

2006 No. 2975

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Markets in
Financial Instruments) (Modification of Powers) Regulations
2006**

<i>Made</i> - - - -	<i>15th November 2006</i>
<i>Laid before Parliament</i>	<i>15th November 2006</i>
<i>Coming into force</i> - -	<i>6th December 2006</i>

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to investment firms and to the provision of investment services and to the operation of regulated markets and clearing or settlement systems and in relation to credit institutions;

The Treasury make these Regulations in exercise of the powers conferred on them by section 2(2) of that Act:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Modification of Powers) Regulations 2006, and come into force on 6th December 2006.

(2) In these Regulations, “the Act” means the Financial Services and Markets Act 2000(c).

Amendment of the Financial Services and Markets Act 2000

2. The Act is amended as follows.

Amendment of section 138 of the Act

3. In section 138 of the Act (general rule-making power)—

(a) after subsection (1) insert—

“(1A) The Authority may also make such rules applying to authorised persons who are investment firms or credit institutions, with respect to the provision by them of a relevant

(a) S.I. 1993/2661 and 2001/3495.

(b) 1972 c.68; by virtue of the amendment of section 1(2) made by section 1 of the European Economic Area Act 1993 (c. 51) regulations may be made under section 2(2) to implement obligations of the United Kingdom created by or arising under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting that Agreement signed at Brussels on 17th March 1993 (Cm 2183). For the decision of the EEA Joint Committee in relation to Directive 2004/39/EC, see Decision No 65/2005 of 29th April 2005 (OJ No L 239, 15.9.2005, p.50).

(c) 2000 c.8.

ancillary service, as appear to the Authority to be necessary or expedient for the purpose of protecting the interests of consumers.

(1B) “Credit institution” means—

- (a) a credit institution authorised under the banking consolidation directive, or
- (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA State.

(1C) “Relevant ancillary service” means any service of a kind mentioned in Section B of Annex I to the markets in financial instruments directive the provision of which does not involve the carrying on of a regulated activity.”;

(b) in subsection (7)(a)—

- (i) at the end of sub-paragraph (i) omit “or”, and
- (ii) after sub-paragraph (i) insert—

“(ia) authorised persons who are investment firms or credit institutions in providing a relevant ancillary service; or”.

Amendment of section 145 of the Act

4. In section 145 of the Act (financial promotion rules), after subsection (3) insert—

“(3A) But subsection (3) does not prevent the Authority from making rules under subsection (1) in relation to a communication that would not contravene section 21(1) if made by a person other than an authorised person, without the approval of an authorised person, if the conditions set out in subsection (3B) are satisfied.

(3B) Those conditions are—

- (a) that the communication would not contravene subsection (1) of section 21 because it is a communication to which that subsection does not apply as a result of an order under subsection (5) of that section;
- (b) that the Authority considers that any of the requirements of—
 - (i) paragraphs 1 to 8 of Article 19 of the markets in financial instruments directive; or
 - (ii) any implementing measure made under paragraph 10 of that Article, apply to the communication; and
- (c) that the Authority considers that the rules are necessary to secure that the communication satisfies such of the requirements mentioned in paragraph (b) as the Authority considers apply to the communication.”.

Amendment of section 157 of the Act

5. In section 157 of the Act (guidance), in subsection (5), after “Chapter” insert “(except in section 158A)”.

Section 158A of the Act

6. After section 158 of the Act (notification of guidance to the Treasury) insert—

“Guidance on outsourcing by investment firms and credit institutions

158A.—(1) Without prejudice to the generality of section 157, the Authority must give guidance in the terms required by Article 15(3) of Commission Directive 2006/73/EC of 10 August 2006 (requirement to publish statement of policy on outsourcing of investment services by investment firms and credit institutions).

(2) Subsections (1), (2)(b) and (d), (4), (5), (6)(a) and (7) of section 155 apply to guidance which the Authority is required to give under this section as they apply to proposed rules.

(3) The Authority must publish its guidance under this section.

(4) The Authority may offer copies of the published guidance for sale at a reasonable price.

(5) Subsections (1) to (4) of section 158 apply to guidance under this section as they apply to general guidance (as defined by section 158(5)).”.

Amendment of section 159 of the Act

7. In section 159 of the Act (interpretation of Chapter 3 of Part 10), in subsection (1), in paragraph (b) of the definition of “regulating provisions”, after “(as defined by section 158(5))” insert “or guidance under section 158A”.

Amendment of section 286 of the Act

8. In section 286 of the Act (qualification for recognition), after subsection (4) insert—

“(4A) If regulations under subsection (1) require an investment exchange to make information available to the public in accordance with—

(a) Article 29.1 of the markets in financial instruments directive and the Commission Regulation, or

(b) Article 44.1 of that directive and that Regulation,

the regulations may authorise the Authority to waive the requirement in the circumstances specified in the relevant provisions.

(4B) The “relevant provisions” for the purposes of subsection (4A) are—

(a) in a case falling within paragraph (a) of that subsection, Article 29.2 of the markets in financial instruments directive and the Commission Regulation, and

(b) in a case falling within paragraph (b) of that subsection, Article 44.2 of that directive and that Regulation.

(4C) If regulations under subsection (1) require an investment exchange to make information available to the public in accordance with—

(a) Article 30.1 of the markets in financial instruments directive and the Commission Regulation, or

(b) Article 45.1 of that directive and that Regulation,

the regulations may authorise the Authority to defer the requirement in the circumstances specified, and subject to the requirements contained, in the relevant provisions.

(4D) The “relevant provisions” for the purposes of subsection (4C) are—

(a) in a case falling within paragraph (a) of that subsection, Article 30.2 of the markets in financial instruments directive and the Commission Regulation, and

(b) in a case falling within paragraph (b) of that subsection, Article 45.2 of that directive and that Regulation.

(4E) ”The Commission Regulation” means Commission Regulation 1287/2006 of 10 August 2006.”.

Amendment of section 292 of the Act

9. In section 292 of the Act (overseas investment exchanges and overseas clearing houses), in subsection (3)(a), after “requirements” insert “, other than any such requirements which are expressed in regulations under section 286 not to apply for the purposes of this paragraph”.

New section 424A of the Act

10. After section 424 of the Act (insurance) insert—

“Investment firm

424A.—(1) In this Act, “investment firm” has the meaning given in Article 4.1.1 of the markets in financial instruments directive.

(2) Subsection (1) is subject to subsections (3) to (5).

(3) References in this Act to an “investment firm” include references to a person who would be an investment firm (within the meaning of Article 4.1.1 of the markets in financial instruments directive) if—

- (a) his registered office, or
- (b) in the case of an individual or a body corporate with no registered office, his head office,

were in an EEA State.

(4) But subsection (3) does not apply if the person in question is one to whom the markets in financial instruments directive would not apply by virtue of Article 2 of that directive.

(5) References in this Act to an “investment firm” do not include references to—

- (a) a person to whom the markets in financial instruments directive does not apply by virtue of Article 2 of the directive; or
- (b) a person whose home Member State (within the meaning of Article 4.1.20 of the markets in financial instruments directive) is an EEA State and to whom, by reason of the fact that the State has given effect to Article 3 of that directive, that directive does not apply by virtue of that Article.”.

Amendment of section 425 of the Act

11. In section 425 of the Act(a) (expressions relating to authorisation elsewhere in the single market), in subsection (1)(a), after ““investment services directive”,” insert ““markets in financial instruments directive”,”.

Amendment of Schedule 1 to the Act

12. In Schedule 1 to the Act (the Financial Services Authority), in paragraph 1(2)(e), after “(as defined by section 158(5))” insert “or guidance under section 158A”.

Amendment of Schedule 3 to the Act

13. In Schedule 3 to the Act(b) (EEA passport rights), after paragraph 4B, insert—

“The markets in financial instruments directive

4C. “The markets in financial instruments directive” means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.”.

Transitional provision: rules under sections 138 and 145 of the Act

14. If, before these Regulations come into force—

(a) Section 425(1)(a) was substituted by S.I. 2003/2066 and amended by S.I. 2004/3379.

(b) Paragraph 4B of Schedule 3 was inserted by S.I. 2003/2066.

- (a) the Authority has taken any step mentioned in section 155 of the Act in relation to rules proposed to be made under section 138 or 145 of the Act as amended by these Regulations; and
- (b) that step would have satisfied a requirement of section 155 in relation to those rules had it been taken after these Regulations come into force,

the step shall be treated as having satisfied that requirement of section 155.

Transitional provision: guidance on outsourcing by investment firms and credit institutions

15. If, before these Regulations come into force—

- (a) the Authority has taken any step mentioned in subsection (2) of section 158A of the Act (inserted by these Regulations) in relation to guidance of the sort referred to in subsection (1) of that section; and
- (b) that step would have satisfied a requirement of section 158A(2) in relation to that guidance had it been taken after these Regulations come into force,

the step shall be treated as having satisfied that requirement.

15th November 2006

Frank Roy
Alan Campbell
Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement in part Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments (OJ No L 145, 30.4.2004, p.1) (“MiFID”). MiFID will also be implemented by the Financial Services Authority (“FSA”) using powers under the Financial Services and Markets Act 2000 (c. 8) (“the Act”) and by other statutory instruments which the Treasury propose to lay before Parliament over the next few months. The Regulations make the following amendments to the Act.

Section 138 of the Act (FSA’s general rule-making power) is amended to enable the FSA to make rules applying to authorised persons who are investment firms (within the meaning of MiFID) with respect to their provision of the ancillary services listed in Section B of Annex I to MiFID which are not regulated activities for the purposes of the Act.

It is intended that the provisions of paragraphs 1 to 8 of Article 19 of MiFID, and of measures made under paragraph 10 of that Article, will be implemented by rules made by the FSA under the power in section 145 of the Act (financial promotion rules). The amendments to section 145 made by these Regulations remove a limitation on the power so that the FSA is able to make rules to implement the provisions in all the circumstances required by the Article.

New section 158A is inserted which transposes the duty in article 15(3) of Commission Directive 2006/73/EC implementing MiFID (OJ No L 241, 2.9.2006, p.26) by placing a duty on the FSA to give guidance on outsourcing by investment firms and credit institutions. The Regulations also make minor consequential amendments to section 159 of, and Schedule 1 to, the Act.

Section 286 of the Act (the Treasury’s power to make regulations setting out the recognition requirements for investment exchanges and clearing houses) is amended. Where regulations under section 286 require investment exchanges to make information available to the public in accordance with Articles 29, 30, 44 and 45 of MiFID, the regulations may authorise the FSA to waive or defer those publication requirements in accordance with those Articles and Commission Regulation 1287/2006 implementing MiFID (OJ No L 241, 2.9.2006, p.1).

Section 292(3)(a) of the Act (overseas investment exchanges and overseas clearing houses) requires that overseas investment exchanges and clearing houses afford equivalent protection to investors as would be afforded if they were required to comply with the recognition requirements. Section 292(3)(a) is amended to enable provision in regulations under section 286 of the Act not to be applicable in the case of an overseas investment exchange or clearing house. This allows the Treasury, in regulations implementing MiFID, to specify that particular provisions do not apply in the case of overseas bodies.

Definitions of “investment firm” and “markets in financial instruments directive”, applying for the purposes of the Act, are inserted into the Act. The Regulations also make transitional provision.

The Treasury will prepare a transposition note which sets out how the main elements of MiFID will be transposed into UK law and a Regulatory Impact Assessment of the effect of the instruments transposing MiFID on the costs of business when the remainder of the legislation transposing MiFID is laid before Parliament. These will be available to be obtained from the Financial Services Strategy Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ, and will also be available on HM Treasury’s website (www.hm-treasury.gov.uk). Copies of both documents will be placed in the libraries of both Houses of Parliament.

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