Draft Order laid before Parliament under section 142Z(2) of the Financial Services and Markets Act 2000, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2016 No. 0000

BANKS AND BANKING

The Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2016

Made - - - -	*****
Coming into force - -	*1st December 2016*

The Treasury, in exercise of the powers conferred by sections 142B(2), 142D(2), 142E, 142F and 428(3) of the Financial Services and Markets Act 2000(**a**) and being of the opinion—

(a) in connection with the exercise of the power conferred by section 142B(2), that the regulated activity of accepting deposits should be a core activity when carried out in the specified circumstances;

(b) in connection with the exercise of the power conferred by section 142D(2), that allowing ring-fenced bodies to deal in investments as principal in the specified circumstances would not be likely to result in any significant adverse effect on the continuity of the provision in the United Kingdom of core services; and

(c) in connection with the exercise of the power conferred by section 142E, that the making of this Order is necessary or expedient for the purpose of protecting the continuity of the provision in the United Kingdom of core services;

make the following Order.

A draft of this Order has been laid before Parliament and approved by resolution of each House of Parliament in accordance with section 142Z of the Financial Services and Markets Act 2000.

Citation and commencement

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2016.

(2) This Order comes into force on 1st December 2016.

(**a**) 2000 c.8; sections 142A to 142Z1 were inserted into the Act by section 4 of the Financial Services (Banking Reform) Act 2013 (c.33).

Amendments to the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014

2.—(1) The Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014(**a**) is amended as follows.

(2) In article 1—

(a) after the definition of "deposit" insert—

""EEA account" has the meaning given in article 2(3)(b);

"EEA account holder" means the holder of an EEA account;";

(b) omit the following definitions—

(i) "qualifying organisation declaration"; and

(ii) "qualifying group member declaration";

(c) after the definition of "registered society" insert—

""relevant financial year" in relation to an organisation means—

(a) the last completed financial year for which accounting records are available, or

(b) where the organisation has existed for less than one financial year, its first financial year;";

(d) in the definition of "UK deposit-taker" for "an institution" substitute "a body corporate incorporated in the United Kingdom".

(3) For article 3 substitute—

"Meaning of qualifying organisation

3.—(1) An organisation is a qualifying organisation in relation to a UK deposit-taker if that deposit-taker, having made reasonable inquiries, determines that the organisation meets the relevant qualifying condition for the relevant financial year.

(2) The relevant qualifying condition is set out—

(a) in the case of a body corporate(**b**) or a partnership, in article 4;

(b) in the case of an organisation which is not a body corporate or a partnership, in article 5.

(3) Upon making a determination in accordance with paragraph (1), a UK deposit-taker must give notice to the organisation in writing—

(a) informing the organisation that the UK deposit-taker has made that determination;

(b) stating the reasons why the UK deposit-taker made that determination; and

(c) notifying the organisation that it has fourteen days from the date upon which the notice is given in which to submit representations to the UK deposit-taker if the organisation considers that the UK deposit-taker's determination was based on a mistake of fact.".

(4) In article 4(3) for sub-paragraph (b) substitute—

"(b) where the UK deposit-taker—

(i) makes a determination as to whether the organisation meets the qualifying condition during the organisation's first financial year; and

(ii) at the time the determination is made, the organisation has not yet prepared a balance sheet;

(**a**) S.I. 2014/1960.

(**b**) "Body corporate" is defined in section 417(1) of the Financial Services and Markets Act 2000. There are amendments to that section, but none are relevant to this Order.

the aggregate of the amounts which would be shown as assets in a balance sheet prepared not more than six weeks before the date upon which that determination is made.".

(5) Omit articles 6 and 7.

(6) For article 8 substitute—

"Meaning of qualifying group member

8.—(1) An organisation is a qualifying group member in relation to a UK deposit-taker if that deposit-taker determines that the organisation is a member of the same group(**a**) as a qualifying organisation.

(2) Upon making a determination that an organisation is a qualifying group member, a UK deposit-taker must give notice to the organisation in writing—

(a) informing the organisation that the UK deposit-taker has reached that determination;

(b) specifying the identity of the relevant qualifying organisation; and

(c) notifying the organisation that it has fourteen days from the date upon which the notice is given in which to submit representations to the UK deposit-taker if the organisation considers that the UK deposit-taker's determination was based on a mistake of fact.

(3) A notice given pursuant to paragraph (2) may be given at the same time as a notice given pursuant to article 3(3).".

(7) In article 14(1)—

(a) in sub-paragraph (a) for "an account" substitute "an EEA account for the purpose of making one or more deposits";

(b) in sub-paragraph (b)—

(i) insert "EEA" at the beginning; and

(ii) after "individuals" insert "who use the account for the purpose of making one or more deposits".

Amendments to the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014

3.—(1) The Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014(**b**) is amended as follows.

(2) In article 1—

(a) after the definition of "capital market arrangement" insert—

""charity" has the meaning given in section 1 of the Charities Act 2011(**c**), section 1 of the Charities Act (Northern Ireland) 2008(**d**) or section 106 of the Charities and Trustee Investment (Scotland) Act 2005(**e**);

"CIO" means a body constituted and registered as a charitable incorporated organisation under Part 11 of the Charities Act 2011 or Part 11 of the Charities Act (Northern Ireland) 2008, or as a Scottish charitable incorporated organisation under Part 1 of the Charities and Trustee Investment (Scotland) Act 2005;";

(b) after the definition of "conduit vehicle" insert—

(**a**) "Group" is defined in section 421 of the Financial Services and Markets Act 2000. Section 421 was amended by S.I. 2008/948.
(**b**) S.I. 2014/2080.
(**c**) 2011 c.25.
(**d**) 2008 c.12 (N.I).
(**e**) 2005 asp 10.

""core deposit" has the meaning given in article 2(2) of the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014;";

(c) in the definition of "global systemically important insurer" at the end insert ", and any subsidiary undertaking of any such undertaking provided that the subsidiary undertaking is also an insurance undertaking, third country insurance undertaking, reinsurance undertaking or third country reinsurance undertaking";

(d) in the definition of "liquidity risk" for "the ring-fenced body" substitute "the undertaking";

(e) in the definition of "payment exposures", in paragraph (d), omit "also";

(f) after the definition of "Regulated Activities Order 2001" insert—

""related undertaking" means any subsidiary undertaking of a parent undertaking where the parent undertaking is subject to rules made by the appropriate regulator pursuant to section 192JA of the Act, but does not include a subsidiary undertaking that is a ring-fenced body;";

(g) after the definition of "UCITS" insert—

""UK deposit-taker" means a body corporate incorporated in the United Kingdom which carries on the regulated activity of accepting deposits in relation to which it has a permission under Part 4A of the 2000 Act;".

(3) In article 3(2)—

(a) in sub-paragraph (b)—

(i) after "assets, created by," omit "or otherwise originated by,";

(ii) in paragraph (ii)—

(aa) omit "or otherwise originated";

(bb) after "any of its subsidiary undertakings" insert "(provided that the assets concerned are assets that the ring-fenced body itself could hold)";

(cc) at the end omit "or";

(iii) at the end of paragraph (iii) insert ", or"; and

(iv) after paragraph (iii) insert—

"(iv) a member of the group of companies to which the ring-fenced body ("A") belongs (other than one falling within paragraph (i), (ii) or (iii)) provided that—

(aa) the assets concerned were created no later than two years before A became a ring-fenced body,

(bb) the assets were transferred to the structured finance vehicle before A became a ring-fenced body, and

(cc) the assets concerned are assets that A itself could hold;";

(b) in sub-paragraph (f) after "the provision of services to" insert ", or in connection with the transfer of assets to,";

(c) after sub-paragraph (g) insert—

"(ga) assets, or an interest in assets, that—

(i) were created by, or comprised of claims against, a company outside the group of companies to which the ring-fenced body ("B") belongs,

(ii) were transferred to the structured finance vehicle from—

(aa) B,

(bb) a subsidiary undertaking of B, or

(cc) any other member of the group of companies to which B belongs,

(iii) were acquired by the company from which the transfer was made no later than two years before B became a ring-fenced body,

(iv) in the case of assets transferred by a company falling within paragraph (ii)(cc), were transferred to the structured finance vehicle before B became a ring-fenced body, and

(v) are assets that B itself could hold;

(gb) assets that—

(i) have at any time been transferred to the ring-fenced body pursuant to a ring-fencing transfer scheme within the meaning of section 106B(**a**) of the Act, and

(ii) are assets that the ring-fenced body itself could hold;

(gc) assets, or an interest in assets, that were—

(i) created or owned at any time by—

(aa) a company ("C") in respect of which an order has been made under the Banking (Special Provisions) Act 2008(**b**), or

(bb) a subsidiary undertaking of C ("D"), and

(ii) transferred to the structured finance vehicle from C or D pursuant to any agreement for that purpose, whether directly or through an intermediary—

(aa) at a time when all of the shares in C were owned by a nominee of the Treasury or a company wholly owned by the Treasury,

(bb) in the case of assets created or owned by D, at a time when D was a subsidiary undertaking of C,

(cc) in connection with a capital market arrangement to which the structured finance vehicle was a party, and

(dd) where the capital market arrangement referred to in sub-paragraph (cc) was established to finance, wholly or in part, the consideration payable to C or D in connection with the transfer of the relevant assets;

(gd) assets, or an interest in assets, that—

(i) have at any time been subject to any transfer effected pursuant to Part 1 of the Banking Act 2009(**c**), and

(ii) are assets that the ring-fenced body itself could hold;";

(d) in sub-paragraph (h) for "(a) to (g)" substitute "(a) to (gd)".

(4) In article 6—

(a) in paragraph (1)—

(i) after sub-paragraph (b) insert—

"(ba) another ring-fenced body within the same group as the ring-fenced body,

(bb) a related undertaking within the same group as the ring-fenced body,";

(ii) in sub-paragraph (e) after "(b)," insert "(ba), (bb),";

(b) after paragraph (4)(d) insert—

"(e) acquiring shares in—

(i) the operator of an inter-bank payment system within the meaning of section 182 of the Banking Act 2009 where ownership of such shares is a condition of participation in the inter-bank payment system operated by that operator;

(ii) a company whose principal business is the provision of electronically transmitted secure financial messaging services; or

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(**a**) Section 106B was inserted into the Financial Services and Markets Act 2000 by paragraph 5 of Schedule 1 to the Financial Services (Banking Reform) Act 2013 (c.33).
(**b**) 2008 c.2.
(**c**) 2009 c.1.

(iii) a recognised clearing house(**a**), an EEA central counterparty(**b**) or a third country central counterparty(**c**) where ownership of such shares is a condition of membership of any such body;

(f) dealing in investments as principal in order to comply with an obligation imposed upon it by a recognised clearing house or an EEA central counterparty pursuant to Article 37 of Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories(**d**).";

(c) in paragraph (5) for "(b) or (d)" substitute "(b), (d), (e) or (f)";

(d) after paragraph (6) insert—

"(7) A ring-fenced body does not carry on an excluded activity by dealing in investments as principal when acting as trustee for or on behalf of any individual, minor, charity or CIO. ".

(5) In article 7, after paragraph (2) insert—

"(3) Subject to the condition in paragraph (4) being met, a ring-fenced body does not carry on an excluded activity by selling any legal or beneficial interest in—

(a) investments acquired from a sponsored structured finance vehicle of the ring-fenced body, or

(b) instruments creating or acknowledging indebtedness issued by a sponsored structured finance vehicle of the ring-fenced body.

(4) The condition referred to in paragraph (3) is that the relevant investments or instruments must relate to assets that fall within the description set out in article 3(2)(gc).".

(6) In article 12—

(a) in paragraph (1)—

(i) for "position risk" in each place it appears, substitute "relevant risk";

(ii) in sub-paragraph (d) for "at the date on which the transaction is entered into" substitute "on the material date";

(iii) in sub-paragraph (e) for "at the time the transaction is entered into" substitute "on the material date";

(b) in paragraph (2)—

(i) for sub-paragraph (a) substitute—

"(a) subject to sub-paragraph (aa) the relevant risk requirement is the sum of the own funds requirements for—

(i) position risk calculated in accordance with Chapter 2 of Title IV of Part Three of the prudential requirements regulation;

(ii) foreign-exchange risk calculated in accordance with Chapter 3 of Title IV of Part Three of the prudential requirements regulation; and

(iii) commodities risk calculated in accordance with Chapter 4 of Title IV of Part Three of the prudential requirements regulation;

(aa) the calculations referred to in sub-paragraph (a) are to be carried out as if the positions associated with the investments referred to in the relevant Chapters are all held in the trading book of the ring-fenced body;";

(ii) for sub-paragraph (d) substitute—

"(d) the material date is to be determined as follows—

(**a**) Defined in section 285(1)(b) of the Financial Services and Markets Act 2000. Paragraphs (b) to (d) of section 285(1) were substituted for the original paragraphs by S.I.2013/504.
(**b**) Defined in section 285(1)(c) of the Financial Services and Markets Act 2000.
(**c**) Defined in section 285(1)(d) of the Financial Services and Markets Act 2000.
(**d**) OJ No L 201, 27.7.2012, p1.

(i) in the case of a transaction entered into by a ring-fenced body, the material date is the date upon which the transaction is entered into; and

(ii) in the case of a transaction entered into by a body ("A") before A became a ring-fenced body, the material date is the date upon which A became a ring-fenced body.".

(7) In article 14—

(a) in paragraph (1) for "19" substitute "19B";

(b) in paragraph (2)—

(i) after sub-paragraph (b) insert—

"(ba) another ring-fenced body within the same group as the ring-fenced body,

(bb) a related undertaking within the same group as the ring-fenced body,";

(ii) in sub-paragraph (e) after "(b)," insert "(ba), (bb),";

(c) after paragraph (3) insert—

"(3A) A ring-fenced body may incur a financial institution exposure if the purpose of the transaction giving rise to the exposure is to allow the ring-fenced body to hold liquid assets in order to meet the general requirement set out in Article 412 of the prudential requirements regulation and further specified in delegated acts adopted by the European Commission under Article 460 of that regulation.";

(d) in paragraph (4)—

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

(ii) after sub-paragraph (b)(ii) insert—

"(iii) the relevant financial institution entering into any guarantee, bond, contract of indemnity or otherwise giving security or becoming responsible for any pension liability of the ring-fenced body, or

(iv) a shared liability arrangement within the meaning of regulation 1 of the Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015(**a**) provided that either—

(aa) the shared liability arrangement is permitted by virtue of regulation 2(8) or (9) of those Regulations, or

(bb) the exposure ceases to be incurred on or after the specified date referred to in regulation 2(10) of those Regulations.".

(8) For article 16 substitute—

"Financial institutions exposure: securitisation and covered bonds

16. A ring-fenced body may incur a financial institution exposure to—

(a) a sponsored structured finance vehicle of that ring-fenced body; or

(b) a covered bond vehicle which is a subsidiary of a ring-fenced body or a building society.".

(9) In article 19—

(a) in paragraph (2)(b)(i) omit "or" at the end;

(b) in paragraph (2)(b)(ii) omit "or" at the end;

(c) after paragraph (2)(b)(ii) insert—

"(iii) services as a trustee or agent in connection with a syndicated invoice discounting or factoring arrangement pursuant to which payment is advanced to any entity which is not a relevant financial institution, or

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(**a**) S.I. 2015/547.

(iv) consultative services, including in particular the provision of business or financial advice; or";

(d) after paragraph (2)(c)(iv) insert—

"(v) the participation by the ring-fenced body in any syndicated invoice discounting or factoring arrangement pursuant to which payment is advanced to any entity which is not a relevant financial institution.";

(e) after paragraph (6) insert—

"(7) A ring-fenced body may incur a financial institution exposure that arises where the ring-fenced body is acting as trustee for or on behalf of any individual or charity.".

(10) After article 19 insert—

"Financial institution exposures: financing of infrastructure projects

19A.—(1) A ring-fenced body may incur a financial institution exposure to a relevant financial institution ("A") where—

(a) A is an infrastructure special purpose vehicle; and

(b) the exposure arises from financial assistance given by the ring-fenced body to A.

(2) For the purposes of this article—

(a) "financial assistance" means—

(i) loans,

(ii) guarantees or indemnities, or

(iii) the purchase of bonds or notes.

(b) "infrastructure special purpose vehicle" means an entity the only business of which (apart from incidental activities) is financing the acquisition, design, construction, conversion, improvement, operation and repair of infrastructure within the EEA.

(c) "infrastructure" means—

(i) housing,

(ii) water, electricity, gas, telecommunications, sewerage or other services,

(iii) railway facilities (including rolling stock), roads or other transport facilities,

(iv) health or educational facilities, and

(v) court or prison facilities.

Financial institution exposures: changes in status of counterparties

19B.—(1) Subject to paragraph (2), where a ring-fenced body incurs a financial institution exposure as a result of a counterparty to a transaction becoming a relevant financial institution at any time after the date upon which the transaction was entered into, that exposure is permitted for a period of twelve months commencing on the date upon which the counterparty became a relevant financial institution.

(2) A ring-fenced body is not permitted to incur the financial institution exposure by virtue of paragraph (1) where, at the time the transaction was entered into, the ring-fenced body knew, or could reasonably be expected to have known, that the counterparty would become a relevant financial institution.".

Name
Name

Date

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (S.I. 2014/1960) ("the Core Activities Order") and the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (S.I. 2014/2080) ("the Excluded Activities Order").

Article 2 makes a number of amendments to the Core Activities Order. In particular, Article 2(2)(d) amends the definition of "UK deposit-taker" in the Core Activities Order with the effect that only bodies corporate that are incorporated in the United Kingdom will be capable of falling within that definition (thus excluding United Kingdom branches of non-United Kingdom banks from the scope of the definition).

Article 2(3) to (6) amends the Core Activities Order in order to make new provision regarding the identification of qualifying organisations. Instead of a relevant organisation being required to give a "qualifying organisation declaration" to a UK deposit-taker before it may be considered to be a qualifying organisation, a UK deposit-taker may determine that an organisation is a qualifying organisation without the organisation having to give any such declaration.

Article 2(7) amends the Core Activities Order for the purpose of ensuring that the duty of ring-fenced bodies to provide "specified information" only applies in the case of (1) individuals that are located in an EEA state and (2) accounts that are provided for the purpose of accepting deposits.

Article 3 makes a number of amendments to the Excluded Activities Order. In particular, article 3(2)(c) extends the definition of "global systemically important insurer" in article 1 of the Excluded Activities Order and article 3(2)(d) amends the definition of "liquidity risk" in article 1 of the Excluded Activities Order so as to clarify that a ring-fenced body does not carry out an excluded activity where the purpose of the transaction in question is to limit the extent to which its subsidiaries etc. (and not just the ring-fenced body itself) will be adversely affected by liquidity risk.

Article 3(3) amends the definition of "sponsored structured finance vehicle" that is set out in article 3(2) of the Excluded Activities Order in order to expand the categories of assets that any such entity may hold. As a result of this amendment, a sponsored structured finance vehicle of a ring-fenced body will be able to hold assets that have been transferred to its ring-fenced body sponsor pursuant to a ring-fencing transfer scheme and assets that have been subject to a transfer effected in the course of resolution action taken pursuant to the Banking (Special Provisions) Act 2008 or Part 1 of the Banking Act 2009. An amendment has also been made to permit a sponsored structured finance vehicle to hold any assets created by a third party provided that they are assets that a ring-fenced body could hold and provided that they were acquired by any company within a group of companies of which the ring-fenced body is a member no later than two years before the ring-fenced body became a ring-fenced body. Article 3(3) also makes an amendment to article 3(2) of the Excluded Activities Order for the purpose of clarifying that a sponsored structured finance vehicle may hold assets created by a securitisation undertaking that itself holds assets created by a subsidiary undertaking of the ring-fenced body only where those assets could be held by the ring-fenced body itself.

Article 3(4) amends article 6 of the Excluded Activities Order in order to provide that a ring-fenced body does not carry on an excluded activity by entering into a transaction where the main purpose of the transaction is to limit the extent to which another ring-fenced body within the same group as the ring-fenced body or another company within the same sub-group as the ring-fenced body is adversely affected by any of the factors set out in article 6(2) of the Excluded Activities Order. Article 3(4) also makes amendments to article 6 of the Excluded Activities Order for the purpose of providing that ring-fenced bodies do not carry on an excluded activity when acquiring or disposing of shares in companies that operate financial market infrastructure (i.e. operators of payment systems, companies providing electronically transmitted secure financial messaging services and central counterparties), complying with the default rules of a central counterparty of

which it is a member, or when acting in the capacity as trustee for or on behalf of individuals (including minors) and charitable bodies.

Article 3(6) amends the conditions in article 12 of the Excluded Activities Order which must be satisfied in order for a ring-fenced body to enter into a derivative transaction with an account holder.

Article 3(7) amends article 14 of the Excluded Activities Order in order to provide that a ring-fenced body ("the relevant RFB") does not incur a prohibited financial institution exposure by entering into a transaction where the main purpose of the transaction is to limit the extent to which another ring-fenced body within the same group as the relevant RFB, or another company within the same sub-group as the relevant RFB, is adversely affected by any of the factors set out in article 14(3) of the Excluded Activities Order. Article 3(7) also makes amendments that allow a ring-fenced body to incur financial institution exposures where the exposure arises as a result of the acquisition of liquid assets for the purposes of managing the ring-fenced body's liquidity risk (provided that the assets in question meet the liquidity buffer requirements of the Regulation of the European Parliament and the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms); giving effect to any agreement whereby a member of the same group provides financial support to the ring-fenced body's pension scheme and giving effect to any agreement whereby the ring-fenced body supports the pension scheme of another group member before 1st January 2026.

Article 3(8) substitutes a new article 16 for the former article 16 in the Excluded Activities Order. The purpose of this amendment is to additionally allow ring-fenced bodies to incur a financial institution exposure where that exposure arises as a result of a transaction with a covered bond vehicle that is a subsidiary of a ring-fenced body or a building society.

Article 3(9) makes further amendments to the Excluded Activities Order in order to allow a ring-fenced body to incur a financial institution exposure which arises a result of providing clients with operational or consultative services, provided that such services are also offered to clients that are not relevant financial institutions.

Article 3(10) inserts two new articles into the Excluded Activities Order: The new article 19A allows for ring-fenced bodies to incur financial institution exposures arising from loans advanced or guarantees given to entities responsible for the financing of infrastructure projects within the EEA; and the new article 19B provides that in instances where a financial institution exposure is incurred as a result of a counterparty changing its status to become a relevant financial institution at any point after the transaction in question is entered into, then that exposure will be permitted for a period of twelve months provided that at the time the transaction was entered into, the ring-fenced body did not know, or could not reasonably be expected to have known, of the counterparty's forthcoming change in status.

A validation impact assessment is being prepared in relation to this Order. The assessment will be placed in the library of each House of Parliament and will be available on http://www.legislation.gov.uk/. Copies will be available from Her Majesty's Treasury, 1 Horse Guards Road, London SW1A 2HQ.

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