STATUTORY INSTRUMENTS

# 2016 No. 392

# FINANCIAL SERVICES AND MARKETS

## The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016

*Made - - - - 16th March 2016*

*Coming into force in accordance with article 1*

The Treasury are a government department designated [F1] for the purposes of section 2(2) of the European Communities Act 1972 [F2] in relation to financial services.

In the opinion of the Treasury, one of the effects of this Order is that an activity which is not a regulated activity, within the meaning of the Financial Services and Markets Act 2000 [F3], will become a regulated activity.

A draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with paragraphs 2 and 2A of Schedule 2 to the European Communities Act 1972 [F4], section 429(3) and (4) of, and paragraph 26(2) of Schedule 2 to, the Financial Services and Markets Act 2000 [F5] and sections 6(10) and 161(4) of the Small Business, Enterprise and Employment Act 2015 [F6].

The Treasury make this Order in exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972, sections 21(9), (10) and (15), 22(1) and (5), 38, 39 and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000 [F7] and sections 5(3) and 161(2)(d) of the Small Business, Enterprise and Employment Act 2015.

**F1** S.I. 2012/1759.

**F2** 1972 c. 68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and the European Union (Amendment) Act 2008 (c. 7), **Sch**edule, Part 1. By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c. 51) legislation may be made under section 2(2) of the European Communities Act to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1992 (Cm 2183).

**F3** 2000 c.8.

**F4** Paragraph 2 was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and paragraph 2A was inserted by section 29 of that Act.

**F5** Paragraph 25 of Schedule 2 was amended, and paragraph 26 was substituted, by section 8 of the Financial Services Act 2012 (c. 21).

**F6** 2015 c. 26.

**F7** Section 38 was amended by paragraph 4 of Schedule 18 to the Financial Services Act 2012. Paragraph 25(1)(f), (2) and (3) of Schedule 2 to the Financial Services and Markets Act 2000 provides that an order under section 22(1) of that Act may make consequential, transitional or supplemental provision.

# PART 1

## Citation and commencement

### Citation, commencement and interpretation

**1.**—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016.

(2) This Order comes into force on the day after the day on which this Order is made for the purposes of the FCA [F8]—

(a) making rules;

(b) giving guidance; and

(c) imposing requirements or giving directions.

(3) For all other purposes—

(a) this article and articles 2(1), (2), (5), 6(1) and (2), 9, 10(1), (3) and (4), 11 and 12 come into force on the day after the day on which this Order is made;

(b) articles 2(10)(a), (13) and (17) and 7 come into force on 20th March 2016;

(c) articles 2(3), (4), (7), (8), (10)(b), (11), (12), (14) to (16) and (18) to (21), 3, 4, 6(4) and (5) and 8 come into force immediately after the coming into force of article 2(3) to (5) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.3) Order 2015 [F9], on 21st March 2016; and

(d) the remaining provisions of this Order come into force on 6th April 2016.

(4) In this Order, "the Regulated Activities Order" means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 [F10].

**F8** "The FCA" means the Financial Conduct Authority (see section 1A(2) of the Financial Services and Markets Act 2000).

**F9** S.I. 2015/1863.

**F10** S.I. 2001/544.

# PART 2

## Amendment of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

### Amendment of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

**2.**—(1) The Regulated Activities Order is amended as follows.

(2) In article 3(1) (interpretation) [F11]—

(a) in the definition of "borrower", in paragraph (b) for "is to be read with article 36H(4)" substitute " has the meaning given by article 36H "; and

(b) in the definition of "lender", in paragraph (b) for "is to be read with article 36H(4)" substitute " has the meaning given by article 36H ".

(3) In article 4 (specified activities: general) [F12], in paragraph (4B)(b) after "mortgage intermediary" insert " in respect of an agreement entered into, or to be entered into, on or after 21st March 2016 ".

(4) In article 25A (arranging regulated mortgage contracts) [F13]—

(a) in paragraph (1)(b)—

(i) after "regulated mortgage contract" insert " falling within paragraph (1A) ";

(ii) omit "after the coming into force of article 61";

(b) after paragraph (1) insert—

"(1A) A regulated mortgage contract falls within this paragraph if—

(a) the contract was entered into on or after 31st October 2004; or

(b) the contract—

(i) was entered into before 31st October 2004; and

(ii) was a regulated credit agreement immediately before 21st March 2016.".

(5) In article 36H (operating an electronic system in relation to lending) [F14]—

(a) in paragraph (2A) for "interest and capital" in sub-paragraphs (a) and (b) substitute " either interest or capital or both ";

(b) after paragraph (2C) insert—

"(2D) Where A carries on an activity of the kind specified in paragraph (1), it is a specified kind of activity for A to operate an electronic system where—

(a) that system enables A to facilitate a person ("B") assuming the rights of the lender under an article 36H agreement by assignment or operation of law, and

(b) the conditions in paragraphs (2), (2A) and (2C) are satisfied where C is the borrower under the agreement in sub-paragraph (a).";

(c) in paragraph (3)—

(i) after "paragraph (1)" insert " or (2D) ";

(ii) in sub-paragraph (a)—

(aa) for "B and C" substitute " either B or C "; and

(bb) after "B becoming the lender under the article 36H agreement" for "and" substitute " or ";

(iii) in sub-paragraph (d), for "performing duties, or exercising or enforcing" substitute " taking steps to perform duties, or exercise or enforce ";

(iv) at the beginning of sub-paragraphs (e), (f), (g) and (h), insert " taking steps with a view to ";

(v) delete "or" at the end of sub-paragraph (g); and

(vi) in sub-paragraph (h)(ii) after "person" insert—
", or

(i) giving advice in relation to the taking of any of the steps in sub-paragraphs (e) to (h)";

(d) for paragraph (4) substitute—

"(4) An "article 36H agreement" is an agreement by which one person provides another person with credit and in relation to which—

(a) the condition in paragraph (4A) is satisfied, and

(b) the condition in either paragraph (5) or (6) is satisfied, or was satisfied at the time the agreement was entered into.

(4A) The condition in this paragraph is that A does not provide credit, assume the rights (by assignment or operation of law) of a person who provided credit, or receive credit under the agreement.";

(e) for paragraph (9) substitute—

"(9) In this article—

"assignment", in relation to Scotland, means assignation;

"borrower" means a person who receives credit under an article 36H agreement or a person to whom the rights and duties of a borrower under such an agreement have passed by assignment or operation of law;

"credit" has the meaning given by article 60L;

"lender" means—

(a) a person providing credit under an article 36H agreement, or

(b) a person who by assignment or operation of law has assumed the rights of a person who provided credit under such an agreement;

"relevant person" means—

(a) a partnership consisting of two or three persons not all of whom are bodies corporate, or

(b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership."; and

(f) in paragraph (10), for "has" substitute " have ".

(6) In article 53 (advising on investments) [F15]—

(a) the existing text becomes paragraph (1); and

(b) after paragraph (1), insert—

"(2) Advising a person is a specified kind of activity if the advice is—

(a) given to the person in that person's capacity as a lender or potential lender under a relevant article 36H agreement, or in that person's capacity as an agent for a lender or potential lender under such an agreement; and

(b) advice on the merits of that person doing any of the following (whether as principal or agent)—

(i) entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law,

(ii) providing instructions to an operator with a view to entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law, where the instructions involve—

(aa) accepting particular parameters for the terms of the agreement presented by an operator,

(bb) choosing between options governing the parameters of the terms of the agreement presented by an operator, or

(cc) specifying the parameters of the terms of the agreement by other means,

(iii) enforcing or exercising the lender's rights under a relevant article 36H agreement, or

(iv) assigning rights under a relevant article 36H agreement.

(3) Paragraph (2) does not apply in so far as—

(a) the advice is given in relation to a relevant article 36H agreement which has been facilitated by the person giving the advice, in the course of carrying on an activity of a kind specified by article 36H and is given by—

(i) an authorised person with permission to carry on a regulated activity of the kind specified by article 36H(1) (operating an electronic system in relation to lending),

(ii) an appointed representative in relation to that activity,

(iii) an exempt person in relation to that activity, or

(iv) a person to whom, as a result of Part 20 of the Act, the general prohibition does not apply in relation to that activity;

(b) the advice is given in the course of carrying on an activity of a kind specified by article 39F [F16] (debt-collecting) by a person carrying on that activity not in contravention of the general prohibition; or

(c) the advice is given in the course of carrying on an activity of a kind specified by article 39G [F17] (debt administration) by a person carrying on that activity not in contravention of the general prohibition.

(4) In this article—

"operator" means a person carrying on an activity of the kind specified by article 36H(1) or (2D), and

"relevant article 36H agreement" means an article 36H agreement (within the meaning of article 36H (operating an electronic system in relation to lending)) which has been, or may be, entered into with the facilitation of a person carrying on an activity of the kind specified by article 36H(1) or (2D).

(5) For the purposes of the application of section 22(1) of the Act (regulated activities) to an activity of a kind specified by paragraph (2) of this article, article 88D [F18] (credit agreement), and article 73 (investments: general) in so far as it relates to that article, have effect as if the reference to a credit agreement in article 88D includes a reference to a relevant article 36H agreement.".

(7) In article 53A (advising on regulated mortgage contracts) [F19]—

(a) in paragraph (1)(b)(ii)—

(i) after "regulated mortgage contract" insert " falling within paragraph (1A) ";

(ii) omit "after the coming into force of article 61";

(b) after paragraph (1) insert—

"(1A) A regulated mortgage contract falls within this paragraph if—

(a) the contract was entered into on or after 31st October 2004; or

(b) the contract—