STATUTORY INSTRUMENTS

2017 No. 488

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017

Made - - - - 28th March 2017

Coming into force in accordance with article 1(2)

The Treasury make the following Order in exercise of the powers conferred by sections 21(5), (9), (10) and (15), 22(1) and (5), 137D(1)(b), 419 and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000(**1**).

In the opinion of the Treasury one of the effects of the following Order is that an activity which is not a regulated activity (within the meaning of the Financial Services and Markets Act 2000) will become a regulated activity.

In accordance with sections 137E(1)(a) and 429(1), (3) and (4) of, and paragraph 26(2) of Schedule 2 to, the Financial Services and Markets Act 2000, a draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017.

(2) This Order comes into force—

(a) on 1st April 2017 for the purposes of—

(i) enabling applications to be made for a Part 4A permission, for a variation of a Part 4A permission or for an approval under section 59 of the Act(**2**), or

(ii) enabling such applications to be determined,

in relation to any specified activity or any specified investment amended or inserted by this Order;

(b) on 1st April 2017 for the purposes of article 16; and

(c) on 3rd January 2018 for all other purposes.

(**1**) 2000 c.8. Sections 137D and 137E were inserted by section 24 of the Financial Services Act 2012 (c.21). Paragraph 25 of Schedule 2 was amended, and paragraph 26 was substituted, by section 8 of the Financial Services Act 2012.

(**2**) Section 59 was amended by section 14 of, and paragraph 3 of Schedule 5 to, the Financial Services Act 2012 and section 18 of and paragraph 1 of Schedule 3 to the Financial Services (Banking Reform) Act 2013 (c.33) and S.I. 2012/1906 and 2013/1773. It is prospectively amended by paragraph 2 of Schedule 4 to the Bank of England and Financial Services Act 2016 (c.14).

(3) In this Order—

"the Act" means the Financial Services and Markets Act 2000;

"the Order" means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(**3**).

Amendments to article 3 of the Order: interpretation

2.—(1) Article 3(1) of the Order(**4**) (interpretation) is amended as follows.

(2) In the definition of "the Commission Regulation" for "1287/2006 of 10 August 2006" substitute "Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive"(**5**).

(3) In the definition of "credit institution"—

(a) in paragraph (a), for "(the text of which is set out in Schedule 3)" substitute "(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)";

(b) in paragraph (b), after "markets in financial instruments directive" insert "read with any directly applicable EU regulation made under Article 2.3 or 2.4 of that directive".

(4) In the definition of "financial instrument" for "Chapter VI" substitute "Articles 5 to 8, 10 and 11".

(5) In the definition of "home Member State" for "Article 4.1.20" substitute "Article 4.1.55(a)".

(6) In the definition of "investment firm"—

(a) in paragraph (a), for "(the text of which is set out in Schedule 3)" substitute "(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)";

(b) in paragraph (c), after "that directive" insert "read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive".

(7) In the definition of "investment services and activities", in paragraph (a) for "Article 52 of Commission Directive 2006/73/EC of 10 August 2006" substitute "Article 9 of the Commission Regulation".

(8) In the definition of "market operator"—

(a) for "Article 4.1.13" substitute "Article 4.1.18";

(b) in paragraph (a), for "(the text of which is set out in Schedule 3)" substitute "(the text of which is set out in Part 1 of Schedule 3) read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive (and the text of Article 4 of the Commission Regulation is set out in Part 2 of Schedule 3)";

(c) in paragraph (b), after "that directive" insert "read with any directly applicable EU regulation made under Article 2.3 or 2.4 of the markets in financial instruments directive".

(**3**) S.I. 2001/544.

(**4**) The definition of "the Commission Regulation" was inserted by S.I. 2006/3384. The definitions of "credit institution", "financial instrument", "investment firm", "market operator" and "multilateral trading facility" were inserted by S.I. 2006/3384. The definition of "home Member State" was inserted by S.I. 2006/3384 and amended by S.I. 2013/3115 and 2015/910. The definition of "investment services and activities" was inserted by S.I. 2006/3384 and substituted by S.I. 2012/1906. The definition of "overseas person" was amended by S.I. 2003/1475 and 1476, 2006/2383 and 3384, 2009/1342 and 2013/1773.

(**5**) The Commission Delegated Regulation has been adopted but has not yet been published in the Official Journal of the European Union. A copy is available at http://ec.europa.eu/finance/securities/docs/isd/mifid/160425-delegated-regulation_en.pdf.

(9) In the definition of "multilateral trading facility" for "Article 4.1.15" in both places substitute "Article 4.1.22".

(10) In the definition of "overseas person" after "25D," insert "25DA,".

(11) In the definition of "security" after "82" insert "or by article 82B".

(12) At the appropriate places insert—

""alternative investment fund managers directive" means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers(**6**);

"markets in financial instruments directive" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast)(**7**);

"markets in financial instruments regulation" means Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments(**8**);

"organised trading facility" means—

(a) an organised trading facility (within the meaning of Article 4.1.23 of the markets in financial instruments directive) operated by an investment firm, a credit institution or a market operator; or

(b) a facility which—

(i) is operated by an investment firm, a credit institution or a market operator which does not have a home Member State; and

(ii) if its operator had a home Member State, would be an organised trading facility within the meaning of Article 4.1.23 of the markets in financial instruments directive;

"structured deposit" means a deposit which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as—

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;

(b) a financial instrument or combination of financial instruments;

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or

(d) a foreign exchange rate or combination of foreign exchange rates;".

Organised trading facility

3. After article 25D of the Order(**9**) (operating a multilateral trading facility), insert—

"**Operating an organised trading facility**

25DA.—(1) The operation of an organised trading facility on which non-equity MiFID instruments are traded is a specified kind of activity.

(2) In paragraph (1) a "non-equity MiFID instrument" means any investment—

(a) of the kind specified by article 77, 77A, 78, 79, 80, 81, 82B, 83, 84 or 85; or

(**6**) OJ L174, 1/7/2011, p.1.
(**7**) OJ L173, 12/6/2014, p.349.
(**8**) OJ L173, 12/6/2014, p.84.
(**9**) Article 25D was inserted by S.I. 2006/3384.

(b) of the kind specified by article 89 so far as relevant to an investment falling within sub-paragraph (a),

that is a bond, a structured finance product (within the meaning of Article 2.1.28 of the markets in financial instruments regulation(**10**)), an emission allowance, or a derivative (within the meaning of Article 2.1.29 of the markets in financial instruments regulation).".

Structured deposits

4.—(1) In article 21(1) of the Order(**11**) (dealing in investments as agent), after "securities" insert ", structured deposits".

(2) In article 25 of the Order (arranging deals in investments)—

(a) in paragraph (1)—

(i) omit "or" at the end of sub-paragraph (b);

(ii) after sub-paragraph (c) insert—

", or

(d) a structured deposit,";

(b) in paragraph (2), for "or (c)" substitute ", (c) or (d)".

(3) In article 37(a) of the Order (managing investments), after "security" insert ", structured deposit".

(4) In article 53(1)(b)(i) of the Order (advising on investments) after "security" insert ", structured deposit".

Amendments to article 72 of the Order: overseas persons

5.—(1) Article 72(**12**) of the Order (overseas persons) is amended as follows.

(2) In paragraphs (1), (2), (3) and (4) for "or 25D" substitute ", 25D or 25DA".

(3) After paragraph (10) insert—

"(11) This Article does not apply where the overseas person is—

(a) a third-country firm, as defined by Article 4.1.57 ("definitions") of the markets in financial instruments directive ("third country firm");

(b) established in a country subject to an equivalence decision; and

(c) carrying on an activity a third country firm established in that third country may carry on by virtue of the equivalence decision under—

(i) Article 46.1 of the markets in financial instruments regulation (general provisions) if it is registered by ESMA in the register of third country firms established in accordance with Article 48 of that Regulation (register);

(ii) Article 47.3 of the markets in financial instruments regulation (equivalence decision) if it has a branch in an EEA State other than the United Kingdom and is authorised in that State in accordance with Article 39 of the markets in financial instruments directive (establishment of a branch); or

(iii) Article 46.5 of the markets in financial instruments regulation.

(12) For the purposes of paragraph (11)—

(**10**) OJ L173, 12/6/2014, p.84.
(**11**) Articles 21 and 25 were amended by S.I. 2003/1476 and 2006/3384. Article 53 was amended by S.I. 2003/1476 and 2016/392.
(**12**) Article 72(1) to (4) was amended by S.I. 2006/3384 and paragraph (10) was inserted by S.I. 2015/910.

(a) "equivalence decision" means a decision adopted by the Commission in relation to a country under Article 47.1 of the markets in financial instruments regulation which has not been withdrawn by a subsequent decision adopted by the Commission under that Article; and

(b) a country is subject to an equivalence decision if a period of more than three years has elapsed since the adoption of the decision by the Commission, beginning on the day after the date of the adoption of the decision.".

Emission allowances

6. After article 82A of the Order(**13**) (greenhouse gas emissions allowances), insert—

"**Emission allowances**

82B.—(1) Subject to paragraph (2), emission allowances consisting of any units recognised for compliance with the requirements of the emission allowance trading directive.

(2) Paragraph (1) only applies to emission allowances in relation to which—

(a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis;

(b) a management company is providing, in accordance with Article 6.3 of the UCITS directive, the investment services specified in paragraph 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex 1 to the markets in financial instruments directive;

(c) a market operator is providing the investment service specified in paragraph 8 or 9 of Section A of Annex 1 to the markets in financial instruments directive; or

(d) an AIFM is providing, in accordance with Article 6.4 of the alternative investment fund managers directive the investment service specified in paragraph 1, 4 or 5 of Section A, or the ancillary service specified in paragraph 1 of Section B, of Annex I to the markets in financial instruments directive.".

Amendments to article 83 of the Order: options

7.—(1) Article 83 of the Order(**14**) (options) is amended as follows.

(2) In paragraph (1)(e)—

(a) after "directive" insert "read with Articles 5, 6, 7 and 8 of the Commission Regulation";

(b) for "the text of which is set out in Part I" substitute "the texts of which are set out in Parts 1 and 2".

(3) In paragraph (2)(d)—

(a) in paragraph (i), after "Schedule 2" insert "(read with Articles 5 and 6 of the Commission Regulation)";

(b) in paragraph (ii), for "38" substitute "7".

(4) In paragraph (3)(c), after "with" insert "Articles 7 and 8 of".

(5) In paragraph (4)—

(a) omit "or" at the end of sub-paragraph (b);

(**13**) Article 82A was inserted by S.I. 2012/1906.
(**14**) Article 83 was amended by S.I. 2006/3384 and 2011/1613.