

2007 No. 763

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Markets in
Financial Instruments) (Amendment) Regulations 2007**

Made - - - - *8th March 2007*

Laid before Parliament *9th March 2007*

Coming into force in accordance with regulation 1(2)

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;

The Treasury make regulation 7 in exercise of the powers conferred on them by sections 39(1), 417(1)(c) and 428(3) of the Financial Services and Markets Act 2000^(d);

The Treasury make regulation 8 in exercise of the powers conferred on them by paragraph 22 of Schedule 3 to, and section 428(3) of, that Act;

The Treasury make regulation 9 in exercise of the powers conferred on them by sections 349(1), (2) and (3), 417(1)(e) and 428(3) of that Act;

The Treasury make the remainder of these Regulations in exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Amendment) Regulations 2007.

(2) These Regulations come into force—

(a) on 1st April 2007—

(a) S.I. 1993/2661.

(b) 1972 c.68; section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51). 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, OJ No L 1, 3.11.1994, p. 3) and the Protocol adjusting that Agreement signed at Brussels on 17th March 1993 (Cm 2183, OJ No L 1, 3.1.1994, p. 572). 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) See the definition of “prescribed”.

(d) 2000 c. 8.

(e) See the definition of “prescribed”.

- (i) for the purposes of enabling notices to be given in accordance with regulation 9A(3)(b) of the principal regulations (inserted by regulation 3) and enabling the Authority to give directions in accordance with that regulation as to the form of such notices,
- (ii) for the purposes of enabling notice to be given under regulation 9B(2), 9C(2) or 9D(2) of the principal regulations (inserted by regulation 4),
- (iii) for the purposes of regulation 9; and
- (b) for all other purposes, on 1st November 2007.

(3) In these Regulations, “the principal regulations” means the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007(a).

Exempt investment firms

2.—(1) In regulation 2 of the principal regulations (interpretation) after the definition of “Part IV permission” insert—

““regulated activity” has the meaning given in section 22 of the Act;”.

(2) In Part 2 of the principal regulations (Part IV permission: investment firms)—

- (a) immediately before regulation 4, insert the heading—

“General restriction on giving Part IV permission”;

- (b) after regulation 4 insert—

“Applications to be an exempt investment firm

4A.—(1) A person may apply in accordance with section 40 of the Act for a Part IV permission to carry on regulated activities as an exempt investment firm.

(2) An authorised person may become entitled to carry on regulated activities as an exempt investment firm only by applying for a variation of his Part IV permission in accordance with section 44 of the Act.

(3) For the purposes of this regulation, and regulations 4B and 4C, “exempt investment firm” means an authorised person who—

- (a) is an investment firm within the meaning given in Article 4.1.1 of the markets in financial instruments directive, and
- (b) has a Part IV permission,

but to whom Title II of the markets in financial instruments directive does not apply.

(4) A person may only apply for a Part IV permission as mentioned in paragraph (1), and an authorised person may only apply for a variation of his Part IV permission as mentioned in paragraph (2), if the person or authorised person has his relevant office in the United Kingdom.

(5) In paragraph (4) “relevant office” means—

- (a) in relation to a body corporate, its registered office or, if it has no registered office, its head office, and
- (b) in relation to a person or authorised person other than a body corporate, the person’s head office.

Limitation on exempt investment firms

4B. An exempt investment firm has no entitlement—

(a) S.I. 2007/126.

- (a) to establish a branch by making use of the procedures in paragraph 19 of Schedule 3, or
- (b) to provide any service by making use of the procedures in paragraph 20 of Schedule 3,

in a case where the entitlement of the firm to do so would, but for this regulation, derive from the markets in financial instruments directive.

Requirements to be applied to exempt investment firms

4C.—(1) If the Authority—

- (a) gives to a person who has applied as mentioned in regulation 4A(1) a Part IV permission to carry on regulated activities as an exempt investment firm, or
- (b) varies the Part IV permission of an authorised person who has applied as mentioned in regulation 4A(2) for a variation to permit him to carry on regulated activities as an exempt investment firm,

the requirements specified in paragraph (3) (“the specified requirements”) shall be treated as being included in the permission by the Authority under section 43 of the Act.

(2) Notwithstanding paragraph (1)—

- (a) the inclusion of the specified requirements in the Part IV permission does not—
 - (i) amount, for the purpose of section 52(6) of the Act, to a proposal to exercise the power of the Authority under section 43(1) of the Act,
 - (ii) amount, for the purpose of section 52(9) of the Act, to a decision to exercise the power of the Authority under section 43(1) of the Act, or
 - (iii) entitle the person to refer a matter under section 55(1) of the Act;
- (b) the specified requirements shall not expire until the person ceases to be an exempt investment firm and, accordingly, section 43(5) shall not be treated as requiring the Authority to specify a period at the end of which they expire; and
- (c) no application under section 44 of the Act to vary the permission by cancelling or varying any of the specified requirements may be made by the person unless he informs the Authority when making the application that he wishes to cease to be an exempt investment firm.

(3) The requirements are that the person—

- (a) does not hold clients’ funds or securities and does not, for that reason, at any time, place himself in debt with his clients;
- (b) does not provide any investment service other than—
 - (i) the reception and transmission of orders in transferable securities and units in collective investment undertakings, and
 - (ii) the provision of investment advice in relation to the financial instruments mentioned in paragraph (i);
- (c) in the course of providing the investment services mentioned in sub-paragraph (b), transmits orders only to—
 - (i) investment firms authorised in accordance with the markets in financial instruments directive,
 - (ii) credit institutions authorised in accordance with the banking consolidation directive,
 - (iii) branches of investment firms or of credit institutions which are authorised in a third country and which are subject to and comply with prudential rules considered by the Authority to be at least as stringent as those laid down in the markets in financial instruments directive, the banking consolidation directive or Directive 2006/49/EC of the European Parliament and of the Council of 14

June 2006 on the capital adequacy of investment firms and credit institutions(a),

- (iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings,
- (v) investment companies with fixed capital, as defined in Article 15(4) of Second Council Directive 77/91/EEC of 13 December 1976 on the coordination of safeguards required of public companies in respect of their formation and the maintenance and alteration of their capital(b), the securities of which are listed or dealt in on a regulated market in a Member State.

(4) In paragraph (3)—

- (a) terms and expressions defined in Article 4 of the markets in financial instruments directive and used in the paragraph have the meanings given in that Article;
- (b) “the banking consolidation directive” means Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions(c);
- (c) other terms and expressions used both in the paragraph and in Article 3 of or Annex 1 to the markets in financial instruments directive have the same meanings in the paragraph as in that Article or Annex; and
- (d) “Member State”, in sub-paragraph (c)(iv), includes an EEA State that is not a Member State.”.

(3) In regulation 10 of the principal regulations (interpretation of Part 3) omit the definitions of “regulated activity” and “Schedule 3”.

Transitional provision in relation to exempt investment firms

3. In Part 3 of the principal regulations (transitional and saving provisions), after regulation 9, insert—

“Transitional provision: exempt investment firms

9A.—(1) Except where paragraph (3) applies, an authorised person who immediately before 1st November 2007—

- (a) is an investment firm within the meaning given in Article 4.1.1 of the markets in financial instruments directive,
- (b) has his relevant office in the United Kingdom, and
- (c) fulfils all the requirements set out in regulation 4C(3),

becomes an exempt investment firm with effect from that day as if he had applied as mentioned in regulation 4A(2) for a variation of his Part IV permission to permit him to carry on regulated activities as an exempt investment firm and the Authority had so varied the permission on that day.

(2) In paragraph (1) “relevant office” has the meaning given in regulation 4A(5).

(3) This paragraph applies—

- (a) to an authorised person having a Part IV permission that, immediately before 1st November 2007—
 - (i) includes no requirement having the effect of prohibiting the person from holding clients’ funds, or

(a) OJ No L 177, 30.6.2006, p. 210.

(b) OJ No L 26, 30.1.77, p. 1.

(c) OJ No L 177, 30.6.2006, p. 1.

- (ii) permits the person, in connection with the carrying on of regulated activities comprising any investment services and activities (excluding activities to which, by virtue of Article 2, the markets in financial instruments directive does not apply), to carry on the activity consisting of both the safeguarding of assets belonging to another and the administration of those assets; and
 - (b) to an authorised person who, before 1st November 2007, gives the Authority notice, in such form as the Authority may direct, that he does not wish to become an exempt investment firm.
- (4) In paragraph (3)—
- (a) “clients’ funds”, in sub-paragraph (a)(i), has the same meaning as in Article 3 of the markets in financial instruments directive, and
 - (b) sub-paragraph (a)(ii) is to be construed in accordance with section 22 of the Act, any relevant order made under that section and Schedule 2 to the Act.
- (5) The variation of a person’s Part IV permission effected by paragraph (1) does not amount to the grant of an application for variation of a Part IV permission for the purpose of section 52(4) of the Act or to the determination of an application under Part IV for the purpose of section 55(1) of the Act.”.

Transitional provision in relation to Part IV permissions

4. In Part 3 of the principal regulations, after regulation 9A (inserted by regulation 3), insert—

“Transitional provision: operators of alternative trading systems

9B.—(1) Any person who immediately before 1st November 2007—

- (a) had a Part IV permission to carry on an activity of the kind specified by article 14, 21 or 25 of the principal Order in relation to an investment of a particular kind; and
- (b) operated an alternative trading system (within the meaning of the Alternative Trading Systems Instrument 2003 (2003/45) made by the Authority under the Act on 19th June 2003),

is, subject to regulation 9C, from 1st November 2007 to be treated as having a Part IV permission to carry on the kind of activity specified by article 25D of the principal Order (inserted by the 2006 Order) in relation to an investment of the same kind which is a financial instrument.

(2) Where the person concerned gave written notice to the Authority on or before 1st October 2007 to that effect, paragraph (1) shall not apply to him.

Transitional provision for investment firms and credit institutions in relation to options, futures and contracts for differences

9C.—(1) Any person who immediately before 1st November 2007—

- (a) was an investment firm or a credit institution (in each case within the meaning of the principal Order as amended by the 2006 Order); and
- (b) had a Part IV permission to carry on an activity of the kind specified by article 14, 21, 25, 37 or 53 of the principal Order in relation to an investment specified in the first column in the table in Schedule 8,

is from 1st November 2007 also to be treated as having a Part IV permission to carry on that kind of activity in relation to an investment specified in the second column of the table opposite that investment (in so far as he does not already have such permission).

(2) Where the person concerned gave written notice to the Authority on or before 1st October 2007 to that effect, paragraph (1) shall not apply to him.

Transitional provision for management companies in relation to options, futures and contracts for differences

9D.—(1) Any person who immediately before 1st November 2007—

- (a) was a management company (within the meaning of the principal Order as amended by the 2006 Order);
- (b) was providing, in accordance with Article 5.3 of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities^(a), the investment service specified in paragraph 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; and
- (c) had a Part IV permission to carry on an activity of the kind specified by article 14, 21, 25, 37, 40 or 53 of the principal Order in relation to an investment specified in the first column in the table in Schedule 8,

is from 1st November 2007 also to be treated as having a Part IV permission to carry on that kind of activity in relation to an investment specified in the second column of the table opposite that investment (in so far as he does not already have such permission).

(2) Where the person concerned gave written notice to the Authority on or before 1st October 2007 to that effect, paragraph (1) shall not apply to him.”.

5. In regulation 10 of the principal regulations, before the definition of “ancillary service” insert—

““the principal Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001^(b);

“the 2006 Order” means the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006^(c).”.

6. After Schedule 7 to the principal regulations, insert—

“SCHEDULE 8

Regulations 9C and 9D

TRANSITIONAL PROVISION FOR PART IV PERMISSIONS

TABLE

<i>Investment in relation to which the person has Part IV permission immediately before 1st November 2007</i>	<i>Additional investments to which the person’s Part IV permission is extended from 1st November 2007</i>
Option (excluding commodity options and options on a commodity future) within the meaning of the General Provisions and Glossary Instrument 2001 (2001/7) made by the Authority under the Act on 21st June 2001 (“the 2001 Instrument”) as amended by the Handbook Administration (No 3) Instrument 2006 (2006/21) made by the Authority under the Act on 22nd June 2006 and the CRD (Consequential Amendments) Instrument 2006 (2006/53) made by the Authority under the Act on 23rd November 2006	Those options within the meaning of the 2001 Instrument as last amended by the Glossary (MIFID) Instrument 2007 (2007/1) made by the Authority under the Act on 25th January 2007 (“the 2007 Instrument”) which are options falling within paragraph 10 of Section C of Annex I to the markets in financial instruments directive (“Section C”)

(a) OJ No L 375, 31.12.1985, p. 3.

(b) S.I. 2001/544.

(c) S.I. 2006/3384.

Commodity option within the meaning of the 2001 Instrument ⁽¹⁾	Those commodity options within the meaning of the 2001 Instrument as last amended by the 2007 Instrument which are options falling within paragraphs 4, 5, 6 and 7 of Section C
Option on a commodity future within the meaning of the 2001 Instrument	Those options on a commodity future within the meaning of the 2001 Instrument as last amended by the 2007 Instrument which are options falling within paragraphs 4, 5, 6 and 7 of Section C
Future (excluding commodity futures and rolling spot forex contracts ⁽²⁾) within the meaning of the 2001 Instrument	Those futures ⁽³⁾ (excluding commodity futures and rolling spot forex contracts) which are futures falling within paragraph 10 of Section C
Commodity future within the meaning of the 2001 Instrument	Those commodity futures within the meaning of the 2001 Instrument as last amended by the 2007 Instrument which are futures falling within paragraphs 5, 6 and 7 of Section C
Contract for differences (excluding spread bets ⁽⁴⁾ and rolling spot forex contracts) within the meaning of the 2001 Instrument	Those contracts for differences (excluding spread bets and rolling spot forex contracts) within the meaning of the 2001 Instrument as last amended by the 2007 Instrument which are derivative instruments for the transfer of credit risk falling within paragraph 8 of Section C

⁽¹⁾ “Commodity” is amended by the CRD (Consequential Amendments) Instrument 2006 and the Handbook Administration (No 4) Instrument 2006 (2006/64) made by the Authority under the Act on 21st December 2006.

⁽²⁾ “Rolling spot forex contract” is defined in the 2001 Instrument.

⁽³⁾ The definition of “future” in the 2001 Instrument is from 1st November 2007 affected by the amendment made to article 84 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) by article 27 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006 (S.I. 2006/3384).

⁽⁴⁾ “Spread bet” is defined in the 2001 Instrument.”.

Amendment of the Appointed Representatives Regulations

7. In the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001(a), after regulation 3 insert—

“Transitional provision in relation to contracts

4. Regulation 3(6) does not apply in relation to a contract made on or before 31st October 2007.”.

Amendment of the EEA Passport Rights Regulations

8. In regulation 1(2) of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001(b), in paragraph (a) of the definition of “UK investment firm”, after “investment firm” insert “(within the meaning of section 424A of the Act)”.

Amendment of the Disclosure of Confidential Information Amendment Regulations

9. In regulation 1(2) of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) (Amendment) Regulations 2006(c)—

(a) S.I. 2001/1217, amended by S.I. 2006/3414.

(b) S.I. 2001/2511, amended by S.I. 2006/3385; there are other amendments but none is relevant.

(c) S.I. 2006/3413.

- (a) at the end of sub-paragraph (a) omit “and”;
- (b) after sub-paragraph (a) insert—
 - “(aa) for the purposes of regulation 6(a) on 1st April 2007; and”.

8th March 2007

Frank Roy
Claire Ward
Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which amend the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126) (“the principal regulations”), the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (S.I. 2001/1217), the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001 (S.I. 2001/2511) and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) (Amendment) Regulations 2006 (S.I. 2006/3413), implement in part Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ No L 145, 30.4.2004, p.1) (“the Directive”). The Directive is also implemented by other statutory instruments including the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006 (S.I. 2006/3384) (“the 2006 Order”) and by the Financial Services Authority (“the FSA”) using powers under the Financial Services and Markets Act 2000 (c. 8) (“the Act”).

Regulations 2 and 3 implement Article 3 of the Directive which allows Member States to exempt certain investment firms from the requirements of the Directive provided that they (1) are not allowed the freedoms which investment firms subject to the Directive have to provide investment services in and establish branches in other Member States, and (2) comply with specified requirements limiting the scope of their activities (“the limiting requirements”). The Regulations achieve this by inserting new provisions into the principal regulations. In particular, new regulation 4A(3) defines the expression “exempt investment firm”, new regulation 4B ensures that exempt investment firms do not have the freedoms mentioned and new regulation 4C applies the limiting requirements to exempt investment firms as if they were requirements imposed by the FSA under the Act.

The regulation 2 and 3 amendments come into force for all purposes on 1 November 2007 and a transitional provision, in regulation 9A, provides that an authorised investment firm complying with the limiting requirements immediately before that date automatically becomes an exempt investment firm on that date unless its FSA permission under Part 4 of the Act permits it to carry on certain activities or it has previously given the FSA notice that it does not wish to become an exempt investment firm. The amendments come into force on 1 April 2007 for the purposes of giving such notice.

Regulations 4 to 6 contain transitional provision consequential on the amendment of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (“the RAO”) by the 2006 Order to make operating a multilateral trading facility a separate specified activity and to extend the specified investments of options, futures and contracts for differences as required by the Directive. The transitional provisions extend the permissions under Part 4 of the Act of authorised persons who are investment firms, credit institutions or UCITS management companies, without the need for the person to make an application or for the FSA to amend the permission. Permissions are only extended where immediately before 1st November 2007 the authorised person has permission under Part 4 of the Act to carry on an approximately equivalent regulated activity or where immediately before 1st November 2007 the authorised person has a permission under Part 4 of the Act in relation to an approximately equivalent kind of investment. The transitional provisions are framed by reference to the categories used by the FSA for permissions under Part 4 of the Act. These categories use terms defined in FSA rules under the Act by reference to the RAO.

Regulation 7, which amends the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, contain transitional provision in relation to the contracts of appointed representatives of principals who are investment firms or credit institutions. Regulations 8 and 9 make corrections to the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001 and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) (Amendment) Regulations 2006.

A transposition note has been prepared which sets out how the main elements of the Directive will be transposed into UK law. A Regulatory Impact Assessment of the effect of this instrument and the other instruments transposing the Directive on the costs of business has been prepared. Both may be obtained from the Financial Services Strategy Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. They are also available on HM Treasury's website (www.hm-treasury.gov.uk). Copies of both documents have been placed in the libraries of both Houses of Parliament.

2007 No. 763

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Markets in
Financial Instruments) (Amendment) Regulations 2007

£3.00

© Crown copyright 2007

Printed and published in the UK by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of Her Majesty's
Stationery Office and Queen's Printer of Acts of Parliament.

E0383 3/2007 170383T 19585