

EXPLANATORY MEMORANDUM TO THE MERITS COMMITTEE OF THE HOUSE OF LORDS AND THE JOINT COMMITTEE ON STATUTORY INSTRUMENTS

Financial Services And Markets Act 2000 (Regulated Activities) (Amendment) Order 2004 No.1610

1. This explanatory memorandum is laid before Parliament by Command of Her Majesty and contains information for the Joint Committee on Statutory Instruments.

1.1. HM Treasury is the Department responsible for the laying of this instrument.

2. Description

2.1. Under section 49(2) of the Financial Services and Markets Act 2000 ("the Act"), the Financial Services Authority ("the FSA") must consult the home state regulator of an EEA firm that is connected with a UK firm before granting that UK firm permission (or varying or cancelling its permission) to carry out a regulated activity under the Act.

2.2. *This Order disapplies section 49(2) of the Act in respect of activities involving regulated mortgage contracts and revokes and re-enacts the disapplication of section 49(2) to the extent that the permission in question relates to an insurance mediation activity.*

3. Legislative Background

3.1. This Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544, "the Regulated Activities Order") and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (S.I. 2003/1476, "the Insurance Mediation Order").

- 3.2. The Regulated Activities Order specifies regulated activities for the purposes of the Financial Services and Markets Act 2000 (“the Act”).
- 3.3. The following activities will become **regulated activities** with effect from either 31 October 2004 or 14 January 2005:
- activities involving regulated mortgage contracts (entering as lender, arranging, advising on, and administering regulated mortgage contracts)¹; and
 - insurance mediation activities (dealing as agent in contracts of insurance, arranging deals in contracts of insurance, assisting in the performance and administration of a contract of insurance and advising on the merits of buying or selling a contract of insurance)².
- 3.4. Section 49(2) of the Act requires the FSA to consult other EEA competent authorities prior to giving or varying a permission in respect of a person who is connected with an EEA firm.
- 3.5. Article 20(3) of the Insurance Mediation Order disapplied section 49(2) of the Act to the extent that the permission in question related to an insurance mediation activity. Article 20(3) was due to be commenced on 14 January 2005 (except in relation to contracts of long-term care insurance, where it was due to be commenced on 31 October 2004).
- 3.6. Article 3 of this Order adds Article 97 to the Regulated Activities Order in order to make similar supplemental provision disapplying section 49(2) of the Act in respect of activities involving regulated mortgage contracts and revokes and re-enacts the disapplication of section 49(2) to the extent that the permission in question relates to an insurance mediation activity.

4. Matters of special interest to the Joint Committee on Statutory Instruments

Amendment of S.I. 2003/1476

- 4.1. In so far as it revokes and re-enacts paragraph (3) of Article 20 of S.I. 2003/1476, the Order simply reproduces the effect of that paragraph. However, by virtue of article 1 of the Order, the commencement date is effectively brought forward.

¹ Articles 25A, 53A, 61-63, 88 and 90-91 of S.I. 2001/544. Articles 61-63, 88 and 90-91 were due to commence on such date specified by the Treasury in the London, Belfast and Edinburgh Gazettes. The Treasury has specified that these provisions will commence on 31 October 2004, in line with the commencement date for Articles 25A and 53A (see articles 1(3) and S.I. 2003/1475).

² Articles 14, 21, 25(1), (2), 39A, 53 and 64 of S.I. 2001/544.

- 4.2. Under S.I. 2003/1476, paragraph (3) of article 20 was due to be commenced on the same day that insurance mediation activities become regulated activities for the purposes of the Act (i.e. either 14 January 2005 or 31 October 2004).
- 4.3. Under the Order, the disapplication of section 49(2) is commenced 21 days after laying the Order before Parliament. This is to enable the FSA to grant permission in the very near future without having regard to the consultation obligations in section 49(2). Even though most permissions will not take effect until 14 January 2005, the FSA is required to determine certain applications for permission before that date (Article 23(4) S.I. 2003/1476).

Amendment of S.I 2003/1475

- 4.4. In so far as they extend the disapplication of section 49(2) of the Act to activities involving regulated mortgage contracts, HM Treasury rely on the same powers as for article 20 of S.I. 2003/1476, namely sections 22 and 483 and Schedule 2, paragraph 25 of the Act.
- 4.5. Exercising the power under Schedule 2, paragraph 25(1)(f), an order under section 22(1) may "...make such consequential, transitional or supplemental provision as the Treasury consider appropriate for purposes of, or connected with, [any provision of, or made under, section 22 or Schedule 2]. Sub-paragraph (2) of paragraph 25 clearly anticipates that it might be necessary to amend the Act itself when specifying new regulated activities.
- 4.6. The disapplication of the consultation requirement in section 49(2) of the Act, is an amendment which is connected with those provisions of the Regulated Activities Order which specify that activities involving regulated mortgages contracts and insurance mediation activities are regulated activities for the purpose of the Act.³
- 4.7. This disapplication of section 49(2) is considered an appropriate supplemental provision in that it disapplies a provision of the Act which was primarily intended to give effect to obligations in EC directives. There being no EC law requirement to consult other EEA regulators in respect of applications for permission to carry out activities involving regulated mortgage contracts or insurance

³ See footnotes 2 and 3 above.

*This Explanatory Memorandum refers to the
Financial Services and Markets Act 2000 (Regulated Activities) Amendment Order 2004*
mediation activities, there is no reason why this consultation
obligation should extend to them.

4.8. Moreover, the scale of consultation which would be required is unprecedented and unnecessarily burdensome for the FSA, economic operators and other EEA regulators.

5. Extent

5.1. This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1. In the view of the Financial Secretary to the Treasury, Ruth Kelly, the provisions of this Order are compatible with the European Convention on Human Rights.

7. Policy background

7.1. Section 49(2) of the Act was primarily intended to give effect to consultation obligations in a number of EC directives relating to financial services. During the passage of the Act, the then Financial Secretary, Stephen Timms MP, stated:⁴

7.2. "The requirements...for the FSA to consult other EEA authorities are explicitly specified in the directives...We have strictly limited explicit references [to requirements for FSA consultation] to the requirements that the directives specify."

7.3. However, whilst there are directive obligations requiring the UK to adopt such provisions in respect of applications for fresh authorisations by certain types of connected person, the directives do not apply to cancellations or to many types of variations of permission and they do not apply to all types of regulated activities under FSMA. In particular, the directives' consultation obligations do not apply in respect of mortgage business or insurance mediation activities.

7.4. If we did not disapply section 49(2), the practical implications of the consultation requirement would substantially altered, imposing

⁴ House of Commons Standing Committee 21 October 1999

a far greater burden on the FSA and other competent EEA authorities than is the case today.

- 7.5. This is demonstrated by comparing the level of consultation obligations triggered by section 49(2) FSMA at present in respect of all regulated activities with those estimated in respect of regulated mortgage contracts.
- 7.6. There are currently estimated to be a few hundred consultations required annually under section 49(2)⁵, whereas it is estimated that this figure would double if the requirement applied to mortgage firms which have connections with EEA firms.
- 7.7. In the short term, it is estimated that there are over 1,000 mortgage firms connected with EEA firms, now seeking permission to carry out activities involving regulated mortgage contracts. This could give rise to several thousand consultations prior to 31 October 2004 (since more than one competent EEA authority may be involved).
- 7.8. Removing these section 49 (2) obligations on the FSA in relation to firms applying for permission to carry on mortgage business considerably reduces the administrative burden on the FSA.
- 7.9. Section 49(2) has already been disapplied on similar grounds in respect of applications for permission to carry out insurance mediation activities. There are no EC law requirements to consult other EEA competent authorities in respect of such applications and the effect of such extended consultation requirements on the FSA and other EEA regulators was considered unnecessarily burdensome. (It is estimated that there are an even greater number of insurance intermediaries connected with EEA firms and that the section 49(2) requirement would have given rise to thousands of consultations, which were unnecessarily burdensome).

8. Impact

- 8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies

9. Contact

⁵ This is based on an annual figure of roughly 1500 new or varied permissions during 2002/3.

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Financial Services and Markets Act 2000 (Regulated Activities) Amendment Order 2004*

Peter McDermott at HM Treasury [tel: 020 7270 5780 or e-mail: peter.mcdermott@hm-treasury.x.gsi.gov.uk] can answer any queries regarding the instrument.