

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (QUALIFYING
PROVISIONS) (AMENDMENT) ORDER 2022

2022 No. 1252

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This Order makes amendments to the Financial Services and Markets Act 2000 (Qualifying Provisions) Order 2013 (“QUPO”) which identifies provisions of EU law which are specified as qualifying provisions for the purposes of various provisions in the Financial Services and Markets Act 2000 (“FSMA”).

2.2 The purpose of this Order is to specify rules made under Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (“PRIIPs regulation”), Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (“markets in financial instruments regulation”) and Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“European market infrastructure regulation”) as qualifying provisions for the purposes of various provisions in FSMA.

2.3 The amendments establish a definition for the markets in financial instruments regulation and enable the appropriate regulator to take enforcement action for breaches of requirements established by rules under the PRIIPs regulation, the markets in financial instruments regulation and the European market infrastructure regulation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Financial Services Act 2021 (“FS Act”) established new rule-making powers for the Financial Conduct Authority (“FCA”) in retained direct EU legislation and amended the definition of “qualifying provision” (section 425C of FSMA) to include other subordinate legislation made under retained direct EU legislation.
- 6.2 Section 38 of the FS Act inserted into the PRIIPs regulation a power for the FCA to make rules specifying whether a particular product falls within the definition of a packaged retail and insurance-based investment product. Section 40 of the FS Act inserted powers into the European market infrastructure regulation for the FCA to make rules on the terms under which providers of clearing services provide such services, and to make rules on procedures and policies that trade repositories must establish to enhance data quality on over-the-counter transactions. Schedule 10 of the FS Act inserted powers into the markets in financial instruments regulation for the FCA to make rules requiring third-country firms to provide specified information and, where it considers it necessary, for the purposes of a requirement imposed by regulations made under Article 48A of that regulation.
- 6.3 Rules made under retained direct EU legislation do not fall within the scope of directly applicable (EU) regulation made under retained direct EU legislation in QUPO. The markets in financial instruments regulation is also currently undefined. This Order amends QUPO to specify rules made under the PRIIPs regulation, the markets in financial instruments regulation and the European market infrastructure regulation as qualifying provisions for the purposes of FSMA and inserts a definition for the markets in financial instruments regulation.

7. Policy background

What is being done and why?

- 7.1 The regulators are not currently able to use enforcement powers to ensure that firms comply with requirements established by rules made under retained direct EU legislation. This is because, as with other retained direct EU legislation, the enforcement powers in FSMA only apply if the legislation is designated as a ‘qualifying provision’ for the purposes of various provisions of FSMA. A lack of enforcement powers in relation to rules made under the PRIIPs regulation, the markets in financial instruments regulation and the European market infrastructure regulation would impede the regulators’ ability to ensure effective regulation.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 HM Treasury has consulted the FCA, the Prudential Regulation Authority and the Bank of England in preparation of this instrument. As this Order does not impose any regulatory burden on businesses, a formal public consultation was not considered necessary.

11. Guidance

11.1 Guidance is not required.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies. Businesses are already required to comply with rules made under retained direct EU legislation.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because this Order does not impose any regulatory burden. This Order provides an enforcement mechanism for obligations imposed by rules made under powers established by the FS Act in retained direct EU legislation and any impact on business, charities or voluntary bodies will arise as a result of those rules. A full impact assessment for the FS Act is available at: <https://publications.parliament.uk/pa/bills/cbill/58-01/0200/FS%20Bill%20Impact%20Assessment%20-%20October%202020%20-%20201020.pdf>.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses but, as above, this Order will not impose any additional burden.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause. In line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to the Treasury, Andrew Griffith has made the following statement:

“In my view, and having had regard to “Small Business, Enterprise and Employment Act 2015 – Statutory Guidance for Departments”, it is not appropriate to make provision requiring the review of the provisions of the Financial Services and Markets Act 2000 (Qualifying Provisions) (Amendment) Order 2022. Such a provision would be disproportionate taking into account the economic impact of this Order”.

15. Contact

15.1 Ethan Magill at HM Treasury Telephone: 07971556199 or email: ethan.magill@hmtreasury.gov.uk can be contacted with any queries regarding this instrument.

15.2 Tom Duggan, Deputy Director for Securities and Markets, at the HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 Andrew Griffith MP, Economic Secretary to the Treasury and City Minister at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.