

## STATUTORY INSTRUMENTS

# 2017 No. 701

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

### PART 2 U.K.

#### Exempt and third-country investment firms

#### CHAPTER 1 U.K.

#### Exempt investment firms

#### Applications to be an exempt investment firm U.K.

4.—(1) A person may apply in accordance with section 55A<sup>M1</sup> (application for permission) of the Act for a Part 4A 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 its Part 4A permission in accordance with section 55H<sup>M2</sup> (variation by FCA) or 55I<sup>M3</sup> (variation by PRA) of the Act.

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

(4) In this regulation “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.

#### Marginal Citations

**M1** Section 55A was inserted by section 11(2) of the Financial Services Act 2012.

**M2** Section 55H was inserted by section 11(2) of the Financial Services Act 2012 and amended by S.I. 2013/1773.

**M3** Section 55I was inserted by section 11(2) of the Financial Services Act 2012.

#### Limitation on exempt investment firms U.K.

5. An exempt investment firm has no entitlement —

- (a) to establish a branch by making use of the procedures in paragraph 19 (establishment) of Schedule 3 (EEA passport rights) to the Act; or
- (b) to provide any services by making use of the procedures in paragraph 20 (services) of Schedule 3 to the Act,

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in a case where the entitlement of the firm to do so would, but for this [<sup>F1</sup>regulation], derive from the markets in financial instruments directive.

#### Textual Amendments

**F1** Word in reg. 5 substituted (2.1.2018) by The Financial Services and Markets Act 2000 (Markets in Financial Instruments) (No.2) Regulations 2017 (S.I. 2017/1255), regs. 2(a), **13**

### Requirements applying to exempt investment firms **U.K.**

6.—(1) If the appropriate regulator—

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

the requirements specified in paragraph (3) (“the specified requirements”) shall be treated as being imposed under section 55L <sup>M4</sup> (imposition of requirements by FCA) (where the FCA is the appropriate regulator) or 55M <sup>M5</sup> (imposition of requirements by PRA) (where the PRA is the appropriate regulator) of the Act.

(2) Notwithstanding paragraph (1)—

- (a) the treatment of the specified requirement as a requirement imposed under section 55L or 55M of the Act does not—
  - (i) amount for the purpose of section 55X(1) <sup>M6</sup> (determination of applications: warning notices and decision notices) of the Act to a proposal to exercise the power of the appropriate regulator under section 55L(1) or 55M(1) of the Act;
  - (ii) amount for the purpose of section 55X(4) <sup>M7</sup> of the Act to a decision to exercise the power of the appropriate regulator under section 55L(1) or 55M(1) of the Act; or
  - (iii) entitle the person to refer a matter under section 55Z3(1) <sup>M8</sup> (right to refer matters to the Tribunal) of the Act;
- (b) the specified requirements shall not expire until the person ceases to be an exempt investment firm; and
- (c) no application under section 55L(5) or 55M(5) of the Act to vary or cancel any of the specified requirements may be made by the person unless they inform the appropriate regulator when making the application that they wish 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 themselves in debit with their clients;
- (b) does not provide any investment service other than the—
  - (i) reception and transmission of orders in transferable securities and units in collective investment undertakings; and
  - (ii) provision of investment advice in relation to the financial instruments mentioned in paragraph (i); and
- (c) in the course of providing the investment services mentioned in sub-paragraph (b), transmits orders only to—

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- (i) an investment firm authorised in accordance with the markets in financial instruments directive;
- (ii) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms <sup>M9</sup>;
- [<sup>F2</sup>(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;]
- (iv) a collective investment undertaking authorised under the law of an EEA State to market units to the public and to a manager of such an undertaking; or
- (v) an investment company with fixed capital, the securities of which are listed or dealt in on a regulated market in an EEA State.

(4) In paragraph (3) “investment company with fixed capital” has the meaning given by Article 17.7 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent <sup>M10</sup>.

(5) Terms and expressions used in paragraph (3)(c)(i) to (v) which are not otherwise defined in these Regulations and are used in Article 3.1(c)(i) to (v) (optional exemptions) of the markets in financial instruments directive have the same meaning as in those provisions of the directive.

[<sup>F3</sup>(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 EU 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms; 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).]

#### Textual Amendments

- F2** Reg. 6(3)(c)(iii) substituted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **14(a)**
- F3** Reg. 6(6) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **14(b)**

#### Marginal Citations

- M4** Section 55L was inserted by section 11(2) of the Financial Services Act 2012.
- M5** Section 55M was inserted by section 11(2) of the Financial Services Act 2012.
- M6** Section 55X(1) was inserted by section 11(2) of the Financial Services Act 2012.
- M7** Section 55X(4) was inserted by section 11(2) of the Financial Services Act 2012.
- M8** Section 55Z3 was inserted by section 11(2) of the Financial Services Act 2012.
- M9** OJ No L 176, 27.6.2013, p. 338.

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**M10** OJ L315, 14/11/2012, p.74.

### **Transitional provision: exempt investment firms** **U.K.**

- 7.—(1) An authorised person who immediately before 3rd January 2018 was—
- (a) an exempt investment firm by virtue of regulation 9A <sup>M11</sup>(transitional provision: exempt investment firms) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007; or
  - (b) permitted to carry on regulated activities as an exempt investment firm in accordance with permission granted in accordance with regulation 4C <sup>M12</sup> (requirements to be applied to exempt investment firms) of those Regulations,
- becomes an exempt investment firm with effect from that day as if they had applied as mentioned in regulation 4(1) or (2) <sup>M13</sup> and had been granted the permission or variation on that day.

#### **Marginal Citations**

**M11** S.I. 2007/126; regulation 9A was inserted by S.I. 2007/763.

**M12** Regulation 4C was inserted by S.I. 2007/263 and was amended by S.I. 2013/472 and 2013/3115.

**M13** Regulation 4(1) and (2) were amended by S.I. 2013/472.

### **Meaning of “exempt investment firm” in Chapter 1** **U.K.**

8. In this Chapter “exempt investment firm” means an authorised person who—
- (a) is an investment firm; and
  - (b) has a Part 4A permission;

but to whom Title II of the markets in financial instruments directive does not apply by virtue of Article 3 of the markets in financial instruments directive.

## CHAPTER 2 **U.K.**

### Third country investment firms

### **Third country firms with an EEA branch: provision of services** **U.K.**

9.—(1) A third country firm with an EEA branch is not to be regarded as carrying on a regulated activity if it carries on the activity in the course of exercising rights under Article 47.3 (equivalence decision) of the markets in financial instruments regulation.

(2) But paragraph (1) only applies once the third country firm with an EEA branch satisfies the service conditions for incoming EEA investment firms.

(3) The service conditions for incoming EEA investment firms apply to a third country firm for the purposes of paragraph (1) with the modifications set out in paragraphs [<sup>F4</sup>(4) and (5)].

(4) A reference to the home state regulator has effect as if in each place it were a reference to the competent authority of the EEA State in which [<sup>F5</sup>the relevant branch of] the third country firm with an EEA branch is established (“supervising EEA competent authority”).

(5) In paragraph 14(1)(b) <sup>M14</sup>(services) of Schedule 3 (EEA passport rights) [<sup>F6</sup>to the Act] the requirement for a regulator's notice to contain such information as may be prescribed has effect as if it were a requirement for the notice to contain—

- (a) a statement by that competent authority that the [<sup>F7</sup>relevant] branch—

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- (i) is authorised in accordance with Article 39 (establishment of a branch) of the markets in financial instruments directive;
  - (ii) is entitled to exercise rights under Article 47.3 of the markets in financial services regulation; and
  - (iii) intends to exercise those rights in the United Kingdom; and
- (b) the [<sup>F8</sup>relevant] branch's programme of operations provided to the supervising EEA competent authority in accordance with Article 40(b) (obligation to provide information) of the markets in financial instruments directive.
- (6) In this regulation “service conditions for incoming EEA investment firms” means the service conditions set out in paragraph 14(1) <sup>M15</sup> of Schedule 3 to the Act which apply to an EEA firm as defined by paragraph 5(a) <sup>M16</sup> (EEA firm) of that Schedule.

[<sup>F9</sup>(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).]

#### Textual Amendments

- F4** Words in reg. 9(3) substituted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(a)**
- F5** Words in reg. 9(4) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(b)**
- F6** Words in reg. 9(5) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(c)(i)**
- F7** Word in reg. 9(5)(a) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(c)(ii)**
- F8** Word in reg. 9(5)(b) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(c)(iii)**
- F9** Reg. 9(7) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **15(d)**

#### Marginal Citations

- M14** Paragraph 14(1)(b) was amended by [S.I. 2003/1473](#), **paragraph 3(2)** of Schedule 4 to the Financial Services Act 2012, and [S.I. 2015/910](#).
- M15** Sub-paragraphs (1)(b) and (ba) of paragraph 14 were amended as mentioned previously. The remaining provisions of paragraph 14 were amended by [S.I. 2003/1473](#), paragraphs (2), (3), (4), (5), (6)(a) and (b), and (7) of Schedule 4 to the Financial Services Act 2012, [S.I. 2012/1906](#), [S.I. 2013/1773](#), and [S.I. 2015/910](#),
- M16** Paragraph 5(a) was amended by [S.I. 2007/126](#).

### FCA power to intervene in relation to third country firms with an EEA branch **U.K.**

**10.**—(1) The FCA may exercise its power of intervention in relation to a third country firm with an EEA branch where the FCA has clear and demonstrable grounds for believing that the firm has contravened, or is contravening, a requirement imposed on the firm—

- (a) by or under any provision adopted for the purpose of implementing the markets in financial instruments directive by an EEA State where a branch of the firm is located and authorised in accordance with Article 39 (establishment of a branch) of the markets in financial instruments directive;
- (b) by or under the markets in financial instruments regulation; or

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(c) by any directly applicable EU regulation made under the markets in financial instruments directive or the markets in financial instruments regulation.

(2) Section 197<sup>M17</sup> (procedure on exercise of power of intervention) [F<sup>10</sup> of the Act] applies to the exercise by the FCA of its power of intervention under paragraph (1) as it does to the exercise by the FCA of its power of intervention under Part 13 of the Act generally.

(3) Section 199<sup>M18</sup> (additional procedure for EEA firms in certain cases) [F<sup>11</sup> of the Act] applies when the FCA's power of intervention is exercisable under paragraph (1) as it does if it appears to the FCA that its power of intervention is exercisable in relation to an EEA firm exercising EEA rights in the United Kingdom in respect of the contravention of a relevant requirement.

(4) Section 199 [F<sup>12</sup> of the Act] has effect for the purposes of paragraph (3) as if—

- (a) a reference to the regulator were in each place a reference to the FCA;
- (b) a reference to an EEA firm were in each place a reference to a third country firm with an EEA branch;
- (c) a reference to EEA rights were in each place a reference to rights under Article 47.3 (equivalence decision) of the markets in financial instruments regulation;
- (d) a reference to the home state regulator were in each place a reference to the competent authority responsible for the supervision of the firm with an EEA branch under Article 41.2 (granting of the authorisation) of the markets in financial instruments directive and Article 47.3 of the markets in financial instruments regulation;
- (e) subsection (1) and (2) were omitted;
- (f) subsection (3A) were omitted; and
- (g) subsections (8) to (12) were omitted.

#### Textual Amendments

- F10** Words in [reg. 10\(2\)](#) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), [regs. 2\(a\)](#), **16(a)**
- F11** Words in [reg. 10\(3\)](#) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), [regs. 2\(a\)](#), **16(b)**
- F12** Words in [reg. 10\(4\)](#) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), [regs. 2\(a\)](#), **16(c)**

#### Marginal Citations

- M17** Section 197 was amended by paragraph 37(2), (3), (4)(a) and (b), and (5) of Schedule 4 to the Financial Services Act 2012.
- M18** Section 199 was amended by [S.I. 2007/126](#), [S.I. 2007/3253](#), [S.I. 2011/1613](#), [paragraph 39\(2\) to \(5\)](#) of Schedule 4 to the Financial Services Act 2012, and [S.I. 2012/916](#), [S.I. 2012/2015](#) and [S.I. 2013/1773](#).

### Third country firms registered with ESMA: provision of services **U.K.**

**11.** A third country firm registered with ESMA is not to be regarded as carrying on a regulated activity if it carries on the activity in the course of exercising rights under Article 46.1 (general provisions) of the markets in financial instruments regulation.

### FCA power to intervene in relation to third country firms registered with ESMA **U.K.**

**12.—(1)** The FCA may exercise its power of intervention in relation to a third country firm registered with ESMA where it considers that —



- (a) the firm has acted, or is acting, in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of the markets; or
  - (b) the firm has seriously infringed provisions—
    - (i) applicable to the firm in the country in which it is established; and
    - (ii) on the basis of which the Commission has adopted a decision under Article 47.1 [F13 of the markets in financial instruments regulation] in relation to the country.
- (2) Section 197 (procedure on exercise of power of intervention) applies to the exercise by the FCA of its power of intervention under paragraph (1) as it does to the exercise by the FCA of its power of intervention under Part 13 of the Act generally.
- (3) Where it appears to the FCA that the power of intervention is exercisable under paragraph (1) in relation to a third country firm registered with ESMA the FCA must give—
- (a) ESMA written notice of its concerns; and
  - (b) the firm written notice of its concerns which—
    - (i) requires the firm to put an end to the conduct which gives rise to the concern;
    - (ii) states that the FCA's power of intervention will become exercisable in accordance with this regulation; and
    - (iii) indicates any requirements that the FCA proposes to impose on the firm in exercise of its power of intervention in the event the power becomes exercisable.
- (4) The FCA may then only exercise its power of intervention under paragraph (1) if—
- (a) the FCA considers a reasonable time has elapsed since it gave the written notices under paragraph (3);
  - (b) the firm has not put an end to the concerning conduct;
  - (c) ESMA has not withdrawn the registration of the firm under Article 49 (withdrawal of registration) of the markets in financial instruments regulation; and
  - (d) the FCA considers the exercise of its power of intervention is not inconsistent with any course of action ESMA has given the FCA written notice it has taken, is taking, or will take under the markets in financial instruments regulation in relation to the notice of the FCA's concerns given to ESMA by the FCA under paragraph (3)(a).
- (5) If the FCA exercises its power of intervention under paragraph (1) in relation to a third country firm registered with ESMA it must at the earliest opportunity inform ESMA of—
- (a) the fact that it has exercised that power in relation to the firm; and
  - (b) any requirements it has imposed on the firm in the exercise of the power.
- (6) For the purposes of paragraph (4)(a) a reasonable time includes a reasonable time for ESMA to take the steps referred to in Article 49.1(c) and (d) (withdrawal of registration) of the markets in financial instruments regulation.

#### Textual Amendments

**F13** Words in [reg. 12\(1\)\(b\)\(ii\)](#) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), [regs. 2\(a\)](#), [17](#)

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### **Third country firms: provision of services to eligible counterparties or clients considered to be professionals** **U.K.**

**13.** A third country firm is not to be regarded as carrying on a regulated activity if it carries on the activity in the course of exercising rights under the third paragraph of Article 46.5 (general provisions) of the markets in financial instruments regulation.

### **Third country firms: financial promotions** **U.K.**

**14.—(1)** The communication, in the course of business, of an invitation or inducement to engage in investment activity is not to be regarded as a communication for the purposes of section 21(1) (restrictions on financial promotion) of the Act if it is made in the course of exercising rights under Title 8 of the markets in financial instruments regulation.

(2) For the purposes of paragraph (1) a communication is made in the course of exercising rights under Title 8 of the markets in financial instruments regulation if it is made—

- (a) by a third country firm registered with ESMA to eligible counterparties or to clients considered to be professionals in the course of exercising rights under Article 46.1 (general provisions) [<sup>F14</sup>of the Regulation];
- (b) by a third country firm to eligible counterparties or to clients considered to be professionals in the course of exercising rights under Article 46.5 of the Regulation provided that—
  - (i) the counterparty or client has initiated at his or her own exclusive initiative the provision by the firm of an investment service or activity under that Article to the counterparty or client; and
  - (ii) the communication is in respect of the investment service or activity; or
- (c) by a third country firm with an EEA branch to eligible counterparties or to clients considered to be professionals in the course of exercising rights under Article 47.3 (equivalence decision) of the [<sup>F15</sup>Regulation].

(3) An order made by the Treasury under section 21(5) of the Act does not apply to a person who, in the course of business, communicates an invitation or inducement to engage in investment activity if—

- (a) the communication is made in the course of providing investment services or performing investment activities with or without ancillary services to eligible counterparties or clients considered to be professionals; and
- (b) the person is—
  - (i) established in a country which is subject to an equivalence decision; or
  - (ii) permitted to provide those services under Article 46.5 of the markets in financial instruments regulation.

(4) For the purposes of paragraph (3)—

- (a) “equivalence decision” means a decision adopted by the Commission in relation to a country under Article 47.1 of the markets in financial instruments regulation which has not been withdrawn by a subsequent decision adopted by the Commission under that Article; and
- (b) a country is subject to an equivalence decision if a period of more than three years has elapsed since the adoption of the decision by the Commission, beginning on the day after the date of the adoption of the decision.



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### Textual Amendments

- F14** Words in reg. 14(2)(a) inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **18(a)**
- F15** Word in reg. 14(2)(c) substituted (2.1.2018) by virtue of [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **18(b)**

## Interpretation of Chapter 2 **U.K.**

### 15. In this Chapter—

“clients considered to be professionals” means professional clients (as defined by Article 4.1.10 of the markets in financial instruments directive) who fall within Section I of Annex II to the directive;

“power of intervention” means the power conferred on the FCA by section 196 (the power of intervention) of the Act;

“third country firm” has the same meaning as in Article 4.1.57 of the markets in financial instruments directive;

“third country firm registered with ESMA” means a third country firm which—

- (a) is registered in the register of third-country firms kept by ESMA in accordance with <sup>[F16]</sup>Article 48 (register) of the markets in financial instruments regulation]; and
- (b) has the right under Article 46.1 (general provisions) <sup>[F17]</sup>of the markets in financial instruments regulation] to provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to clients considered to be professionals;

“third country firm with an EEA branch” means a third country firm which—

- (a) is established in a country whose legal and supervisory framework has been recognised to be effectively equivalent in accordance with Article 47.1 (equivalence decision) of the markets in financial instruments regulation;
- (b) has a branch located in an EEA state other than the United Kingdom which is authorised in that state in accordance with Article 39 (establishment of a branch) of the markets in financial instruments directive; and
- (c) has the right under Article 47.3 of the markets in financial instruments regulation to provide the services and activities covered under the authorisation to eligible counterparties and clients considered to be professionals in other EEA States without the establishment of a branch in those states.

### Textual Amendments

- F16** Words in reg. 15 substituted (2.1.2018) by virtue of [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **19(a)**
- F17** Words in reg. 15 inserted (2.1.2018) by [The Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) \(No.2\) Regulations 2017 \(S.I. 2017/1255\)](#), regs. 2(a), **19(b)**

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