

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED
ACTIVITIES) (AMENDMENT) ORDER 2021

2021 No. 90

1. Introduction

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

2. Purpose of the instrument

2.1 This Order amends the regulatory framework for providers of pre-paid funeral plan contracts, such that providers of funeral plan contracts will generally need to be appropriately authorised under the Financial Services and Markets Act 2000 (“the Act”) when entering into, or carrying out, such contracts.

2.2 The Order also makes other amendments relating to the intermediation and financial promotion of funeral plan contracts, and expands the permitted business of appointed representatives, so that such persons are able to intermediate the sale of funeral plan contracts as either an arranger or an agent.

2.3 Finally, the Order makes various transitional modifications to the ombudsman scheme established under the Act, so as to allow complaints made on or after the date on which the Order comes fully into force relating to acts or omissions that occurred before that date to be dealt with by the Financial Ombudsman Service (“FOS”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The Department has reached this view because Financial Services is reserved.

4. Extent and territorial application

4.1 The territorial extent of this instrument is the United Kingdom.

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

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding Human Rights:

“In my view, the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 are compatible with the Convention rights.”

6. Legislative context

- 6.1 The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the Regulated Activities Order”) specifies kinds of activities and investments for the purposes of the Act. When an activity of a specified kind is carried on by way of business in relation to an investment of a specified kind, it is a “regulated activity” for the purposes of the Act. Section 19 of the Act prohibits persons from carrying on any regulated activity in the United Kingdom, unless they are either authorised or exempt.
- 6.2 While entering as provider into a funeral plan contract is currently a specified kind of activity, the Regulated Activities Order excludes plans covered by insurance or trust arrangements from the definition of a funeral plan contract, such that a provider who enters into an insurance- or trust-backed plan and meets the relevant exclusion criteria does not need to be authorised.
- 6.3 The Order amends the Regulated Activities Order to remove this exclusion, so that funeral plan providers will generally need to be appropriately authorised to enter into funeral plan contracts. The Order also introduces a new regulated activity, namely the carrying out of a funeral plan contract as provider, which will apply to both existing and new funeral plan contracts. As a result of removing the exclusion for trust- and insurance-backed funeral plan contracts, persons who carry on other specified activities in relation to funeral plan contracts will also need to consider whether they require Part 4A permission under the Act. This includes persons who arrange, or advise on, funeral plan contracts.
- 6.4 The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (“the Collective Investment Schemes Order”) prescribes particular arrangements which do not amount to collective investment schemes for the purposes of section 235(5) of the Act. Section 235 provides that a collective investment scheme is any arrangement with respect to property of any description, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in, or receive profits or income arising from, the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The Order makes a consequential amendment to the Collective Investment Schemes Order.
- 6.5 The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (“the Appointed Representatives Regulations”) prescribe the descriptions of business which appointed representatives of authorised persons may carry on without themselves requiring authorisation under the Act. Pursuant to section 39 of the Act, a person who is an appointed representative is an exempt person for the purposes of section 19 of the Act. The Order makes dealing in funeral plan contracts as agent a specified kind of activity, and amends the Appointed Representatives Regulations to allow appointed representatives of authorised persons to carry out this activity.
- 6.6 The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (“the Financial Promotion Order”) specifies the kinds of activities and investments which are controlled activities and controlled investments for the purposes of section 21 of the Act. Any invitation or inducement which is made in the course of business and which invites or induces someone either to enter, or to offer to enter, into an agreement the making or performance of which by either party constitutes a controlled activity or to exercise certain rights conferred by a controlled investment is

subject to the restriction imposed by section 21(1) of the Act. Section 21(1) precludes anyone from communicating such an invitation or inducement unless either they are an authorised person within the meaning of the Act or the content of the communication is approved by an authorised person. The Order amends the Financial Promotion Order to make the carrying out of a funeral plan contract as provider a controlled activity.

- 6.7 Finally, the Order modifies Part 16 of, and Schedule 17 to, the Act, which provides for the establishment of an ombudsman scheme, by making provision, in certain circumstances, for complaints made on or after the date on which the Order comes fully into force relating to acts or omissions that occurred before that date to be dealt with by FOS. In particular, FOS will have jurisdiction to deal with complaints made in relation to acts or omissions that took place at a time when the funeral plan provider was registered with the Funeral Planning Authority (“the FPA”) and subject to the FPA’s Code of Conduct and Rules.

7. Policy background

What is being done and why?

Background to the funeral plan market

- 7.1 A funeral plan is a contract under which a policyholder makes one or more payments to a funeral plan provider, who subsequently provides, arranges or pays for a funeral upon the death of the customer.
- 7.2 Under the current regulatory framework, entering into a funeral plan contract as provider is a regulated activity. However, a funeral plan is excluded from the scope of this regulated activity if it is backed by a trust or a contract of insurance meeting the conditions of the exclusion. All known providers, which might otherwise have required permission to enter into funeral plan contracts, have structured their business within this exclusion. The Financial Conduct Authority (“the FCA”) (and its predecessor, the Financial Services Authority) has not authorised any firm for the purpose of entering into funeral plan contracts since the regulated activity was introduced.
- 7.3 However, over the past few years, concern has grown about consumer detriment within the pre-paid funeral plan sector. While the demand for pre-paid funeral plans has grown considerably in recent years, the regulatory framework that was developed for the sector in 2001 remains unchanged.

Evidence of consumer detriment and the government’s call for evidence

- 7.4 Following reports produced by Citizens Advice Scotland¹ (February 2016) and Fairer Finance² (April 2018), and discussions between HM Treasury and relevant stakeholders in the market, the government concluded in 2018 that the current regulatory regime was not sufficient to ensure the fair treatment of consumers and a more robust regulatory framework was required.
- 7.5 In June 2018 the government launched a call for evidence to seek views and information on the potential risk of consumer detriment under the current regulatory framework. The vast majority of respondents noted that there was consumer detriment

¹ https://www.cas.org.uk/system/files/publications/funeral_poverty_in_scotland_0.pdf

² <https://www.fairerfinance.com/assets/uploads/documents/The-road-to-regulating-prepaid-funeral-plans.pdf>

present in the pre-paid funeral plan market, both at the point of sale and after a plan has been entered into.

- 7.6 In the call for evidence, the government also indicated that it was minded to strengthen the regulatory framework by bringing funeral plan providers within the remit of the FCA.

Government's consultation

- 7.7 In the light of the responses to the call for evidence and meetings with stakeholders from across the sector, in June 2019, the government launched a consultation on its proposed policy response for strengthening the regulation of the funeral plans market. Respondents to the call for evidence cited various examples of detriment to consumers, including high pressure and misleading sales tactics and also prudential concerns, and there was a strong demand among funeral plan providers for the sector to come under compulsory regulation. The government considered a range of policy options, including whether a new statutory regulator should be established, and concluded that bringing all funeral plan providers within the remit of the FCA would be the most effective and proportionate response.
- 7.8 HM Treasury received 30 responses to the consultation. The majority of these supported or strongly supported the government's proposal to bring funeral plan providers within the scope of compulsory regulation.

Amendments to the regulatory framework

- 7.9 Given the evidence of consumer detriment in the funeral plan market, and having considered the responses to the consultation, the government has decided to bring forward secondary legislation by which providers of funeral plan contracts will generally need to be appropriately authorised under the Act.
- 7.10 This approach will enable the FCA to create rules that will ensure pre-paid funeral plan providers are subject to robust and enforceable standards. These rules are likely to encompass conduct of business requirements, and ensure that there is enhanced oversight of funeral plan providers' prudential soundness.
- 7.11 This Order brings funeral plan providers within the remit of the FCA by amending the Regulated Activities Order.

"Entering into" a funeral plan contract

- 7.12 The Order removes the current exclusions contained in article 60 of the Regulated Activities Order, i.e. those provisions which exclude plans covered by trust- or insurance-backed arrangements from the definition of a funeral plan contract. The effect of this is to require providers generally to be authorised by the FCA in relation to the "entering into" of all funeral plan contracts following the change to regulation.

"Carrying out" a funeral plan contract

- 7.13 In order to address concerns about the administration of funeral plan contracts, the Order also amends article 59 of the Regulated Activities Order to include a new specified activity, namely the "carrying out" of a funeral plan contract as provider.
- 7.14 This specified activity will ensure that the FCA is empowered to place requirements on funeral plan providers with respect to the administration of a consumer's funeral plan contract by the provider after the sale. Funeral plan providers will generally be

required to have FCA authorisation in order to administer both new plans (i.e. those entered into after the new regulatory framework comes fully into force) and existing plans (i.e. those that were entered before the new regulatory framework comes into force). This will ensure that customers with existing funeral plans will also benefit from the added protection of FCA regulation in respect of the administration of those contracts that have already been entered into, and ensure that the FCA can take a consistent approach to the regulation of the market. The FCA is expected to make rules which will support the expansion in its regulatory remit. The FCA has a power to make such rules as appear to be necessary or expedient for the purpose of advancing its operational objectives, including consumer protection.

Local authorities

- 7.15 The Order also amends the Regulated Activities Order to exclude local authorities from the regulated activities of entering into and carrying out funeral plan contracts.

Intermediaries

- 7.16 Funeral plan providers widely use intermediaries (i.e. third-party distributors) to promote and sell funeral plans. While the majority of intermediation activities (e.g. arranging, advising) are applicable as a result of the amendments to the Regulated Activities Order outlined in paragraphs 7.12 and 7.13 above, the Order also makes certain other amendments to the Regulated Activities Order to make dealing in funeral plan contracts as an agent a regulated activity. The effect of this is that all relevant activities undertaken by intermediaries to promote or sell funeral plan contracts are brought within the scope of the amended regulatory regime.
- 7.17 The FCA is also expected to consult on the rules applying to the activities of persons when carrying on these other activities set out in paragraphs 7.12 and 7.13 in relation to funeral plan contracts.
- 7.18 Those who intermediate sales of funeral plans (e.g. those who advise on or arrange plans) will therefore need to consider the legal basis on which they carry on their activities. This may mean applying for FCA authorisation or considering whether it would be appropriate and possible to carry on business as an appointed representative under the responsibility of an authorised principal. In order to allow intermediaries to operate different business models in the capacity of an appointed representative, the Order amends the Appointed Representatives Regulations to include dealing in funeral plan contracts as agent in the list of permitted business of an appointed representative.

Financial promotion

- 7.19 The Order also amends the Financial Promotion Order to make the carrying out of a funeral plan contract as provider a controlled activity for the purposes of the financial promotion regime.

Consumer redress

- 7.20 Finally, the government considers that consumers should have access to FOS, both in relation to plans that are purchased after the Order comes fully into force and plans that would otherwise have benefitted from the FPA's complaints procedure.
- 7.21 In order to meet this second objective, the Order modifies Part 16 of, and Schedule 17 to, the Act (which provides for the establishment of an ombudsman scheme) to allow

FOS to deal with complaints relating to acts or omissions of funeral plan providers who were formerly members of the FPA that occurred before the date on which the new regulatory framework comes fully into force. Specifically, FOS will have jurisdiction to deal with complaints made in relation to acts or omissions that took place at a time when the funeral plan provider was registered with the FPA. This will ensure that, in certain circumstances, customers of providers who were previously members of the FPA will have access to FOS, once regulation has transferred to the FCA.

Implementation period

- 7.22 In order to allow sufficient time for the FCA to design, consult on and implement the relevant architecture for the new regulatory regime, and for funeral plan providers and intermediaries to take the necessary steps (including seeking authorisation) to meet the requirements of the new regulatory framework, the Order provides that the new regulatory framework will come fully into force 18 months after the Order is made.
- 7.23 However, the Order comes into force on the day after the day on which it is made for certain purposes, including to allow the FCA to exercise all of its powers under Part 4A and Part 5 of the Act that might be required between the date on which it is made and the date it comes fully into force (i.e. 18 months after the Order is made), in relation to any activity that becomes a regulated activity by virtue of this Order.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

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

9. Consolidation

- 9.1 HM Treasury does not propose to consolidate any legislation in consequence of this instrument.

10. Consultation outcome

- 10.1 The government launched a call for evidence on pre-paid funeral plans on 1st June 2018. The call for evidence closed on 1st August 2018 and 57 responses were received.
- 10.2 The government then issued a consultation paper entitled “Regulation of pre-paid funeral plans: consultation on a policy proposal” on 1st June 2019. The consultation period closed on 25th August 2019 and 30 responses were received.
- 10.3 HM Treasury has published a response to the consultation at the following location: <https://www.gov.uk/government/consultations/regulation-of-pre-paid-funeral-plans-consultation-on-a-policy-proposal>.

11. Guidance

- 11.1 HM Treasury does not propose to issue guidance on the content of this Order. The FCA and FOS are likely to issue operational guidance.

12. Impact

- 12.1 There will be some impact on certain businesses, including funeral plan providers, third-party distributors and funeral directors.
- 12.2 Funeral plan providers will incur one-off costs arising from preparing and submitting their application, their authorisation fee, and the costs of entering into contractual arrangements with any appointed representatives. In addition, authorised funeral plan providers are likely to need to meet ongoing regulatory costs. This will be partially offset by the fees that the majority of providers currently pay to the existing voluntary regulator.
- 12.3 It is anticipated that many funeral directors may become appointed representatives as an alternative to seeking authorisation in respect of their regulated funeral plan activities.
- 12.4 There will be further one-off and ongoing impacts arising from the costs of firms needing to familiarise themselves and comply with FCA rules, which are expected to be prepared by the regulator under the Act. As any rules will be subject to further cost-benefit analysis, these impacts have not been considered further at this stage in line with Better Regulation guidance.
- 12.5 A full impact assessment has not been prepared for this instrument because, in line with Better Regulation guidance, HM Treasury considers that the net impact of this instrument on businesses will be less than net £5 million Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis impact assessment has been carried out, a copy of which is published alongside this Explanatory Memorandum on the legislation.gov.uk website.
- 12.6 There is no, or no significant, impact on charities or voluntary bodies.
- 12.7 There is no, or no significant, impact on the public sector.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. Many of these businesses, such as funeral directors, are likely to be engaged in activities involving the sale of funeral plan contracts which will become regulated as a result of the change to regulation. To the extent that funeral directors and other intermediaries are able to carry on their activities as appointed representatives of principal firms, the impact of the change in regulation will be reduced for such persons. This is because, such small businesses would not require FCA authorisation but would instead carry on their activities under the responsibility of an authorised principal.
- 13.2 The government considers that the costs and regulatory requirements on funeral plan providers and their intermediaries caused by the government's approach are proportionate, given the risk of consumer detriment that has been identified in the funeral plan market.

14. Monitoring and review

- 14.1 A statutory review clause is included in the Order which provides that HM Treasury must keep under review and publish a report setting out the conclusions of the review. The first report must be published within five years of the date on which this Order first comes into force. Subsequent reports must be published at intervals not exceeding five years.

15. Contact

- 15.1 Joshua Osborne at the Treasury. Telephone: 0207 270 5512 or email: Joshua.osborne@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Anna Harvey, Deputy Director for Personal Finances and Funds, at the Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen MP at the Treasury can confirm that this Explanatory Memorandum meets the required standard.