction of an individual desiring to obtain credit if the introduction is made –

- (a) to an authorised person, within the meaning of the 2000 Act, who has permission under that Act to enter as lender into relevant agreements; or
- (b) to a qualifying broker,

with a view to that individual obtaining credit under a relevant agreement.

(5B) It is not debt-adjusting for a person to carry on an activity mentioned in paragraph (a), (b) or (c) of section 145(5) if –

- (a) the debt in question is due under a relevant agreement; and
- (b) that activity is a regulated activity for the purposes of the 2000 Act.

(5C) It is not debt-counselling for a person to give advice to debtors about the liquidation of debts if –

- (a) the debt in question is due under a relevant agreement; and
- (b) giving that advice is a regulated activity for the purposes of the 2000 Act.

(5D) In this section –

“the 2000 Act” means the Financial Services and Markets Act 2000;

“relevant agreement” means a consumer credit agreement which is secured by a land mortgage, where entering into that agreement as lender is a regulated activity for the purposes of the 2000 Act;

“qualifying broker” means a person who may effect introductions of the kind mentioned in subsection (5A) without contravening the general prohibition, within the meaning of section 19 of the 2000 Act,

and subsections (5A) to (5C) and the definition of “qualifying broker” must be read with –

- (a) section 22 of the Financial Services and Markets Act 2000 (regulated activities: power to specify classes of activity and categories of investment);
- (b) any order for the time being in force under that section; and
- (c) Schedule 2 to that Act.”.

**Disapplication of section 155 in relation to authorised persons and appointed representatives**

**21.**—(1) Section 155 of the Consumer Credit Act 1974 (right to recover brokerage fees) is amended follows.

(2) At the start of subsection (1), insert “Subject to subsection (2A),”.

(3) After subsection (2) insert –

“(2A) But subsection (1) does not apply where –

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(a) 1974 c. 39.

- (a) the fee or commission relates to the effecting of an introduction of a kind mentioned in section 146(5A); and
- (b) the person charging that fee or commission is an authorised person or an appointed representative, within the meaning of the Financial Services and Markets Act 2000.”.

*Amendments to other instruments made under the Financial Services and Markets Act 2000*

**Amendment to the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001**

**22.** In the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001(a), after article 3 insert –

**“Arranging and advising on regulated mortgage contracts**

(3A) A person is not to be regarded as carrying on by way of business an activity of the kind specified by –

- (a) article 25A of the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 (arranging regulated mortgage contracts); or
- (b) article 53A of that Order (advising on regulated mortgage contracts),

unless he carries on the business of engaging in that activity.”.

**Amendment to the Financial Services and Markets Act 2000 (Exemption) Order 2001**

**23.** The Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001(b) is amended as follows.

- (a) In paragraph 47 (local authorities), for “article 61” substitute “article 25A, 53A or 61”.
- (b) In paragraph 48 (social housing)(c), for “article 61” substitute “article 25A, 53A or 61”.

**Amendment to the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001**

**24.—(1)** The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (d) are amended as follows.

(2) In regulation 1 (citation, commencement and interpretation), in paragraph (2), after the definition of “the Regulated Activities Order” insert –

““regulated mortgage contract”, and “borrower” in relation to such a contract, have the meaning given in article 61(3) of the Regulated Activities Order;”.

(3) In regulation 2 (descriptions of business for which appointed representatives are exempt) –

(a) after paragraph (a) insert –

“(aa) an activity of the kind specified by article 25A of the Regulated Activities Order (arranging regulated mortgage contracts);”;

(b) at the end of paragraph (c) omit “or”;

(c) after paragraph (c) insert –

“(cc) an activity of the kind specified by article 53A of that Order (advising on regulated mortgage contracts); or”; and

(d) in paragraph (d), for “paragraph (a), (b) or (c)” substitute “any of paragraphs (a) to (cc)”.

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(a) S.I. 2001/1177

(b) S.I. 2001/1201.

(c) Amendments not relevant to this article were made to paragraph 48 by S.I. 2001/3623.

(d) S.I. 2001/1217, as amended by S.I. 2001/2508.

(4) In regulation 3 (requirements applying to contracts between authorised persons and appointed representatives), after paragraph (2) insert –

“(3) A representative is also to be treated as representing other counterparties for the purposes of paragraph (1) where he –

(a) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by article 25A of that Order) -

(i) for persons to enter (or with a view to persons entering) as borrowers into regulated mortgage contracts with other counterparties, or

(ii) for a person to vary a regulated mortgage contract entered into by a person as borrower after the coming into force of article 61 of that Order with other counterparties; or

(b) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by article 53A of that Order) on the merits of –

(i) persons entering as borrowers into regulated mortgage contracts with other counterparties, or

(ii) persons varying regulated mortgage contracts entered into by them as borrower after the coming into force of article 61 of that Order with other counterparties.”.

#### **Amendment to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001**

**25.**—(1) The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001(a) is amended as follows.

(2) The existing article 6A(b) is renumbered as article 6B.

(3) After article 6 insert –

“**6A** – (1) An activity of the kind specified by article 53A of the Regulated Activities Order (advising on regulated mortgage contracts) where the advice in question falls within paragraph (2).

(2) Subject to paragraph (3), advice falls within this paragraph in so far as –

(a) it consists of a recommendation, given to an individual, to enter as borrower into a regulated mortgage contract with a particular person; and

(b) in entering into a regulated mortgage contract that person would be carrying on an activity of the kind specified by article 61(1) of the Regulated Activities Order (regulated mortgage contracts).

(3) Advice does not fall within paragraph (2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by article 53A of the Regulated Activities Order or a person who is an exempt person in relation to an activity of that kind.”.

Date

Two of the Lords Commissioners of  
Her Majesty’s Treasury

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(a) S.I. 2001/1227, as amended by S.I. 2001/3650.

(b) Article 6A was inserted by S.I. 2001/3650, article 3.

## EXPLANATORY NOTE

*(This Note does not form part of the Order)*

This Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the principal Order') so as to specify the activities of arranging regulated mortgage contracts and advising on regulated mortgage contracts as regulated activities for the purposes of the Financial Services and Markets Act 2000 ('FSMA'). It also amends instruments made under FSMA in order to apply the regulatory regime established under that Act to persons who carry on these newly specified regulated activities, and makes necessary consequential amendments to the Consumer Credit Act 1974.

Article 1 provides that the Order will come into force on a day specified by the Treasury, and that day must be notified at least one week in advance in the London, Edinburgh and Belfast Gazettes.

Article 3 makes a consequential amendment to the definition of "overseas person" in the principal Order which reflects the new provision inserted by article 19.

Article 4 inserts a new article into the principal Order which specifies the new regulated activity of arranging regulated mortgage contracts ('mortgage arranging'). The activity consists of arranging for a borrower to enter into a regulated mortgage contract, arranging for a borrower to vary the terms of a regulated mortgage contract, and making arrangements with a view to a person who participates in those arrangements entering into a regulated mortgage contract as borrower.

Articles 5, 6, 8 and 10 amend, respectively, articles 26, 27, 29 and 33 of the principal Order, so as to apply the exclusions specified in those articles to the new regulated activity of arranging regulated mortgage contracts. Those exclusions relate to arrangements not causing a deal, the provision of the means of communication between the parties to a transaction, arrangements where the transaction is with or through an authorised person, and arrangements which consist of an introduction to an authorised person, appointed representative or other person lawfully carrying regulated activities, with a view to the provision of independent advice.

Articles 7, 9 and 11 insert new articles into the principal Order specifying exclusions applicable to mortgage arranging. The effect of the first is that a person does not carry on that regulated activity if he is a party to any arrangements he makes. The second article inserted applies where regulated mortgage contracts have been securitised and ensure that an unauthorised special purpose vehicle will not be treated as carrying on the regulated activity by virtue of any thing done by an authorised person who administers those contracts pursuant to an arrangement with the special purpose vehicle. The third excludes from the scope of mortgage arranging introductions made to an authorised person, an appointed representative or an overseas persons, provided that the person making the introduction does not handle client money and discloses specified information to the client.

Article 13 inserts a new article into the principal Order which specifies the new regulated activity of advising on regulated mortgage contracts ('mortgage advice'). The activity consists of giving advice to a borrower or potential borrower under a regulated mortgage contract on the merits of that person entering into a particular regulated mortgage contract or varying the terms of such a contract in a way which varies his obligations as borrower.

Article 14 amends article 54 of the principal Order so as to apply the exclusion relating to advice given in the media to mortgage advice.

Article 15 inserts a new article into the principal Order. That new article specifies an exclusion from the scope of mortgage advice which applies 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 any thing done by an authorised person who administers those contracts pursuant to an arrangement with the special purpose vehicle.

Articles 17 and 18 amend articles 66 and 67 of the principal Order, so as to extend the scope of the exclusions relating to trustees, nominees and personal representatives and to activities carried on in the course of a profession or non-investment business to mortgage arranging and mortgage advice.

Article 19 inserts new provisions into article 72 of the principal Order. Those amendments apply the exclusion for overseas person to mortgage arranging and to the activities of entering into a regulated mortgage contract as lender and administering a regulated mortgage contract, in cases where the activity is carried out by an overseas person in relation to a contract the borrower or prospective borrower under which is not, or was not, resident in the United Kingdom at the time when the contract is, or was, entered into.

Articles 20 and 21 make consequential amendments to the Consumer Credit Act 1974. The effect of those amendments is to exclude mortgage broking and mortgage advice from the scope of ancillary credit business within the meaning of that Act, and to disapply section 155 of that Act in relation to fees charged by brokers in respect of introductions which constitute mortgage broking.

Article 22 amends the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, 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.

Article 23 amends the Financial Services and Markets Act 2000 (Exemption) Order 2001, so that local authorities and specified providers of social housing are exempt from the general prohibition under section 19 of FSMA in respect of mortgage arranging and mortgage advice.

Article 24 inserts new provisions into the Financial Services and Markets Act 2000 (Appointed Representatives) Order 2001, so as to prescribe mortgage arranging and mortgage advice as descriptions of business which appointed representatives of authorised persons may carry on without themselves requiring authorisation under FSMA.

Article 25 inserts a new provision into the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001. That provision specifies mortgage advice which consists of a recommendation to enter into a regulated mortgage contract with a particular person as a regulated activity which does not fall within the exemption under Part XX of FSMA.