

2016 No. 392

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016

Made - - - - *16th March 2016*

Coming into force in accordance with article 1

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.

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

A draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with paragraphs 2 and 2A of Schedule 2 to the European Communities Act 1972(d), section 429(3) and (4) of, and paragraph 26(2) of Schedule 2 to, the Financial Services and Markets Act 2000(e) and sections 6(10) and 161(4) of the Small Business, Enterprise and Employment Act 2015(f).

The Treasury make this Order in exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972, sections 21(9), (10) and (15), 22(1) and (5), 38, 39 and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000(g) and sections 5(3) and 161(2)(d) of the Small Business, Enterprise and Employment Act 2015.

(a) S.I. 2012/1759.

(b) 1972 c. 68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and the European Union (Amendment) Act 2008 (c. 7), Schedule, Part 1. By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c. 51) legislation may be made under section 2(2) of the European Communities Act 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 1992 (Cm 2183).

(c) 2000 c.8.

(d) Paragraph 2 was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and paragraph 2A was inserted by section 29 of that Act.

(e) Paragraph 25 of Schedule 2 was amended, and paragraph 26 was substituted, by section 8 of the Financial Services Act 2012 (c. 21).

(f) 2015 c. 26.

(g) Section 38 was amended by paragraph 4 of Schedule 18 to the Financial Services Act 2012. Paragraph 25(1)(f), (2) and (3) of Schedule 2 to the Financial Services and Markets Act 2000 provides that an order under section 22(1) of that Act may make consequential, transitional or supplemental provision.

PART 1

Citation and commencement

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016.

(2) This Order comes into force on the day after the day on which this Order is made for the purposes of the FCA(a)—

- (a) making rules;
- (b) giving guidance; and
- (c) imposing requirements or giving directions.

(3) For all other purposes—

- (a) this article and articles 2(1), (2), (5), 6(1) and (2), 9, 10(1), (3) and (4), 11 and 12 come into force on the day after the day on which this Order is made;
- (b) articles 2(10)(a), (13) and (17) and 7 come into force on 20th March 2016;
- (c) articles 2(3), (4), (7), (8), (10)(b), (11), (12), (14) to (16) and (18) to (21), 3, 4, 6(4) and (5) and 8 come into force immediately after the coming into force of article 2(3) to (5) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.3) Order 2015(b), on 21st March 2016; and
- (d) the remaining provisions of this Order come into force on 6th April 2016.

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

PART 2

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

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

2.—(1) The Regulated Activities Order is amended as follows.

(2) In article 3(1) (interpretation)(d)—

- (a) in the definition of “borrower”, in paragraph (b) for “is to be read with article 36H(4)” substitute “has the meaning given by article 36H”; and
- (b) in the definition of “lender”, in paragraph (b) for “is to be read with article 36H(4)” substitute “has the meaning given by article 36H”.

(3) In article 4 (specified activities: general)(e), in paragraph (4B)(b) after “mortgage intermediary” insert “in respect of an agreement entered into, or to be entered into, on or after 21st March 2016”.

(4) In article 25A (arranging regulated mortgage contracts)(f)—

- (a) in paragraph (1)(b)—

(a) “The FCA” means the Financial Conduct Authority (see section 1A(2) of the Financial Services and Markets Act 2000).

(b) S.I. 2015/1863.

(c) S.I. 2001/544.

(d) Article 3(1) was amended by S.I. 2013/1881. There are other amendments, but none is relevant here.

(e) In article 4, paragraph (4B) was inserted by S.I. 2015/910. There are other amendments to article 4 but none is relevant here.

(f) Article 25A was inserted by S.I. 2003/1475 and amended by S.I. 2015/910.

- (i) after “regulated mortgage contract” insert “falling within paragraph (1A)”;
- (ii) omit “after the coming into force of article 61”;
- (b) after paragraph (1) insert—
 - “(1A) A regulated mortgage contract falls within this paragraph if—
 - (a) the contract was entered into on or after 31st October 2004; or
 - (b) the contract—
 - (i) was entered into before 31st October 2004; and
 - (ii) was a regulated credit agreement immediately before 21st March 2016.”.
- (5) In article 36H (operating an electronic system in relation to lending)(a)—
 - (a) in paragraph (2A) for “interest and capital” in sub-paragraphs (a) and (b) substitute “either interest or capital or both”;
 - (b) after paragraph (2C) insert—
 - “(2D) Where A carries on an activity of the kind specified in paragraph (1), it is a specified kind of activity for A to operate an electronic system where—
 - (a) that system enables A to facilitate a person (“B”) assuming the rights of the lender under an article 36H agreement by assignment or operation of law, and
 - (b) the conditions in paragraphs (2), (2A) and (2C) are satisfied where C is the borrower under the agreement in sub-paragraph (a).”;
 - (c) in paragraph (3)—
 - (i) after “paragraph (1)” insert “or (2D)”;
 - (ii) in sub-paragraph (a)—
 - (aa) for “B and C” substitute “either B or C”; and
 - (bb) after “B becoming the lender under the article 36H agreement” for “and” substitute “or”;
 - (iii) in sub-paragraph (d), for “performing duties, or exercising or enforcing” substitute “taking steps to perform duties, or exercise or enforce”;
 - (iv) at the beginning of sub-paragraphs (e), (f), (g) and (h), insert “taking steps with a view to”;
 - (v) delete “or” at the end of sub-paragraph (g); and
 - (vi) in sub-paragraph (h)(ii) after “person” insert—
 - “, or
 - (i) giving advice in relation to the taking of any of the steps in sub-paragraphs (e) to (h)”;
 - (d) for paragraph (4) substitute—
 - “(4) An “article 36H agreement” is an agreement by which one person provides another person with credit and in relation to which—
 - (a) the condition in paragraph (4A) is satisfied, and
 - (b) the condition in either paragraph (5) or (6) is satisfied, or was satisfied at the time the agreement was entered into.
 - (4A) The condition in this paragraph is that A does not provide credit, assume the rights (by assignment or operation of law) of a person who provided credit, or receive credit under the agreement.”;
 - (e) for paragraph (9) substitute—
 - “(9) In this article—

(a) Article 36H was inserted by S.I. 2013/1881 and amended by S.I. 2014/366.

“assignment”, in relation to Scotland, means assignation;

“borrower” means a person who receives credit under an article 36H agreement or a person to whom the rights and duties of a borrower under such an agreement have passed by assignment or operation of law;

“credit” has the meaning given by article 60L;

“lender” means—

- (a) a person providing credit under an article 36H agreement, or
- (b) a person who by assignment or operation of law has assumed the rights of a person who provided credit under such an agreement;

“relevant person” means—

- (a) a partnership consisting of two or three persons not all of whom are bodies corporate, or
- (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.”; and

(f) in paragraph (10), for “has” substitute “have”.

(6) In article 53 (advising on investments)(a)—

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

“(2) Advising a person is a specified kind of activity if the advice is—

- (a) given to the person in that person’s capacity as a lender or potential lender under a relevant article 36H agreement, or in that person’s capacity as an agent for a lender or potential lender under such an agreement; and
- (b) advice on the merits of that person doing any of the following (whether as principal or agent)—
 - (i) entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law,
 - (ii) providing instructions to an operator with a view to entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law, where the instructions involve—
 - (aa) accepting particular parameters for the terms of the agreement presented by an operator,
 - (bb) choosing between options governing the parameters of the terms of the agreement presented by an operator, or
 - (cc) specifying the parameters of the terms of the agreement by other means,
 - (iii) enforcing or exercising the lender’s rights under a relevant article 36H agreement, or
 - (iv) assigning rights under a relevant article 36H agreement.

(3) Paragraph (2) does not apply in so far as—

- (a) the advice is given in relation to a relevant article 36H agreement which has been facilitated by the person giving the advice, in the course of carrying on an activity of a kind specified by article 36H and is given by—
 - (i) an authorised person with permission to carry on a regulated activity of the kind specified by article 36H(1) (operating an electronic system in relation to lending),

(a) Article 53 was amended by S.I. 2003/1476.

- (ii) an appointed representative in relation to that activity,
 - (iii) an exempt person in relation to that activity, or
 - (iv) a person to whom, as a result of Part 20 of the Act, the general prohibition does not apply in relation to that activity;
- (b) the advice is given in the course of carrying on an activity of a kind specified by article 39F(a) (debt-collecting) by a person carrying on that activity not in contravention of the general prohibition; or
 - (c) the advice is given in the course of carrying on an activity of a kind specified by article 39G(b) (debt administration) by a person carrying on that activity not in contravention of the general prohibition.

(4) In this article—

“operator” means a person carrying on an activity of the kind specified by article 36H(1) or (2D), and

“relevant article 36H agreement” means an article 36H agreement (within the meaning of article 36H (operating an electronic system in relation to lending)) which has been, or may be, entered into with the facilitation of a person carrying on an activity of the kind specified by article 36H(1) or (2D).

(5) For the purposes of the application of section 22(1) of the Act (regulated activities) to an activity of a kind specified by paragraph (2) of this article, article 88D(c) (credit agreement), and article 73 (investments: general) in so far as it relates to that article, have effect as if the reference to a credit agreement in article 88D includes a reference to a relevant article 36H agreement.”.

(7) In article 53A (advising on regulated mortgage contracts)(d)—

(a) in paragraph (1)(b)(ii)—

- (i) after “regulated mortgage contract” insert “falling within paragraph (1A)”;
- (ii) omit “after the coming into force of article 61”;

(b) after paragraph (1) insert—

“(1A) A regulated mortgage contract falls within this paragraph if—

- (a) the contract was entered into on or after 31st October 2004; or
- (b) the contract—
 - (i) was entered into before 31st October 2004; and
 - (ii) was a regulated credit agreement immediately before 21st March 2016.”.

(8) In article 53DA (advising on regulated credit agreements for the acquisition of land)(e), in paragraph (1)(c) after “regulated credit agreements” insert “entered into, or to be entered into, on or after 21st March 2016”.

(9) In article 54 (advice given in newspapers etc)(f), in paragraph (1)(b) after paragraph (i) insert—

“(ia) to enter into a relevant article 36H agreement (within the meaning of that article) as a lender, to assume the rights of a lender under such an agreement by assignment or operation of law, or to assign rights under such an agreement.”.

(10) In article 60B (regulated credit agreements)(g), in paragraph (3)—

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- (a) Article 39F was inserted by S.I. 2013/1881.
 - (b) Article 39G was inserted by S.I. 2013/1881.
 - (c) Article 88D was inserted by S.I. 2013/1881.
 - (d) Article 53A was inserted by S.I. 2003/1475.
 - (e) Article 53DA was inserted by S.I. 2015/910.
 - (f) Article 54 was amended by S.I. 2003/1475. There are other amendments, but none is relevant here.
 - (g) Article 60B was inserted by S.I. 2013/1881 and amended by S.I. 2014/1850 and S.I. 2015/853.

- (a) for the definition of “regulated credit agreement” substitute—
- ““regulated credit agreement” means—
- (a) in the case of an agreement entered into on or after 1st April 2014, any credit agreement which is not an exempt agreement; or
- (b) in the case of an agreement entered into before 1st April 2014, a credit agreement which—
- (i) was a regulated agreement within the meaning of section 189(1) of the Consumer Credit Act 1974(a) when the agreement was entered into; or
- (ii) became such a regulated agreement after being varied or supplemented by another agreement before 1st April 2014.”;
- (b) in the definition of “regulated credit agreement” (as substituted by sub-paragraph (a)), in sub-paragraph (b) for “1st April 2014” at the end of paragraph (ii) substitute—
- “1st April 2014,
and would not be an exempt agreement pursuant to article 60C(2) on 21st March 2016 if the agreement were entered into on that date.”.
- (11) In article 60C(2) (exempt agreements: exemption relating to the nature of the agreement)(b), in sub-paragraph (c) omit “in the case of an agreement entered into before 31st October 2004.”.
- (12) In article 60D(4) (exempt agreements: exemptions relating to the purchase of land for non-residential purposes)(c) after “of the type described in Article 3(1)(b) of the mortgages directive(d)” insert “that is entered into on or after 21st March 2016 and does not meet the conditions in paragraphs (i) to (iii) of article 61(3)(a) (regulated mortgage contracts)”.
- (13) In article 60E(7) (exempt agreements: exemptions relating to the nature of the lender)(e), in the definition of “housing authority”—
- (a) in paragraph (a) after “wholly owned subsidiary of the Welsh Ministers,” insert “a registered social landlord within the meaning of Part 1 of the Housing Act 1996(f),”; and
- (b) in paragraph (c) after “Northern Ireland Housing Executive” insert “or a housing association within the meaning of Part 2 of the Housing (Northern Ireland) Order 1992(g)”.
- (14) In article 60G (exempt agreements: exemptions relating to the total charge for credit)(h)—
- (a) in paragraph (2A)—
- (i) omit “or” after sub-paragraph (a); and
- (ii) , after sub-paragraph (b) insert—
- “; or
- (c) the agreement was entered into before 21st March 2016.”; and
- (b) in paragraph (8) after “mortgages directive” insert “which is entered into on or after 21st March 2016”.

(a) 1974 c. 39. The definition of “regulated agreement” was substituted by S.I. 2013/1881.

(b) Article 60C was inserted by S.I. 2013/1881; paragraph (2) was amended by S.I. 2015/910 and S.I. 2015/1863.

(c) Article 60D was inserted by S.I. 2013/1881; paragraph (4) was inserted by S.I. 2015/910.

(d) “The mortgages directive” is defined in paragraph 4E of Schedule 3 to the Financial Services and Markets Act 2000 as Directive 2014/17/EU of the European Parliament and of the Council of 4th February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p.34).

(e) Article 60E was inserted by S.I. 2013/1881; the definition of “housing authority” in paragraph (7) was amended by S.I. 2014/1740.

(f) 1996 c. 52.

(g) S.I. 1992/1725 (N.I. 15).

(h) Article 60G was inserted by S.I. 2013/1881; paragraphs (2A) and (8) were inserted by S.I. 2015/910.

(15) In article 60H (exempt agreements: exemptions relating to the nature of the borrower)(a), in paragraph (1)(b)(ii) after “exceeds £60,260 and” insert “, if entered into on or after 21st March 2016,”.

(16) In article 60HA (exempt agreements: exemptions not permitted under the mortgages directive)(b), in paragraph (1) after “credit agreement” insert “entered into on or after 21st March 2016”.

(17) In article 60N (regulated consumer hire agreements)(c), in paragraph (3) for the definition of “regulated consumer hire agreement” substitute—

““regulated consumer hire agreement” means—

- (a) in the case of an agreement entered into on or after 1st April 2014, any consumer hire agreement which is not an exempt agreement; or
- (b) in the case of an agreement entered into before 1st April 2014, a consumer hire agreement which—
 - (i) was a regulated agreement within the meaning of section 189(1) of the Consumer Credit Act 1974 when the agreement was entered into; or
 - (ii) became such a regulated agreement after being varied or supplemented by another agreement before 1st April 2014.”.

(18) In article 61 (regulated mortgage contracts)(d),—

(a) in paragraph (3)(a), before “a contract is a “regulated mortgage contract”” insert “subject to paragraph (5),”; and

(b) after paragraph (4) insert—

“(5) In this Chapter, a contract entered into before 21st March 2016 is a “regulated mortgage contract” only if—

- (a) at the time it was entered into, entering into the contract was an activity of the kind specified by paragraph (1), or
- (b) the contract is a consumer credit back book mortgage contract within the meaning of article 2 of the Mortgage Credit Directive Order 2015(e).”.

(19) In article 61A (mortgage contracts which are not regulated mortgage contracts)(f)—

(a) in paragraph (1)—

- (i) omit “or” after sub-paragraph (e); and
- (ii) after sub-paragraph (f) insert—

“; or

(g) an exempt housing authority loan.”;

(b) in paragraph (6), after the definition of “exempt equitable mortgage bridging loan” insert—

““exempt housing authority loan” is a contract that—

(a) provides for credit to be granted by a housing authority within the meaning of article 60E (exempt agreements: exemptions relating to the nature of the lender); and

(b) if it is entered into on or after 21st March 2016—

- (i) is of a kind to which the mortgages directive does not apply by virtue of Article 3(2) of that directive,

(a) Article 60H was inserted by S.I. 2013/1881 and amended by S.I. 2015/910.

(b) Article 60HA was inserted by S.I. 2015/910.

(c) Article 60N was inserted by S.I. 2013/1881 and amended by S.I. 2014/366.

(d) In article 61(3), sub-paragraph (a) was substituted by S.I. 2001/3544 and amended by S.I. 2006/2383 and 2015/910.

(e) S.I. 2015/910. The definition of “consumer credit back book mortgage contract” was amended by S.I. 2015/1557 and is amended by article 8 of this Order.

(f) Article 61A was inserted by S.I. 2015/910 and amended by S.I. 2015/1863.

- (ii) is a bridging loan, or
- (iii) is a restricted public loan within the meaning of article 60HA (exempt agreements: exemptions not permitted under the mortgages directive), in respect of which the borrower receives timely information on the main features, risks and costs at the pre-contractual stage, and any advertising is fair, clear and not misleading.”.

(20) In article 72G (local authorities)(a)—

- (a) in paragraph (3B)—
 - (i) after “contract” omit “is”; and
 - (ii) for sub-paragraphs (a) to (c) substitute—
 - “(a) was entered into before 21st March 2016; or
 - (b) is entered into on or after 21st March 2016 and—
 - (i) is of a kind to which the mortgages directive does not apply by virtue of Article 3(2) of that directive;
 - (ii) is a bridging loan; or
 - (iii) is a restricted public loan in relation to which the requirements of paragraph (6) are met.”;
- (b) in paragraph (4)—
 - (i) for sub-paragraph (a) substitute—
 - “(a) any activity which is carried on by a local authority—
 - (i) in relation to a credit agreement which was entered into before 21st March 2016, or which is entered into on or after that date for a purpose other than acquiring or retaining property rights in land or in an existing or projected building; and
 - (ii) in so far as the activity is carried on in relation to a credit agreement of a kind to which the consumer credit directive does not apply by virtue of Article 2(2) of that directive;”;
 - (ii) in sub-paragraph (b) after “local authority” insert “in relation to a credit agreement entered into on or after 21st March 2016”.

(21) In article 72I (registered consumer buy-to-let mortgage firms)(b), in paragraph (1) after “consumer buy-to-let mortgage business” insert “which relates to an agreement entered into on or after 21st March 2016 and is”.

PART 3

Amendment of other legislation

Amendment of the Consumer Credit Act 1974

3.—(1) The Consumer Credit Act 1974(c) is amended as follows.

(2) In section 8 (consumer credit agreements), in subsection (3)(b) at the beginning insert “if entered into on or after 21st March 2016,”.

(3) In section 189(1) (definitions), in the definition of “residential renovation agreement” after “consumer credit agreement” insert “entered into on or after 21st March 2016”.

(a) Article 72G was inserted by S.I. 2014/366 and amended by S.I. 2015/910.

(b) Article 72I was inserted by S.I. 2015/910.

(c) 1974 c. 39. Section 8(3) was substituted by S.I. 2013/1881 and 2015/910. In section 189(1), the definition of “residential renovation agreement” was inserted by S.I. 2015/910.

Amendment of the Financial Services and Markets Act 2000 (Exemption) Order 2001

4. In the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001(a), in paragraph 48 (social housing), in sub-paragraph (1A) for paragraphs (a) to (c) substitute—

- “(a) was entered into before 21st March 2016; or
- (b) is entered into on or after 21st March 2016 and—
 - (i) is of a kind to which the mortgages directive does not apply by virtue of Article 3(2) of that directive;
 - (ii) is a bridging loan; or
 - (iii) is a restricted public loan in relation to which the requirements of sub-paragraph (1B) are met.”.

Amendment of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001

5.—(1) Regulation 3 of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001(b) (requirements applying to contracts between authorised persons and appointed representatives) is amended as follows.

- (2) In paragraph (2)(c) for “53” substitute “53(1)”.
- (3) In paragraph (3CA)—
 - (a) in sub-paragraph (a) delete “(within the meaning of article 36H(4) of the Regulated Activities Order)”;
 - (b) after sub-paragraph (a) insert—
 - “(aa) facilitates a person assuming the rights of the lender under an article 36H agreement by assignment or operation of law on behalf of other counterparties;”;
 - (c) in sub-paragraph (b), for “sub-paragraph (a)” substitute “sub-paragraph (a) or (aa)”;
 - (d) after sub-paragraph (b) insert—
 - “(c) gives advice (in circumstances constituting the carrying on of activity of the kind specified by article 53(2) of that Order) on the merits of—
 - (i) a person entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law,
 - (ii) a person providing instructions to an operator with a view to entering into a relevant article 36H agreement as a lender or assuming the rights of a lender under such an agreement by assignment or operation of law, where the instructions involve—
 - (aa) accepting particular parameters for the terms of the agreement presented by an operator,
 - (bb) choosing between options governing the parameters of the terms of the agreement presented by an operator, or
 - (cc) specifying the parameters of the terms of the agreement by other means,
 - (iii) a person enforcing or exercising the lender’s rights under a relevant article 36H agreement, or
 - (iv) a person assigning rights under a relevant article 36H agreement, on behalf of other counterparties.”.
- (4) After paragraph (3CA) insert—

(a) S.I. 2001/1201. Paragraph 48 was substituted by S.I. 2003/1675, and sub-paragraph (1A) was inserted by S.I. 2015/910.

(b) S.I. 2001/1217. Paragraph (3CA) was inserted by S.I. 2014/206. There are other amendments, but none is relevant here.

“(3CB) In paragraph (3CA)—

“article 36H agreement” has the meaning given by article 36H of the Regulated Activities Order,

“lender” has the meaning given by article 36H of the Regulated Activities Order,

“operator” means a person carrying on an activity of the kind specified by article 36H(1) or (2D), and

“relevant article 36H agreement” means an article 36H agreement which has been, or is to be, entered into with the facilitation of a person carrying on a regulated activity of the kind specified by article 36H(1) or (2D) not in contravention of the general prohibition.”.

Amendment of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005

6.—(1) In Schedule 1 to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005(a), Part 1 (controlled activities) is amended as follows.

(2) In paragraph 4C (operating an electronic system in relation to lending)—

(a) in sub-paragraph (2A) for “interest and capital” in paragraphs (a) and (b) substitute “either interest or capital or both”;

(b) after sub-paragraph (2C) insert—

“(2D) Where A carries on the activity specified by sub-paragraph (1), it is a controlled activity for A to operate an electronic system where—

(a) that system enables A to facilitate a person (“B”) assuming the rights of the lender under a paragraph 4C agreement by assignment or operation of law, and

(b) the conditions in sub-paragraphs (2), (2A) and (2C) are satisfied where C is the borrower under the agreement in paragraph (a).”;

(c) in sub-paragraph (3)—

(i) after “sub-paragraph (1)” insert “or (2D)”,

(ii) in paragraph (a)—

(aa) for “B and C” substitute “either B or C”,

(bb) after “B becoming the lender under the paragraph 4C agreement” for “and” substitute “or”,

(iii) in paragraph (d), for “performing duties, or exercising or enforcing” substitute “taking steps to perform duties, or exercise or enforce”,

(iv) at the beginning of paragraphs (e), (f), (g) and (h), insert “taking steps with a view to”,

(v) delete “or” at the end of paragraph (g), and

(vi) in paragraph (h)(ii) after “person” insert—

“, or

(i) giving advice in relation to the taking of any of the steps in sub-paragraphs (e) to (h)”;

(d) for sub-paragraph (4) substitute—

“(4) A “paragraph 4C agreement” is an agreement by which one person provides another person with credit and in relation to which—

(a) the condition in sub-paragraph (4A) is satisfied, and

(a) S.I. 2005/1529. Paragraph 4C was inserted by S.I. 2013/1881 and amended by S.I. 2014/366. There are other amendments, but none is relevant here. Paragraphs 10A & 10B to Schedule 1 were numbered as such in the Order when originally made.

(b) the condition in either sub-paragraph (5) or (6) is satisfied, or was satisfied at the time the agreement was entered into.

(4A) The condition in this sub-paragraph is that A does not provide credit, assume the rights (by assignment or operation of law) of a person who provided credit, or receive credit under the agreement.”;

(e) for sub-paragraph (9) substitute—

“(9) In this paragraph—

“assignment”, in relation to Scotland, means assignation;

“borrower” means a person who receives credit under a paragraph 4C agreement or a person to whom the rights and duties of a borrower under such an agreement have passed by assignment or operation of law;

“credit” has the meaning given by article 60L of the Regulated Activities Order;

“lender” means—

(a) a person providing credit under a paragraph 4C agreement, or

(b) a person who by assignment or operation of law has assumed the rights of a person who provided credit under such an agreement;

“relevant person” means—

(a) a partnership consisting of two or three persons not all of whom are bodies corporate, or

(b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.”; and

(f) in sub-paragraph (10), for “has” substitute “have”.

(3) In paragraph 7 (advising on investments)—

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

(b) after sub-paragraph (1), insert—

“(2) Advising a person is a controlled activity if the advice is—

(a) given to the person in that person’s capacity as a lender or potential lender under a relevant paragraph 4C agreement, or in that person’s capacity as an agent for a lender or potential lender under such an agreement; and

(b) advice on the merits of the person doing any of the following (whether as principal or agent)—

(i) entering into a relevant paragraph 4C agreement as a lender or assuming the rights of a lender under such an agreement,

(ii) providing instructions to an operator with a view to entering into a relevant paragraph 4C agreement as a lender or to assuming the rights of a lender under such an agreement by assignment or operation of law, where the instructions involve—

(aa) accepting particular parameters for the terms of the agreement presented by an operator,

(bb) choosing between options governing the parameters of the terms of the agreement presented by an operator, or

(cc) specifying the parameters of the terms of the agreement by other means,

(iii) enforcing or exercising the lender’s rights under a relevant paragraph 4C agreement, or

(iv) assigning rights under a relevant paragraph 4C agreement.

(3) In sub-paragraph (2)—

“operator” means a person carrying on a controlled activity of the kind specified by paragraph 4C(1) or (2D), and

“relevant paragraph 4C agreement” means a paragraph 4C agreement (within the meaning of that paragraph) which has been, or is to be, entered into with the facilitation of a person carrying on a controlled activity of the kind specified by paragraph 4C(1) or (2D) not in contravention of the general prohibition.

(4) For the purposes of the application of section 21(9) and (10) of the Act (restrictions on financial promotion) to an activity of a kind specified by sub-paragraph (2), paragraph 26D of this Schedule (relevant credit agreements), and article 4 (definition of controlled activities and controlled investments) in so far as it relates to that paragraph, have effect as if the reference to a relevant credit agreement in paragraph 26D includes a reference to a paragraph 4C agreement.”.

(4) In paragraph 10A (arranging qualifying credit etc.)—

- (a) the existing text becomes sub-paragraph (1);
- (b) in sub-paragraph (1)(b) for “, within the meaning of article 61(3) of the Regulated Activities Order, entered into after the coming into force of that article,” substitute “falling within sub-paragraph (2)”;
- (c) after sub-paragraph (1) insert—

“(2) A regulated mortgage contract falls within this sub-paragraph if—

- (a) the contract was entered into on or after 31st October 2004; or
- (b) the contract—
 - (i) was entered into before 31st October 2004; and
 - (ii) was a regulated credit agreement immediately before 21st March 2016.

(3) In this paragraph “regulated mortgage contract” has the meaning given by article 61(3) of the Regulated Activities Order.”.

(5) In paragraph 10B (advising on qualifying credit etc.)—

- (a) in sub-paragraph (1) for “entered into by him after the coming into force of article 61 of the Regulated Activities Order” substitute “falling within sub-paragraph (1A)”;
- (b) after sub-paragraph (1) insert—

“(1A) A regulated mortgage contract falls within this sub-paragraph if—

- (a) the contract was entered into on or after 31st October 2004; or
- (b) the contract—
 - (i) was entered into before 31st October 2004; and
 - (ii) was a regulated credit agreement immediately before 21st March 2016.”.

Amendment of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013

7.—(1) The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013(a) is amended as follows.

(2) In article 56 (interim permission)(b), after paragraph (2) insert—

“(2A) On and after the relevant date, any relevant person (“P”) is to be treated as having an interim permission to carry on relevant mortgage activity.

(2B) For the purposes of paragraph (2A)—

- (a) a person is a “relevant person” if—

(a) S.I. 2013/1881.

(b) Article 56 was amended by S.I. 2014/366, 376 and 1446.

- (i) the person is a housing authority within the meaning of article 60E of the Regulated Activities Order,
- (ii) the person has notified the FCA before 1st April 2016 that the person wishes to obtain an interim permission under paragraph (2A) to carry on relevant mortgage activity,
- (iii) immediately before 1st April 2014 the person carried on an activity which would be relevant mortgage activity if carried on on or after that date, and held a standard licence under the 1974 Act covering such activity,
- (iv) immediately before 20th March 2016 the person did not hold an interim permission to carry on relevant mortgage activity, and
- (v) the person did not previously obtain interim permission to carry on relevant mortgage activity under this article, or the person did obtain such an interim permission and the FCA did not cancel such permission or vary the permission by removing relevant mortgage activity from the activities to which the interim permission related, otherwise than on an application by the person;

(b) “the relevant date” means the later of—

- (i) the date on which a person notifies the FCA that the person wishes to obtain an interim permission under paragraph (2A), or
- (ii) 20th March 2016.

(2C) A person is to be treated as having notified the FCA that the person wishes to obtain an interim permission under paragraph (2A) to carry on relevant mortgage activity only if the notice has been given in writing and includes—

- (a) the person’s name and address,
- (b) the number of the person’s licence under the 1974 Act, and
- (c) confirmation that the person carries on relevant mortgage activity.

(2D) For the purposes of paragraphs (2A) to (2C), “relevant mortgage activity” means activity of the kind specified by article 60B(2) of the Regulated Activities Order (exercising, or having the right to exercise the lender’s rights and duties under a regulated credit agreement) in relation to agreements entered into before 1st April 2014 which, if entered into on or after 20th March 2016, would be exempt agreements pursuant to article 60E(5) of the Regulated Activities Order (mortgage lending by housing authorities).

(2E) Section 347 of the Act (the record of authorised persons etc.)^(a) does not apply in relation to a person who appears to the FCA to be an authorised person only by virtue of an interim permission obtained under paragraph (2A), but this does not prevent the FCA from maintaining a record of such persons.”.

(3) In article 58 (duration of interim permissions)^(b)—

(a) after paragraph (1) insert—

“(1ZA) If P has obtained an interim permission by virtue of article 56(2A), 1st July 2016 is to be treated as the application date in relation to that interim permission unless the FCA specifies a different date in a direction made on or after 20th March 2016.”;

(b) in paragraph (1A)(a) after “36A” insert “, 39F(1), 39G(1)”; and

(c) in paragraphs (1A)(b) and (1D)(b), after “the Mortgage Credit Directive Order 2015” insert “, the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.3) Order 2015 and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016”.

^(a) There are amendments to section 347 of the Financial Services and Markets Act 2000, but none is relevant here.

^(b) Article 58 was amended by S.I. 2014/208, 366, 506 and 2632 and 2015/910.

Amendment of the Mortgage Credit Directive Order 2015

8.—(1) The Mortgage Credit Directive Order 2015(a) is amended as follows.

(2) In article 2(1) (interpretation), in the definition of “consumer credit back book mortgage contract”—

(a) in sub-paragraph (a)—

(i) the second paragraph (iii) is renumbered as paragraph (iv)(b), and

(ii) in that paragraph, omit “but for article 28(1),”; and

(b) for sub-paragraph (b) substitute—

“(b) (i) is entered into on or after 21st March 2016 in the circumstances described in article 28,

(ii) would be a regulated credit agreement within the meaning of article 60B(3) of the Regulated Activities Order if it had been entered into immediately before 21st March 2016, and

(iii) is a regulated mortgage contract immediately after it is entered into.”.

(3) In Part 3 (consumer buy-to-let mortgages), before article 4 (interpretation of Part 3) insert—

“Application of this Part

3A. This Part does not apply in relation to any agreement entered into before 21st March 2016.”.

(4) For article 28 (transitional provision: agreements before 21st March 2016) substitute—

“Transitional provision: agreements before 21st March 2016

28. Where a credit agreement is entered into before 21st March 2016 and a further agreement relating to the same credit is to be entered into before the borrower is to be entitled to the credit, the following enactments do not apply to the agreements until immediately after the later agreement has been entered into—

(a) this Order;

(b) paragraphs (3) to (5) of article 2 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.3) Order 2015(c); and

(c) articles 2(3), (4), (7), (8), (10)(b), (11), (12), (14) to (16) and (18) to (21), 3, 4 and 6(4) and (5) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016.”.

(5) In article 29 (transitional provision: consumer credit back book mortgage contracts), in paragraph (1) after “consumer credit back book mortgage contract” insert “other than one in relation to which the Consumer Credit Act 1974 applies as described in article 31(2)”.

(6) After article 31(d) (transitional provision: person subject to the Consumer Credit Act 1974 who chooses to adopt new rules before 21st March 2016), insert—

“Transitional provision: first charge mortgages entered into before 31st October 2004 which are regulated credit agreements immediately before 21st March 2016

31A.—(1) This article applies to an agreement—

(a) entered into before 31st October 2004,

(a) S.I. 2015/910.

(b) S.I. 2015/1557 inserted a new paragraph (iii) after the existing sub-paragraph (ii). There was, however, an original paragraph (iii), and this provision renumbers that original paragraph (iii) as paragraph (iv).

(c) S.I. 2015/1863.

(d) Article 31 was amended by S.I. 2015/1557.

- (b) which is a consumer credit back book mortgage contract, and
 - (d) under which the mortgage securing the borrower’s obligation to repay is a first charge mortgage.
- (2) Until the relevant date—
- (a) the agreement continues to be a regulated credit agreement within the meaning of article 60B(3) of the Regulated Activities Order,
 - (b) making arrangements for a person to vary the terms of the agreement is not a regulated activity pursuant to article 25A(1) of the Regulated Activities Order,
 - (c) advising a person on the merits of varying the terms of the agreement is not a regulated activity pursuant to article 53A(1) of the Regulated Activities Order,
 - (d) administering the agreement is not a regulated activity pursuant to article 61(2)(b) of the Regulated Activities Order,
 - (e) the agreement continues to be a regulated agreement within the meaning of section 8(1) of the Consumer Credit Act 1974, and
 - (f) article 29 (transitional provision: consumer credit back book mortgage contracts) does not apply to the agreement.
- (3) Article 60C(2)(c) of the Regulated Activities Order^(a) applies to the agreement as if the reference to 21st March 2016 were a reference to the relevant date.
- (4) In this article “the relevant date” means the earlier of—
- (a) the date on which the lender first acts in respect of the agreement in compliance or purported compliance with rules made by the FCA which apply to regulated mortgage contracts and which are different from rules made by the FCA which apply to regulated credit agreements;
 - (b) the date which the lender notifies in writing to the borrower as being the date from which the lender will act in respect of the agreement in compliance with rules made by the FCA which apply to regulated mortgage contracts; or
 - (c) 21st March 2017.”.

PART 4

Amendment of the Small and Medium Sized Business (Finance Platforms) Regulations 2015

Amendment of the Small and Medium Sized Business (Finance Platforms) Regulations 2015

- 9.** In the Small and Medium Sized Business (Finance Platforms) Regulations 2015^(b)—
- (a) in regulation 2(1) (interpretation), after the definition of “the 2000 Act” insert—
 - ““broker” means a person who, as part of that person’s usual business activities, effects introductions of persons seeking finance to finance providers;”;
 - (b) in regulation 3(3) (designated banks to provide information to designated finance providers)—
 - (i) at the end of sub-paragraph (c) omit “or”; and
 - (ii) after sub-paragraph (d) insert—
 - “; or
 - (e) the application was made by a broker on behalf of the business.”.

^(a) Article 60C(2)(c) was inserted by S.I. 2015/1863 and is amended by article 2 of this Order.

^(b) S.I. 2015/1946.

PART 5

Transitional provisions relating to the operation of an electronic platform in relation to lending

Transitional provision: permission

10.—(1) A person who, at the end of the day on which this Order is made, has permission under the Financial Services and Markets Act 2000 to carry on an activity of the kind specified by article 36H of the Regulated Activities Order (operating an electronic platform in relation to lending), is to be treated as having that permission varied with effect from the day after the day on which this Order is made to include permission to carry on activities of the kind specified by paragraph (2D) and (3) of that article.

(2) A person who, immediately before 6th April 2016, has permission under the Financial Services and Markets Act 2000 to carry on an activity of the kind specified by article 53 of the Regulated Activities Order (advising on investments), is to be treated as having that permission varied with effect from 6th April 2016 to include permission to carry on activities of the kind specified by paragraph (2) of that article (advising on article 36H agreements) where that person may lawfully carry on activities of that kind.

(3) Where a person who, immediately before 6th April 2016, had a Part 4A permission(a) that is treated as having been varied in accordance with paragraph (2), the varied permission remains subject to any limitations(b) or requirements(c) specified or imposed in relation to that permission immediately before 6th April 2016.

(4) A Part 4A permission that is treated as having been varied in accordance with paragraphs (1) or (2) is to be treated as having been varied by—

- (a) in the case of a PRA-authorized person(d), the PRA(e); or
- (b) in the case of any other authorised person, the FCA.

(5) Paragraphs (1) to (3) do not affect the ability of the FCA or the PRA to vary or cancel a Part 4A permission under the Act.

Transitional provision: article 36H agreements

11.—(1) This article applies to an agreement for the provision of credit (within the meaning of article 60L of the Regulated Activities Order) which is not an article 36H agreement (within the meaning of article 36H of that Order) immediately before the coming into force of article 2(5) of this Order but which would, but for paragraph (2), fall to be so treated after that date by virtue of the amendments made by article 2(5).

(2) An agreement to which this article applies is not to be treated as an article 36H agreement unless the condition in paragraph (3) is satisfied.

(3) The condition in this paragraph is that after the coming into force of article 2(5) of this Order, a person, acting in the course of carrying on an activity of the kind specified by article 36H(2D) of the Regulated Activities Order, facilitates a transfer of the rights under the agreement (by assignment or operation of law) to a lender (within the meaning of article 36H of that Order) not previously party to the agreement.

-
- (a) “A Part 4A permission” means a permission given by the appropriate regulator under Part 4A of the Financial Services and Markets Act 2000 (see section 55A(5) of that Act).
 - (b) Limitations may be imposed by the FCA pursuant to section 55E of the Financial Services and Markets Act 2000, and by the PRA pursuant to section 55F of that Act.
 - (c) Requirements may be imposed by the FCA pursuant to section 55L of the Financial Services and Markets Act 2000, and by the PRA pursuant to section 55M of that Act.
 - (d) “PRA-authorized person” means a person authorised to carry on one or more regulated activity that is designated as a PRA-regulated activity by the Treasury pursuant to section 22A of the Financial Services and Markets Act 2000 (see section 2B(5) of that Act).
 - (e) “The PRA” means the Prudential Regulation Authority (see section 2A(2) of the Financial Services and Markets Act 2000).

Transitional provision: paragraph 4C agreements

12.—(1) This article applies to an agreement for the provision of credit (within the meaning of article 60L of the Regulated Activities Order) which is not a paragraph 4C agreement (within the meaning of paragraph 4C of Schedule 1 to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005) immediately before the coming into force of article 6(2) of this Order but which would, but for paragraph (2), fall to be so treated after that date by virtue of the amendments made by article 6(2).

(2) An agreement to which this article applies is not to be treated as a paragraph 4C agreement, unless the condition in paragraph (3) is satisfied.

(3) The condition in this paragraph is that after the coming into force of article 6(2) of this Order, a person, acting in the course of carrying on a controlled activity of the kind specified by sub-paragraph 4C(2D) of Schedule 1 to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 facilitates a transfer of the rights under the agreement (by assignment or operation of law) to a lender (within the meaning of paragraph 4C of Schedule 1 to that Order) not previously party to the agreement.

David Evennett
Mel Stride

16th March 2016

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes legislative amendments relating to the regulation of activities connected with lending, and in particular amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (“the Regulated Activities Order”). Some amendments relate to the regulated activity of operating an electronic system in relation to lending. Other amendments relate to the regulated activities connected with regulated credit agreements and regulated mortgage contracts.

Some provisions of this Order supplement the Mortgage Credit Directive Order 2015 (S.I. 2015/910) (“the Mortgages Order”) and other legislation amended by that Order, which transposed in part Directive 2014/17/EU of the European Parliament and of the Council of 4th February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (“the mortgages directive”) (OJ L 60, 28.2.2014, p.34). A transposition note setting out how the mortgages directive has been transposed into UK law was appended to the Explanatory Memorandum for the 2015 Order and is available on the legislation.gov.uk website.

Part 2 of the Order amends the Regulated Activities Order as follows:

— Article 2(4) and (7) extend the scope of the regulated activities of arranging and advising on regulated mortgage contracts so that mortgages entered into before 31st October 2004 and which are regulated as consumer credit agreements before 21st March 2016 are included within the activities from that date. In Part 3 of the Order, article 8(6) provides for first charge mortgages of that type to continue to be regulated as consumer credit agreements during a transitional period.

— Article 2(5) amends the regulated activity of operating an electronic system in relation to lending so that, first, such activity is carried on regardless of whether the person operating the system (or a person acting on instructions) collects only the interest or capital due under the agreement or both and, second, where a person is carrying on that activity, facilitating another person transferring their rights under an agreement to a third person is also a regulated activity. Article 2(5) also aligns related regulated activities with the regulated activities relating to the provision of credit information services, and article 2(2) and (5) make amendments to definitions.

— Article 2(6) amends the regulated activity of advising on investments such that the activity includes: (a) giving advice to a lender or potential lender on the merits of entering into, or assuming rights under, a relevant agreement through an electronic system; (b) providing instructions to the operator of such a system; (c) enforcing or exercising such a lender’s rights; and (d) assigning rights under such an agreement.

— Article 2(10) and (17) clarify the regulatory position of a consumer credit or consumer hire agreement entered into before 1st April 2014 such that it is clear that the regulatory position is determined primarily by reference to the position when the agreement was entered into.

— Article 2(13) extends the exemption from regulation as a consumer credit agreement for mortgage lending by housing authorities such that lending by housing associations in Wales and Northern Ireland from 1st April 2014 is included within the exemption.

— Article 2(18) supplements the definition of “regulated mortgage contract” such that agreements entered into before 21st March 2016 will only be regulated mortgage contracts if they were regulated as such when entered into, or if they were regulated credit agreements which are becoming regulated mortgage contracts pursuant to the Mortgages Order. This replicates part of the effect of article 28 of the Mortgages Order, which is amended by article 8(4) in Part 3 of this Order.

— Article 2(19) exempts mortgage lending by housing authorities from being regulated as a regulated mortgage contract after 21st March 2016, to the extent that such exemption is compatible with the mortgages directive.

— The other provisions of Part 2 are consequential on the amendments in articles 2(18) and 8(4).

Part 3 of the Order contains the provisions at articles 8(4) and (6) mentioned above, other amendments to legislation in consequence of the amendments to the Regulated Activities Order made by Part 2, and other minor amendments to the Mortgages Order at article 8(2)(a) and (5).

Part 4 of the Order amends the Small and Medium Sized Business (Finance Platforms) Regulations 2015 (S.I. 2015/1946) so that the obligation of a designated bank to refer an unsuccessful finance application by a small or medium sized business to a designated finance platform does not apply where the application was made on behalf of the business by a broker.

Part 5 of the Order makes transitional provision relating to the amendments in article 2(5) and (6).

An impact assessment has not been produced for this instrument as no significant impact on the costs of business or the voluntary sector is foreseen.

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