

2017 No. 1255

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Markets in
Financial Instruments) (No.2) Regulations 2017**

Made - - - - *12th December 2017*

Laid before Parliament *13th December 2017*

Coming into force in accordance with regulation 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 financial services.

The Treasury, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and sections 22(1) and (5), and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000(c), make the following Regulations.

Citation and commencement

1. These Regulations may be cited as the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (No.2) Regulations 2017.

2. These Regulations come into force as follows—

- (a) regulations 10 to 38 come into force on 2nd January 2018; and
- (b) the remaining provisions of these Regulations come into force on 3rd January 2018.

Financial Services and Markets Act 2000

3.—(1) The Financial Services and Markets Act 2000 is amended as follows.

(2) In section 129(d) (power of court to impose administrative sanctions in cases of market abuse)—

- (a) in the opening words of subsection (1) for the words “sections 380 to 383 which relates to a market abuse requirement” substitute “Part 25 which relates to the market abuse regulation”;
- (b) in subsection (7) omit the definition of “market abuse requirement”; and

(a) S.I. 2012/1759.

(b) 1972 c.68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c. 7). By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) of the European Communities Act 1972 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 1993 (Cm 2183).

(c) 2000 c.8.

(d) Section 129 was substituted by S.I. 2016/680.

- (c) after subsection (7) insert—
 - “(8) An application under Part 25 relates to the market abuse regulation if—
 - (a) it is made under section 380 or 382 and the relevant requirement for the purposes of that section is a requirement imposed by the market abuse regulation or a supplementary EU regulation; or
 - (b) it is made under section 381 or 383.”.
- (3) In section 165A(9)(b) for “4.1(17)” substitute “4.1(15)”.
- (4) For section 168(4)(jb)(a) (appointment of persons to carry out investigations in particular cases) substitute—
 - “(jb)a person may have contravened—
 - (i) any provision made by or under this Act for the purposes of the market abuse regulation; or
 - (ii) a requirement imposed on that person under sections 122A to 122C, 122G to 122I, 123A or 123B;
 - (jc) a person may have been knowingly concerned in the contravention of—
 - (i) a provision of the market abuse regulation other than Article 14 (prohibition of insider dealing) or 15 (prohibition of market manipulation) of that regulation; or
 - (ii) a directly applicable EU regulation made under the market abuse regulation; or”.

Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

- 4.—(1) The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(b) is amended as follows.
- (2) In article 54(1)(b)(i)(c) (advice given in newspapers etc) after “securities” insert “, structured deposits,”.
- (3) After article 72I(d) (registered consumer buy-to-let mortgage firms) insert—

“Persons seeking to use the exemption under Article 2.1(j) of the markets in financial instruments directive

- 72J.**—(1) An activity which falls within Article 2.1(j)(i) or (ii) (exemptions) of the markets in financial instruments directive (“an Article 2.1(j) activity”) is excluded from the activities specified by articles 14, 21 and 25 if during a calendar year the person carrying on the activity—
 - (a) cannot perform the market threshold calculation to establish if the Article 2.1(j) activity falls within the exemption under Article 2.1(j) of the markets in financial instruments directive because the relevant data is not publicly available from an official source;
 - (b) carries on the Article 2.1(j) activity during a period of 8 weeks beginning with the day after the day on which the relevant data is made publicly available from an official source; or
 - (c) has made an application to the appropriate regulator for a Part 4A permission to carry on a regulated activity specified by articles 14, 21 and 25 which constitutes the Article 2.1(j) activity and the application has not been determined or withdrawn.

(a) Paragraph (jb) was inserted by S.I. 2016/680.

(b) S.I. 2001/544.

(c) Article 54(1)(b)(i) was substituted by S.I. 2003/1475 and amended by S.I. 2003/1476.

(d) Article 72I was inserted by S.I. 2015/910; there are amendments which are not relevant to these Regulations.

(2) The exclusion in paragraph (1) does not apply to an Article 2.1(j) activity carried on by a person who is an authorised person in relation to an activity which constitutes the Article 2.1(j) activity.

(3) In this paragraph—

“market threshold calculation” means the calculation of the size of trading activities referred to in Article 2 of the delegated regulation that must be carried out annually in the first quarter of a calendar year under the procedure set out in Article 4 (procedure for calculation) of that delegated regulation;

“official source” means an EU institution or a regulator;

“relevant data” means any data or other information that enables a calculation to be made of the overall market trading activity in an asset class under the procedure in Article 2.3 (overall market threshold) of the delegated regulation;

“the appropriate regulator” in relation to an application for a Part 4A permission means the appropriate regulator in relation to that application for the purposes of section 55A(a) (application for permission) of the Act; and

“the delegated regulation” means Commission Delegated Regulation (EU) 2017/592 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and the Council with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business (b).”.

Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001

5. Omit paragraph 7C(4)(c) of Schedule to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001(d).

Occupational Pension Schemes (Investment) Regulations (Northern Ireland) 2005

6. In regulation 4(11) (investment by trustees) of the Occupational Pension Schemes (Investment) Regulations (Northern Ireland) 2005(e)—

(a) in the definition of “derivative instrument” for “Directive 2004/39/EC” substitute “Directive 2014/65/EU(f)”; and

(b) in paragraph (b) of the definition of “regulated market” for “Directive 2004/39/EC” substitute “Directive 2014/65/EU”.

Companies Act 2006

7.—(1) The Companies Act 2006(g) is amended as follows.

(2) In section 474(1)(h) in the definition of “MiFID investment firm” —

(a) for sub-paragraph (b) substitute—

“(b) a company which is an exempt investment firm as defined by regulation 8 (meaning of “exempt investment firm”) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017(S.I. 2017/701);”;

(b) in paragraph (c) for “4C(3)” substitute “6(3)”.

(a) Section 55A was inserted by section 11(2) of the Financial Services Act 2012 (c. 21).

(b) OJ L87, 31.3.2017, p. 492.

(c) Paragraph 7C(4) was inserted by S.I. 2006/3386.

(d) S.I. 2001/995.

(e) S.R. 2005 No. 569.

(f) OJ L173, 12.06.2014, p.349. The Directive was amended by Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 (OJ L257, 28.8.2014, p.1) and Directive (EU) 2016 of the European Parliament and of the Council of 23 June 2016 (OJ L175, 30.6.2016, p.8).

(g) 2006 c.46.

(h) Section 474(1) was amended by S.I. 2007/2932; there are other amendments but none is relevant.

Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations (Northern Ireland) 2010

8. In regulation 35(2)(a) of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations (Northern Ireland) 2010(b) in paragraph (b) of the definition of “competent authority” for “Article 4(22) of Directive 2004/39/EC” substitute “Article 4(26) of Directive 2014/65/EU”.

Recognised Auction Platform Regulations 2011

9. In paragraph 11(c) of Schedule 1 (modifications of the Act for the purposes of Articles 37 to 43 of the emission allowance auctioning regulation) of the Recognised Auction Platform Regulations 2011(d)—

- (a) for paragraph (a) substitute—
 - “(a) in subsection (1) the reference to the market abuse regulation were to the emission allowance market abuse regime;”;
- (b) omit paragraph (c)(ii); and
- (c) after paragraph (c) insert –
 - “; and
- (d) for subsection (8) there were substituted—
 - “(8) An application under Part 25 relates to the emission allowance market abuse regime if —
 - (a) it is made under section 380 or 382 and the relevant requirement for the purposes of that section is a requirement imposed by the emission allowance market abuse regime; or
 - (b) it is made under section 381 or 383.”

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017

10. In article 16 (transitional provision: structured deposits) of the Financial Services and Markets Act (Regulated Activities) (Amendment) Order 2017(e)—

- (a) in paragraph (1)(a) for “3rd January 2018” substitute “1st April 2018”; and
- (b) after paragraph (2) insert—
 - “(2A) Notwithstanding article 15, paragraph (2B) applies where—
 - (a) an EEA firm gives notice to the appropriate regulator before 1st April 2018, in such form as the appropriate regulator directs, that the EEA firm wishes to carry on a permitted activity in relation to structured deposits;
 - (b) the appropriate regulator acknowledges receipt of the notice in writing; and
 - (c) the EEA firm—
 - (i) immediately before 3rd January 2018 had permission under paragraph 15 of Schedule 3 (EEA passport rights) to the Act to carry on the permitted activity to which the notice under sub-paragraph (a) relates;
 - (ii) the EEA firm’s permission under paragraph 15 of Schedule 3 to the Act does not permit it to carry on the permitted activity in relation to structured deposits after 3rd January 2018; and

(a) Regulation 35(2) was substituted by S.R. 2012 No.237.
(b) S.R. 2010 No. 122.
(c) Paragraph 11 was substituted by S.I. 2016/680.
(d) S.I. 2011/2699.
(e) S.I. 2017/488.

- (iii) the EEA firm is not, or would not be, otherwise entitled to carry on the permitted activity in exercise of an EEA right, whether through a United Kingdom branch or by providing services in the United Kingdom.

(2B) The EEA firm is to be treated, from 3rd January 2018 (or the date of acknowledgement of receipt, if later), as having a Part 4A permission to carry on any permitted activity to which the notice under paragraph (2A)(a) relates in relation to structured deposits.”.

Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017

11. The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017(a) are amended as follows.

12. In regulation 2(1) (interpretation) at the appropriate place insert—

““regulated market” has the meaning given by article 4.1.21 of the markets in financial instruments directive;”.

13. In the closing words of regulation 5 (limitation on exempt investment firms) for “paragraph” substitute “regulation”.

14. In regulation 6 (requirements applying to exempt investment firms)—

(a) for paragraph (3)(c)(iii) substitute—

“(iii) a branch of an investment firm or of a credit institution authorised in a third country and which is subject to, and complies with, prudential rules considered by the appropriate regulator to be at least as stringent as those laid down in the markets in financial instruments directive, the capital requirements regulation, and the solvency 2 directive.”; and

(b) after paragraph (5) insert—

“(6) In this regulation—

“appropriate regulator” means the appropriate regulator for the purposes of section 55A in relation to an application under regulation 4(1);

“the capital requirements regulation” means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms(b); and

“the solvency 2 directive” means Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)(c).”.

15. In regulation 9 (third country firms with an EEA branch: provision of services)—

(a) in paragraph (3) for “(5) and (6)” substitute “(4) and (5)”;

(b) in paragraph (4) after “in which” insert “the relevant branch of”;

(c) in paragraph (5)—

(i) in the opening words after “(EEA passport rights)” insert “to the Act”;

(ii) in the opening words of sub-paragraph (a) before “branch” insert “relevant”; and

(iii) in sub-paragraph (b) before “branch’s” insert “relevant”.

(d) after paragraph (6) insert—

(a) S.I. 2017/701.

(b) OJ L176, 27.6.2013, p.1-133.

(c) OJ L335, 17.12.2009, p.1-155.

“(7) For the purposes of this regulation the relevant branch of a third country firm with an EEA branch is the branch mentioned in paragraph (b) of the definition of “third country firm with an EEA branch” in regulation 15 (interpretation).”.

16. In regulation 10 (FCA power to intervene in relation to third country firms)—

- (a) in paragraph (2) after “(procedure on exercise of power of intervention)” insert “of the Act”; and
- (b) in paragraph (3) after “(additional procedure for EEA firms in certain cases)” insert “of the Act”; and
- (c) in paragraph (4) after “Section 199” insert “of the Act”.

17. In regulation 12(1)(b)(ii) (FCA power to intervene in third country firms registered with ESMA) after “47.1” insert “of the markets in financial instruments regulation”.

18. In regulation 14(2) (third country firms: financial promotions)—

- (a) in sub-paragraph (a) after “(general provisions)” insert “of the Regulation”;
- (b) in sub-paragraph (c) for “markets in financial instruments regulation” insert “the Regulation”.

19. In regulation 15 (interpretation of Chapter 2) in the definition of “third country firm registered with ESMA”—

- (a) in sub-paragraph (a) after “Article 47.1 (equivalence decision)” substitute “Article 48 (register) of the markets in financial instruments regulation”; and
- (b) in sub-paragraph (b) after “(general provisions)” insert “of the markets in financial instruments regulation”.

20. In regulation 20(2)(b) (ESMA opinions on position limits) for “amending” substitute “modifying”.

21. In regulation 21(6) (position limits affecting multiple EEA jurisdictions) —

- (a) after the definition of “the relevant method for calculation” insert “and”;
- (b) omit “; and” after the definition of “the same commodity derivative”; and
- (c) omit the definition of “significant volumes”.

22. In regulation 22(2)(b) (cooperation with other competent authorities regarding position limits affecting multiple EEA jurisdictions) omit “subject”.

23. In regulation 25(6) (procedure in exceptional cases) after “website” omit “a notice”.

24. After paragraph 28 (FCA power to intervene) insert—

“Cooperation with ESMA and other competent authorities in respect of interventions to restrict, reduce, or limit positions

28A.—(1) The FCA must notify ESMA and all the competent authorities of the other EEA States of the details of any limitation, restriction, or requirement it imposes under regulation 28(1).

(2) The notification under paragraph (1) must include, where relevant —

- (a) the details of any requirement imposed by the FCA under regulation 27(1) or (2) (“information requirement”) that relates to the limitation, restriction or requirement imposed under regulation 28(1) including—
 - (i) the identity of the person subject to the information requirement; and
 - (ii) the FCA’s reasons for imposing the information requirement.
- (b) if the notification concerns a limitation or restriction imposed under regulation 28(1)(a) or (b)—

- (i) the person the limitation or restriction concerns;
 - (ii) the financial instrument the limitation or restriction applies to;
 - (iii) any limit under the limitation or restriction on the size of a position a person can hold at all times;
 - (iv) any exemption provided for in the limitation or restriction; and
 - (v) the FCA’s reasons for imposing the limitation or restriction.
- (c) if the notification concerns a requirement imposed under regulation 28(1)(c)—
- (i) the identity of the person subject to the requirement; and
 - (ii) the FCA’s reasons for imposing the requirement.
- (3) The FCA must make the notification under paragraph (1) not less than 24 hours before the limitation, restriction, or requirement concerned takes effect unless—
- (a) there are exceptional circumstances; and
 - (b) it is not possible for the FCA to make the notification 24 hours before the limitation, restriction, or requirement concerned takes effect.
- (4) The FCA may exercise the power under regulation 28(1) if—
- (a) the competent authority of an EEA State other than the United Kingdom notifies the FCA for the purposes of Article 79.5 (obligation to cooperate) of the markets in financial instruments directive that it has taken measures in accordance with Article 69(2)(o) or (p) of the directive; and
 - (b) the FCA is satisfied that it is necessary to exercise the power under regulation 28(1) to achieve the objective of the measures taken by that competent authority.
- (5) Where the FCA proposes to exercise its power under paragraph (4), it must notify in accordance with paragraphs (1) to (3) of this regulation.
- (6) Regulation 28(2) to (5) applies to the exercise by the FCA of its power under regulation 28(1) for the purposes of paragraph (4) as they do to the exercise by the FCA of its power under regulation 28(1) generally.”.

25. In regulation 29(2) (interpretation of Part 3) at the appropriate place insert—

““significant volumes” has the meaning given by regulatory technical standards referred to in sub-paragraph (d) of Article 57.12 of the markets in financial instruments directive and adopted by the Commission under the last paragraph of that Article.”.

26. In the opening words of regulation 30(2) (algorithmic trading) after “systems and” insert “risk”.

27. In regulation 31(provision of information to the FCA concerning algorithmic trading)—

(a) for paragraph (1) substitute—

“(1) If a member of, or participant in, a regulated market or multilateral trading facility (“M”) is subject to the requirements set out in regulation 30 the FCA may require M to provide the information specified in paragraph (2) on a regular or ad hoc basis.”; and

(b) in paragraph (2)—

(i) in sub-paragraph (c) for “systems and controls” substitute “compliance and risk controls”; and

(ii) in sub-paragraph (d) omit “and controls”.

28. In regulation 32(9) (direct electronic access)—

(a) in sub-paragraph (a) for “paragraphs (4)(a) to (c)” substitute “paragraphs (4), (5), and (7)”; and

(b) in sub-paragraph (b) for “36” substitute “33”.

29. In regulation 40 (removal of persons from management boards: procedure)—

- (a) in paragraph (4)—
 - (i) in sub-paragraph (c)(i) for “the interested party” substitute “each interested party”; and
 - (ii) in sub-paragraph (d) after “referred” omit “the matter”;
- (b) in paragraph (7) omit “and give an indication of the procedure on such a reference”;
- (c) after paragraph (7) insert—

“(8) If a notice under paragraph (3) or (6)(b) or (c) informs a person of that person’s right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference.”.

30. In regulation 33(1) (provision of information to the FCA concerning direct electronic access)—

- (a) in sub-paragraph (a)—
 - (i) after “systems” insert “and controls”; and
 - (ii) for “32(3)” substitute “32(4)”; and
- (b) in sub-paragraph (b) after “systems” insert “and controls”.

31. In regulation 42 (provision of information to ESMA about multilateral trading facilities) in paragraph (1) after “under” omit “the”.

32. In regulation 45(1) (provision of information to ESMA regarding sanctions and measures imposed for the purposes of the markets in financial instruments directive) after “regulation 3” insert “and paragraph 17(1) of the Data Reporting Services Regulations 2017”.

33. In regulation 46(2) (provision of information to other competent authorities regarding persons engaged in algorithmic trading or providing direct electronic access)—

- (a) in sub-paragraph (a) for “17.5” substitute “17.2 of the markets in financial instruments directive”; and
- (b) in sub-paragraph (b)(i) for “first” substitute “fourth”.

34. In paragraph 41 of Schedule 2 (amendments to the Financial Services and Markets Act 2000) in the new section 313CC (suspension or removal of a financial instrument from trading in another EEA state: FCA duties) after subsection 2 insert —

“(2A) But the FCA is not obliged to impose a requirement under subsection (2) if it could cause significant damage to the interests of investors or the orderly functioning of the market.”.

35. In paragraph 42(4) of Schedule 2 (amendments to the Financial Services and Markets Act 2000) in the new section 313D(2)(b)(ii) (interpretation of Part 18A) to be inserted into the Financial Services and Markets Act 2000 after “52.2” omit “of the markets”.

36. In paragraph 48(a) of Schedule 2 in the new section 398(1A)(ba) (misleading FCA or PRA) to be inserted into the Financial Services and Markets Act 2000 for “XXXX” substitute “701”.

37. Sub-paragraphs 9(2)(b) and (c) of Schedule 4 (amendments to other primary legislation) is revoked.

38. In paragraph 8 of Schedule 5 (amendments to other secondary legislation) at the beginning insert “Parts 2 and 3 of, and Schedules 7 to 9 to,”.

12th December 2017

Mark Spencer
Heather Wheeler
Two Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations address minor drafting points and omissions in:

- the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (S.I. 2017/701), which implemented Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) (OJ No L173, 12/06/2014, p.349) (“MiFID II”) and Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (OJ No L173, 12/06/2014, p.84) and
- the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 (S.I. 2016/680), which implemented Regulation (EU) 596/2014 of the European Parliament and of the Council on market abuse (OJ No L 173, 14.04.2014, p31).

The Regulations also contain two substantively new provisions. Firstly regulation 4(3) of the Regulations amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) to create a new exclusion from various activities specified in that Order. The exclusion applies to persons dealing in commodity derivatives or emission allowances on their own account or providing investment services relating to such instruments in an ancillary capacity. These activities are not treated as regulated activities until the appropriate regulator can determine whether or not they fall within the exemption under Article 2.1(j) MiFID II for this type of activity.

Secondly regulation 10 of the Regulations amends a transitional provision in article 16 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 (S.I. 2017/488). Article 16 extends firms’ existing permissions to carry on activities relating to investments under the Financial Services and Markets Act 2000 (c. 8) (“FSMA”) to cover the same activities relating to structured deposits from 3rd January 2018 (when such activities are due to become regulated activities for the purposes of FSMA if carried out in relation to structured deposits) to 1st April 2018. Regulation 10 of these Regulations extends this transitional arrangement to firms authorised elsewhere in the EEA which operate in the United Kingdom under Schedule 3 to FSMA. It also allows all firms to take advantage of the transitional arrangement until 1st April 2018.

Impact assessments relating to the implementation of MiFID II and MAR are available from HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and are published alongside this instrument at www.legislation.gov.uk.

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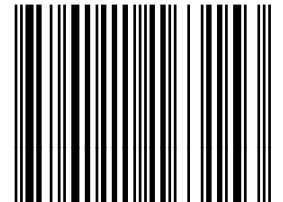
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