

**EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED
ACTIVITIES) (AMENDMENT) ORDER 2011**

2011 No. 133

1. This explanatory memorandum has been prepared by the Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the Regulated Activities Order”) to reverse certain inadvertent changes to the Regulated Activities Order made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2010 (“the Amending Order”).

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

3.1 None

4. Legislative Context

4.1 Part 3 of the Regulated Activities Order sets out the types of investments that are “specified investments” for the purposes of section 22 of the Financial Services and Markets Act 2000 (“FSMA”). Section 22 of FSMA provides that an activity is a regulated activity for the purposes of that Act if it is an activity of a specified kind which is carried on by way of business and, *inter alia*, relates to an investment of a specified kind.

4.2 Article 2(3) of the Amending Order inserted a new article 77A into Part 3 of the Regulated Activities Order with the effect that Alternative Finance Investment Bonds (“AFIBs”) became a kind of specified investment for the purposes of section 22 of FSMA. Article 77A sets out the criteria that an instrument must fulfil in order to constitute an AFIB.

4.3 Article 2(2)(a) of the Amending Order and the wording of the new article 77A(1) had the unintended effect of making article 77 of the Regulated Activities Order subject to article 77A. Article 2(2)(b) had the unintended effect of creating uncertainty over the classification under the Regulated Activities Order of certain instruments by removing them from within the ambit of article 77.

4.4 Articles 2(2) and 2(3) of this Order amend articles 77 and 77A of the Regulated Activities Order so that article 77 is no longer subject to article 77A. Article 2(2) also revokes article 77(2)(e) so that instruments are not unintentionally removed from within the ambit of article 77.

4.5 Article 3 makes parallel amendments to the Financial Services and Markets Act (Financial Promotion) Order 2005 (“Financial Promotion Order”) which uses the same criteria as articles 77 and 77A to define certain instruments as controlled investments for the purposes of the Financial Promotion Order.

4.6 Article 4 provides that the amendments made by this Order will apply to all instruments, including existing instruments, and so ensures that from the date this Order comes into force instruments are not affected by the unintended consequences of the Amending Order.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 AFIBs are a form of alternative financial instrument structured to have similar economic characteristics to conventional debt securities. They include but are not limited to sukuk. The Amending Order, which came into force on 24 February 2010, sought to introduce clarity and create a level playing field between comparable instruments. The aim was to reduce compliance and legal costs for AFIBs and thus facilitate their issuance in the UK.

7.2 By removing certain instruments from the ambit of article 77 of the Regulated Activities Order, the Amending Order unintentionally had a number of potential adverse consequences for the tax, regulatory and insolvency treatment of these types of debt securities. This Order is intended to restore the legal position in respect of the potentially affected debt securities from the date that this Order comes into force and will rectify the potential problem for the future.

- *Consolidation*

7.3 This Order amends only the Regulated Activities Order and the Financial Promotion Order. Since the amendments are so limited in scope, consolidation of the acts or orders is not merited.

8. Consultation outcome

8.1 This Order merely reinstates the intended legal status quo and, accordingly, the effects of this Order are in line with the general views of respondents to the consultations which preceded the Amending Order. These consisted of a 12-week consultation following the publication of a consultation paper with draft legislation,

and a further one month for additional comments following publication of a detailed review of the responses and revised draft legislation.

9. Guidance

9.1 The Treasury has not produced guidance for this legislative change.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 If it emerges that there are further unintended consequences of this Order or the Amending Order, which are not anticipated, we will review these developments and consider whether any additional legislative action is required. Any issues arising from the classification and treatment of the potentially affected debt securities during the period from 24 February 2010 (the date on which the Amending Order came into force) and the date on which this Order comes into force would have to be addressed by retrospective primary legislation.

13. Contact

Richard Caine at HM Treasury, Tel: 020 7270 5772 or email: richard.caine@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.