

2006 No. 3384

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006

Approved by both Houses of Parliament

Made - - - - 18th December 2006

Laid before Parliament 18th December 2006

Coming into force in accordance with article 1(2)

In the opinion of the Treasury, one of the effects of the following Order is that an activity which is not a regulated activity (within the meaning of the Financial Services and Markets Act 2000(a)) will become a regulated activity;

The Treasury make the following Order in exercise of the powers conferred upon them by sections 22(1) and (5) and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000:

PART 1
GENERAL

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006.

(2) This Order comes into force—

(a) on 1st April 2007 for the purposes of enabling applications to be made for—

(i) a Part IV permission,

(ii) a variation of a Part IV permission,

(iii) the Authority's approval under section 59 of the Act,

in relation to an activity of the kind specified by article 25D of the principal Order (inserted by this Order) or in relation to an investment of the kind specified by article 83, 84 or 85 of the principal Order (as amended by this Order);

(b) for all other purposes, on 1st November 2007.

(3) In this Order, “the Act” means the Financial Services and Markets Act 2000, and “the principal Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a).

PART 2

AMENDMENTS OF THE PRINCIPAL ORDER

Amendments of the principal Order

2. The principal Order is amended as follows.

3. In article 3(1)(b) (interpretation)—

(a) in paragraph (a) of the definition of “overseas person” after “25C,” insert “25D,”;

(b) at the appropriate place, insert—

““the Commission Regulation” means Commission Regulation 1287/2006 of 10 August 2006(c);

“credit institution” means—

(a) a credit institution authorised under the banking consolidation directive(d) other than an institution to which Article 2.1 of the markets in financial instruments directive(e) (the text of which is set out in Schedule 3) applies, or

(b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive (other than an institution to which Article 2.1 of the markets in financial instruments directive would apply) if it had its registered office (or if it does not have a registered office, its head office) in an EEA State;

“financial instrument” means any instrument listed in Section C of Annex I to the markets in financial instruments directive (the text of which is set out in Part 1 of Schedule 2) read with Chapter VI of the Commission Regulation (the text of which is set out in Part 2 of Schedule 2);

“home Member State”, in relation to an investment firm, has the meaning given by Article 4.1.20 of the markets in financial instruments directive, and in relation to a credit institution, has the meaning given by Article 4.7 of the banking consolidation directive;

“investment firm” means a person whose regular occupation or business is the provision or performance of investment services and activities on a professional basis but does not include—

(a) a person to whom the markets in financial instruments directive does not apply by virtue of Article 2 of that directive (the text of which is set out in Schedule 3);

(b) a person whose home Member State is an EEA State other than the United Kingdom and to whom, by reason of the fact that the State has given effect to Article 3 of that directive, that directive does not apply by virtue of that Article;

(c) a person who does not have a home Member State and to whom (if he had his registered office in an EEA State, or, being a person other than a body corporate or a body corporate not having a registered office, if he had his head office in an EEA State) the markets in financial instruments directive would not apply by virtue of Article 2 of that directive;

“investment services and activities” means—

(a) S.I. 2001/544.

(b) The definition of “overseas person” was amended by S.I. 2003/1475 and 1476 and 2006/2383.

(c) OJ No L 241, 2.9.2006, p.1.

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

(e) OJ No L 145, 30.4.2004, p.1.

(a) any service provided to third parties listed in Section A of Annex I to the markets in financial instruments directive (the text of which is set out in Part 3 of Schedule 2) read with Article 52 of Commission Directive 2006/73/EC of 10 August 2006^(a) (the text of which is set out in Part 4 of Schedule 2), or

(b) any activity listed in Section A of Annex I to that directive,
relating to any financial instrument;

“management company” has the meaning given by Article 1a.2 of the UCITS directive^(b) as amended by Directive 2001/107/EC^(c);

“market operator” means a market operator within the meaning of Article 4.1.13 of the markets in financial instruments directive, or a person who would be a market operator if he had his registered office, or if he does not have a registered office his head office, in an EEA State, but does not include—

(a) a person to whom the markets in financial instruments directive does not apply by virtue of Article 2 of that directive (the text of which is set out in Schedule 3);

(b) a person who does not have a home Member State to whom (if he had his registered office, or if he does not have a registered office his head office, in an EEA State) the markets in financial instruments directive would not apply by virtue of Article 2 of that directive;

“multilateral trading facility” means—

(a) a multilateral trading facility (within the meaning of Article 4.1.15 of the markets in financial instruments directive) operated by an investment firm, a credit institution or a market operator, or

(b) a facility which—

(i) is operated by an investment firm, a credit institution or market operator which does not have a home Member State, and

(ii) if its operator had a home Member State, would be a multilateral trading facility within the meaning of Article 4.1.15 of the markets in financial instruments directive;”.

4. In article 4(d) (specified activities: general)—

(a) for paragraph (4) substitute—

“(4) Where an investment firm or credit institution—

(a) provides or performs investment services and activities on a professional basis, and

(b) in doing so would be treated as carrying on an activity of a kind specified by a provision of this Part but for an exclusion in any of articles 15, 16, 19, 22, 23, 29, 38, 67, 68, 69, 70 and 72E,

that exclusion is to be disregarded and, accordingly, the investment firm or credit institution is to be treated as carrying on an activity of the kind specified by the provision in question.”
;

(b) in paragraph (5)(e) omit the definitions of “core investment service” and “investment firm”.

5. In article 14 (dealing in investments as principal)—

(a) the existing text becomes paragraph (1);

(b) after paragraph (1) insert—

“(2) Paragraph (1) does not apply to a kind of activity to which article 25D applies.”.

(a) OJ No L 241, 2.9.2006, p. 26.

(b) OJ No L 375, 31.12.85, p.3.

(c) OJ No L 41, 13.2.2002, p.20.

(d) Article 4(4) was amended by S.I. 2002/682 and 2005/1518.

(e) Article 4(5) was amended by S.I. 2003/1476.

6. In article 15 (absence of holding out etc.) after paragraph (3) insert—
“(4) This article is subject to article 4(4).”.
7. In article 16 (dealing in contractually based investments)—
(a) the existing text becomes paragraph (1);
(b) after paragraph (1) insert—
“(2) This article is subject to article 4(4).”.
8. In article 19 (risk management) after paragraph (2) insert—
“(3) This article is subject to article 4(4).”.
9. In article 21(a) (dealing in investments as agent)—
(a) the existing text becomes paragraph (1);
(b) after paragraph (1) insert—
“(2) Paragraph (1) does not apply to a kind of activity to which article 25D applies.”.
10. In article 22 (deals with or through authorised persons)(b) after paragraph (2) insert—
“(3) This article is subject to article 4(4).”.
11. In article 23 (risk management) after paragraph (2) insert—
“(3) This article is subject to article 4(4).”.
12. In article 25(c) (arranging deals in investments) after paragraph (2) insert—
“(3) Paragraphs (1) and (2) do not apply to a kind of activity to which article 25D applies.”.
13. After article 25C (arranging regulated home purchase plans)(d) insert—

“Operating a multilateral trading facility

25D.—(1) The operation of a multilateral trading facility on which MiFID instruments are traded is a specified kind of activity.

(2) In paragraph (1), “MiFID instrument” means any investment—

- (a) of the kind specified by article 76, 77, 78, 79, 80, 81, 83, 84 or 85; or
(b) of the kind specified by article 89 so far as relevant to an investment falling within sub-paragraph (a),

that is a financial instrument.”.

14. In article 29(e) (arranging deals with or through authorised persons) after paragraph (2) insert—

“(3) This article is subject to article 4(4).”.

15. In article 30(f) (arranging transactions in connection with lending on the security of insurance policies) after paragraph (2) insert—

“(3) This article is subject to article 4(4A)(g).”.

16. In article 36(h) (other exclusions) after paragraph (2) insert—

(a) Article 21 was amended by S.I. 2003/1476.

(b) Article 22 was amended by S.I. 2003/1476.

(c) Article 25 was amended by S.I. 2003/1476.

(d) Article 25C was inserted by S.I. 2006/2383.

(e) Article 29 was amended by S.I. 2003/1475 and 1476 and 2006/2383.

(f) Article 30 was amended by S.I. 2001/3544 and 2003/1476.

(g) Article 4(4A) was inserted by S.I. 2003/1476.

(h) Article 36 was amended by S.I. 2003/1475 and 2006/2383; there are other amending instruments but none is relevant.

“(3) Article 25D is also subject to the exclusion in article 72 (overseas persons).”.

17. In article 38(a) (attorneys)—

- (a) the existing text becomes paragraph (1);
- (b) after paragraph (1) insert—

“This article is subject to article 4(4).”.

18. In article 64(b) (agreeing to carry on specified kinds of activity) after “10,” insert “25D,”.

19. In article 66(c) (trustees, nominees and personal representatives) after paragraph (7) insert—

“(8) This article is subject to article 4(4A).”.

20. In article 67(d) (activities carried on in the course of a profession or non-investment business) after paragraph (2) insert—

“(3) This article is subject to article 4(4) and (4A).”.

21. In article 68(e) (activities carried on in connection with the sale of goods or supply of services) after paragraph (11) insert—

“(12) This article is subject to article 4(4).”.

22. In article 69(f) (groups and joint enterprises) after paragraph (12) insert—

“(13) This article is subject to article 4(4).”.

23. In article 70(g) (activities carried on in connection with the sale of a body corporate) after paragraph (7) insert—

“(8) This article is subject to article 4(4).”.

24. In article 72(h) (overseas persons)—

- (a) in paragraph (1) after “article 14” insert “or 25D”;
- (b) in paragraph (2) after “article 21” insert “or 25D”;
- (c) in paragraph (3) after “article 25(1)” insert “or 25D”;
- (d) in paragraph (4) after “article 25(2)” insert “or 25D”;
- (e) after paragraph (7) insert—

“(8) Paragraphs (1) to (5) do not apply where the overseas person is an investment firm or credit institution—

- (a) who is providing or performing investment services and activities on a professional basis; and
- (b) whose home Member State is the United Kingdom.”.

25. In article 72E(i) (Business Angel-led Enterprise Capital Funds) after paragraph (10) insert—

“(11) This article is subject to article 4(4).”.

26. In article 83 (options)—

- (a) the existing text becomes paragraph (1);
- (b) in paragraph (1)—

(a) Article 38 was amended by S.I. 2001/3544.

(b) Article 64 was amended by S.I. 2002/682.

(c) Article 66 was amended by S.I. 2003/1475 and 1476 and 2006/2383; there are other amending instruments but none is relevant.

(d) Article 67 was amended by S.I. 2001/3544, 2003/1475 and 1476 and 2006/2383.

(e) Article 68 was amended by S.I. 2001/3544 and 2003/1476.

(f) Article 69 was amended by S.I. 2002/682 and 2003/1476.

(g) Article 70 was amended by S.I. 2003/1476.

(h) Article 72 was amended by S.I. 2003/1475 and 1476 and 2006/2383.

(i) Article 72E was inserted by S.I. 2005/1518.

- (i) at the end of sub-paragraph (c) omit “or”; and
- (ii) at the end of sub-paragraph (d) insert—
 - “;
 - (e) subject to paragraph (4), an option to acquire or dispose of an option to which paragraph 5, 6, 7 or 10 of Section C of Annex I to the markets in financial instruments directive (the text of which is set out in Part I of Schedule 2) applies”;
- (c) after paragraph (1) insert—
 - “(2) Subject to paragraph (4), options—
 - (a) to which paragraph (1) does not apply;
 - (b) which relate to commodities;
 - (c) which may be settled physically; and
 - (d) either—
 - (i) to which paragraph 5 or 6 of Section C of Annex I to the markets in financial instruments directive, the text of which is set out in Part 1 of Schedule 2, applies, or
 - (ii) which in accordance with Article 38 of the Commission Regulation (the text of which is set out in Part 2 of Schedule 2) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes, and to which paragraph 7 of Section C of Annex I to the markets in financial instruments directive applies.
 - (3) Subject to paragraph (4), options—
 - (a) to which paragraph (1) does not apply;
 - (b) which may be settled physically; and
 - (c) to which paragraph 10 of Section C of Annex I to the markets in financial instruments directive (read with the Commission Regulation) applies.
 - (4) Paragraphs (1)(e), (2) and (3) only apply to options in relation to which—
 - (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
 - (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
 - (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.
 - (5) Expressions used in paragraphs (1)(e), (2) and (3) and in the markets in financial instruments directive have the same meaning as in that directive.”.

27. In article 84 (futures) after paragraph (1) insert—

- “(1A) Subject to paragraph (1D), futures—
 - (a) to which paragraph (1) does not apply;
 - (b) which relate to commodities;
 - (c) which may be settled physically; and
 - (d) to which paragraph 5 or 6 of Section C of Annex I to the markets in financial instruments directive applies.
- (1B) Subject to paragraph (1D), futures and forwards—
 - (a) to which paragraph (1) does not apply;
 - (b) which relate to commodities;
 - (c) which may be settled physically;

- (d) which in accordance with Article 38 of the Commission Regulation (the text of which is set out in Part 2 of Schedule 2) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes; and
- (e) to which paragraph 7 of Section C of Annex I to the markets in financial instruments directive applies.

(1C) Subject to paragraph (1D), futures—

- (a) to which paragraph (1) does not apply;
- (b) which may be settled physically; and
- (c) to which paragraph 10 of Section C of Annex I to the markets in financial instruments directive (read with the Commission Regulation) applies.

(1D) Paragraph (1A), (1B) and (1C) only apply to futures or forwards in relation to which—

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
- (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
- (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.

(1E) Expressions used in paragraphs (1A) to (1C) and in the markets in financial instruments directive have the same meaning as in that directive.”.

28. In article 85 (contracts for differences etc.) after paragraph (2) insert—

“(3) Subject to paragraph (4), derivative instruments for the transfer of credit risk—

- (a) to which neither article 83 nor paragraph (1) applies; and
- (b) to which paragraph 8 of Section C of Annex I to the markets in financial instruments directive applies.

(4) Paragraph (3) only applies to derivatives in relation to which—

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
- (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
- (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.

(5) ”Derivative instruments for the transfer of credit risk” has the same meaning as in the markets in financial instruments directive.”.

29. For Schedule 2 (Annex to the investment services directive) substitute—

SECTIONS A AND C OF ANNEX I TO THE MARKETS IN
FINANCIAL INSTRUMENTS DIRECTIVE AND RELATED
COMMUNITY SUBORDINATE LEGISLATION

PART 1

SECTION C OF ANNEX I TO THE MARKETS IN FINANCIAL
INSTRUMENTS DIRECTIVE

“Financial instruments

1. Transferable securities;
2. Money-market instruments;
3. Units in collective investment undertakings;
4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);
6. Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;
7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
8. Derivative instruments for the transfer of credit risk;
9. Financial contracts for differences;
10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.”

PART 2
CHAPTER VI OF THE COMMISSION REGULATION

“Derivative financial instruments

Article 38

Characteristics of other derivative financial instruments

1. For the purposes of Section C(7) of Annex I to Directive 2004/39/EC, a contract which is not a spot contract within the meaning of paragraph 2 of this Article and which is not covered by paragraph 4 shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies the following conditions:

- (a) it meets one of the following sets of criteria:
 - (i) it is traded on a third country trading facility that performs a similar function to a regulated market or an MTF;
 - (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;
 - (iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;
- (b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;
- (c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

2. A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

- (a) two trading days;
- (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to an underlying referred to in that Section or in Article 39 shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied:

- (a) that contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;
- (b) that contract is traded on a regulated market or an MTF;
- (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2004/39/EC, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

Article 39

Derivatives within Section C(10) of Annex I to Directive 2004/39/EC

In addition to derivative contracts of a kind referred to in Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to any of the following shall fall within that Section if it meets the criteria set out in that Section and in Article 38(3):

- (a) telecommunications bandwidth;
- (b) commodity storage capacity;
- (c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;
- (d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;
- (e) a geological, environmental or other physical variable;
- (f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- (g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation.”

PART 3

SECTION A OF ANNEX I TO THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE

“Investment services and activities

1. Reception and transmission of orders in relation to one or more financial instruments.
2. Execution of orders on behalf of clients.
3. Dealing on own account.
4. Portfolio management.
5. Investment advice.
6. Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.
7. Placing of financial instruments without a firm commitment basis.
8. Operation of Multilateral Trading Facilities.”

PART 4

ARTICLE 52 OF COMMISSION DIRECTIVE 2006/73/EC

“Article 52

Investment advice

For the purposes of the definition of “investment advice” in Article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

- (a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;
- (b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.””.

30. For Schedule 3(a) (Article 2.2 of the investment services directive) substitute—

“SCHEDULE 3

Article 3(1)

ARTICLE 2 OF THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE

“Article 2

Exemptions

1. This Directive shall not apply to:

- (a) insurance undertakings as defined in Article 1 of Directive 73/239/EEC or assurance undertakings as defined in Article 1 of Directive 2002/83/EC or undertakings carrying on the reinsurance and retrocession activities referred to in Directive 64/225/EEC;
- (b) persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;
- (d) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;
- (e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;
- (f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (g) the members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;
- (h) collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings;
- (i) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main

(a) Schedule 3 was amended by S.I. 2006/3221.

business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;

- (j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;
- (k) persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;
- (l) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;
- (m) associations set up by Danish and Finnish pensions funds with the sole aim of managing the assets of pension funds that are members of those associations;
- (n) ‘agenti di cambio’ whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.

2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

3. In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may, in respect of exemptions (c), (i) and (k) define the criteria for determining when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner.””.

PART 3

CONSEQUENTIAL AMENDMENTS OF PRIMARY LEGISLATION

Amendment of the Fair Trading Act 1973

31. In the Fair Trading Act 1973(a), in section 118(6A) (trading schemes to which Part XI applies), after paragraph (b), insert—

“(ba) operating a multilateral trading facility;”.

Amendment of the Companies Act 1989

32. In the Companies Act 1989(b), in section 176(8) (power to make provision about certain other charges), after paragraph (b), insert—

(a) 1973 c. 41; section 118(6A) was inserted by S.I. 2001/3649.

(b) 1989 c. 40; section 176(8) was inserted by S.I. 2001/3649.

“(ba) operating a multilateral trading facility;”.

Amendment of the Terrorism Act 2000

33. In the Terrorism Act 2000(a), in paragraph 6(1A) of Schedule 6 (financial information), after paragraph (b), insert—

“(ba) operating a multilateral trading facility;”.

PART 4

CONSEQUENTIAL AMENDMENTS OF SECONDARY LEGISLATION

Amendment of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987

34. In the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987(b), in regulation 3(4)(a), after paragraph (ii), insert—

“(iia) operating a multilateral trading facility;”.

Amendment of the Companies (No. 2) (Northern Ireland) Order 1990

35. In the Companies (No.2) (Northern Ireland) Order 1990(c), in Article 98(8), after subparagraph (b), insert—

“(ba) operating a multilateral trading facility;”.

Amendment of the Collective Investment Schemes Order

36.—(1) The Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes Order) 2001(d) is amended as follows.

(2) In paragraph 5(2)(a), after “25 (arranging deals in investments),” insert “25D (operating a multilateral trading facility);”.

(3) In paragraph 9(1)(a)(e), after “25”, insert “, 25D;”.

Amendment of the Carrying on Regulated Activities by Way of Business Order

37. In the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001(f), in article 3(2) (investment business), after subparagraph (c), insert—

“(ca) article 25D (operating a multilateral trading facility);”.

Amendment of the Consultation with Competent Authorities Regulations

38. In the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001(g), in regulation 2, omit the definition of “investment firm”.

(a) 2000 c. 11; paragraph 6(1A) of Schedule 6 was inserted by S.I. 2001/3649.

(b) S.I. 1987/2117; regulation 3(4) was inserted by S.I. 2001/3649.

(c) S.I. 1990/1504 (N.I.10); Article 98(8) was inserted by S.I. 2001/3469.

(d) S.I. 2001/1062.

(e) Paragraph 9(1)(a) was substituted by S.I. 2001/3650.

(f) S.I. 2001/1177, amended by S.I. 2003/1476; there are other amending instruments but none is relevant.

(g) S.I. 2001/2509, to which there are amendments not relevant to these Regulations.

Amendment of the Money Laundering Regulations

39. In the Money Laundering Regulations 2003(a), in regulation 2(2)(a), after paragraph (iv), insert—

“(iva) operating a multilateral trading facility;”.

Amendment of the Financial Promotion Order

40.—(1) The Schedule to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005(b) is amended as follows.

(2) In Part I (controlled activities)—

(a) after paragraph 4 insert—

“Operating a multilateral trading facility

4A. Operating a multilateral trading facility on which MiFID instruments are traded is a controlled activity.”;

(b) in paragraph 11 after “10B above” insert “(other than paragraph 4A)”.

(3) In Part II (controlled investments), in paragraph 21 (options)—

(a) the existing text becomes sub-paragraph (1);

(b) in sub-paragraph (1)—

(i) at the end of paragraph (c) omit “or”;

(ii) at the end of paragraph (d) insert—

“;

(e) subject to sub-paragraph (4), an option to acquire or dispose of an option to which paragraph 5, 6, 7 or 10 of Section C of Annex I to the markets in financial instruments directive applies”;

(c) after sub-paragraph (1) insert—

“(2) Subject to sub-paragraph (4), options—

(a) to which sub-paragraph (1) does not apply;

(b) which relate to commodities;

(c) which may be settled physically; and

(d) either—

(i) to which paragraph 5 or 6 of Section C of Annex I to the markets in financial instruments directive applies, or

(ii) which in accordance with Article 38 of the Commission Regulation are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes, and to which paragraph 7 of Section C of Annex I to the markets in financial instruments directive applies.

(3) Subject to sub-paragraph (4), options—

(a) to which sub-paragraph (1) does not apply;

(b) which may be settled physically; and

(c) to which paragraph 10 of Section C of Annex I to the markets in financial instruments directive (read with the Commission Regulation) applies.

(4) Sub-paragraphs (1)(e), (2) and (3) only apply to options in relation to which—

(a) S.I. 2003/3075.

(b) S.I. 2005/1529, amended by S.I. 2006/2383.

- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
 - (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
 - (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.
- (5) Expressions used in sub-paragraphs (1)(e), (2) and (3) and in the markets in financial instruments directive have the same meaning as in that directive.”.
- (4) In Part II, in paragraph 22 (futures), after sub-paragraph (1) insert—
- “(1A) Subject to sub-paragraph (1D), futures—
 - (a) to which sub-paragraph (1) does not apply;
 - (b) which relate to commodities;
 - (c) which may be settled physically; and
 - (d) to which paragraph 5 or 6 of Section C of Annex I to the markets in financial instruments directive applies.
 - (1B) Subject to sub-paragraph (1D), futures and forwards—
 - (a) to which sub-paragraph (1) does not apply;
 - (b) which relate to commodities;
 - (c) which may be settled physically;
 - (d) which in accordance with Article 38 of the Commission Regulation are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes; and
 - (e) to which paragraph 7 of Section C of Annex I to the markets in financial instruments directive applies.
 - (1C) Subject to sub-paragraph (1D), futures—
 - (a) to which sub-paragraph (1) does not apply;
 - (b) which may be settled physically; and
 - (c) to which paragraph 10 of Section C of Annex I to the markets in financial instruments directive (read with the Commission Regulation) applies.
 - (1D) Sub-paragraphs (1A), (1B) and (1C) only apply to futures or forwards in relation to which—
 - (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
 - (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
 - (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.
 - (1E) Expressions used in sub-paragraphs (1A) to (1C) and in the markets in financial instruments directive have the same meaning as in that directive.”.
- (5) In Part II, in paragraph 23 (contracts for differences etc.) after sub-paragraph (2) insert—
- “(3) Subject to sub-paragraph (4), derivative instruments for the transfer of credit risk—
 - (a) to which neither paragraph 21 nor sub-paragraph (1) applies; and
 - (b) to which paragraph 8 of Section C of Annex I to the markets in financial instruments directive applies.

- (4) Sub-paragraph (3) only applies to derivatives in relation to which—
- (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis,
 - (b) a management company is providing, in accordance with Article 5(3) of the UCITS directive, 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, or
 - (c) a market operator is providing the investment service specified in paragraph 8 of Section A of Annex I to the markets in financial instruments directive.
- (5) "Derivative instruments for the transfer of credit risk" has the same meaning as in the markets in financial instruments directive."
- (6) In Part II, in paragraph 28, in the appropriate places, insert—
- ““Commission Regulation” means Commission Regulation 1287/2006 of 10 August 2006;
 - “credit institution” has the meaning given in the Regulated Activities Order;
 - “investment firm” has the meaning given in the Regulated Activities Order;
 - “investment services and activities” has the meaning given in the Regulated Activities Order;
 - “management company” has the meaning given in the Regulated Activities Order;
 - “market operator” has the meaning given in the Regulated Activities Order;
 - “MiFID instrument” has the meaning given in article 25D(2) of the Regulated Activities Order;
 - “multilateral trading facility” has the meaning given in the Regulated Activities Order;”
- .

Kevin Brennan
Dave Watts

18th December 2006

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order implements in part Directive 2004/39/EC of 21 April 2004 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) (“MiFID”). MiFID is also implemented by other statutory instruments including the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126), the Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2007 (S.I. 2007/125), the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) (Amendment) Regulations 2006 (S.I. 2006/3386) and the Financial Services and Markets Act 2000 (EEA Passport Rights) (Amendment) Regulations 2006 (S.I. 2006/3385), and by the Financial Services Authority using powers under the Financial Services and Markets Act 2000 (c. 8) (“the Act”).

Part 2 of the Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (“the principal Order”). The amendments include the following.

- Article 4(4) of the principal Order is updated to take account of MiFID’s repeal and replacement of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ No L 141, 11.6.1993, p.27) (“ISD”). Article 4(4) provided that in respect of any regulated activity that falls within the scope of the ISD, the exclusions in the principal Order applicable to that activity must be disregarded if they are incompatible with that directive. The replacement provision provides that in respect of any regulated activity that falls within the scope of MiFID, the exclusions in the principal Order applicable to that activity are to be disregarded if they are incompatible with MiFID. The articles of the principal Order to which article 4(4) applies are amended to show that they must be read subject to article 4(4).
- Operating a multilateral trading facility, one of the “investment services and activities” in MiFID, is made a separate regulated activity for the purposes of the Act. This kind of activity is already specified by the principal Order, but it is covered by several of the existing specified activities. The Order creates an exclusion from the new activity for certain overseas persons.
- Articles 83 (options), 84 (futures) and 85 (contracts for differences etc.) of the principal Order are extended to include “financial instruments” in Section C of Annex I to MiFID which are not currently investments specified in Part 3 of the principal Order. These new categories of investment are only specified for the purposes of the Act in so far as an investment firm, credit institution or in some circumstances a management company (within the meaning 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, OJ No L 375, 31.12.85, p.3) or a market operator carries on an investment service or activity in relation to the investment.
- New definitions of “investment firm”, “credit institution”, “market operator”, “multilateral trading facility” and “investment services and activities” (all terms defined in MiFID) are inserted into the principal Order. The provisions of MiFID and subordinate legislation made under it to which the definitions refer are set out in new Schedules 2 and 3 to the principal Order (replacing existing Schedules setting out the corresponding provisions of the ISD). The definitions apply for the purposes of the above-mentioned provisions.

Parts 3 and 4 of the Order make amendments to other legislation consequential on the changes made by this Order.

A transposition note has been prepared which sets out how the main elements of MiFID will be transposed into UK law. A Regulatory Impact Assessment of the effect of this instrument and the other instruments transposing MiFID 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), and copies of both documents have been placed in the libraries of both Houses of Parliament.

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