EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (RING-FENCED BODIES, CORE ACTIVITIES, EXCLUDED ACTIVITIES AND PROHIBITIONS) (AMENDMENT) ORDER 2024

2024 No. [XXXX]

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Tulip Siddiq, Economic Secretary to the Treasury confirms that this Explanatory Memorandum meets the required standard.

2.2 James Fairburn, Deputy Director for Financial Stability Systems and Analysis at HM Treasury, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Naomi Russell at HM Treasury (naomi.russell@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Order implements reforms to the bank ring-fencing regime to improve its functionality. The objectives of the ring-fencing regime, as outlined by the Independent Commission on Banking (ICB), are to "sort out both ring-fenced banks and non-ring-fenced banks which get into trouble, without the provision of taxpayer-funded solvency support" and to "insulate vital banking services on which households and SMEs depend on from problems elsewhere in the financial system"[1]. To achieve this, the ring-fencing regime requires banking groups above a certain threshold of core deposits to separate their retail and investment banking activities into a ring-fenced body (RFB) and a non-ring-fenced body (NRFB). Firms subject to the regime are required to hold core deposits within the RFB and there are limits on the activities RFBs can undertake and the products they can offer to their customers.

4.2 The amendments to the regime made by this Order resolve unintended consequences of the original legislation, provide increased flexibility to banks within scope of the regime, exempt certain banks from the regime, and ensure it remains proportionate.

[1] Independent Commission on Banking, Final Report Recommendations, September 2011. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20120827143059/http:/bankingcommission.independent.gov.uk/

Where does the legislation extend to, and apply?

4.3 The extent of this Order (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.4 The territorial application of this Order (that is, where the instrument produces a practical effect) is the whole of the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The ring-fencing regime was introduced in 2013 with the Financial Services (Banking Reform) Act 2013, which inserted certain provisions into the Financial Services and Markets Act 2000. This legislation formed part of the structural reforms made to the UK banking sector following the 2008 Global Financial Crisis. Broadly, the regime requires large banks to separate their core retail banking services from their investment banking activities. The aim was to improve the sector's resilience to future crises while ensuring failures could be managed with minimal disruption to critical banking services and without the use of public funds. The legislation came into full effect on 1 January 2019.

5.2 The original legislation contained a statutory review clause, requiring the Government (HM Treasury) to commission an independent review of the operation of ring-fencing legislation within two years of it coming into full effect. An independent review by a panel of experts (the Panel) chaired by Sir Keith Skeoch (the Skeoch Review) was commissioned in 2021 and reported in March 2022.[2]

5.3 The Skeoch Review made seven recommendations related to the ring-fencing regime. One recommendation asked HM Treasury to review how to align the ring-fencing regime and resolution regime in the longer-term to ensure a simpler and more coherent regulatory regime. The other six recommendations proposed alterations to the regime that the Panel judged would improve the operation of the regime in a fashion that was beneficial to the banking industry and their customers, without undermining the UK's financial stability, with five of these directed at HM Treasury and one at the Bank of England. This Order broadly addresses the five recommendations on improving the operation of the regime directed at HM Treasury, and also implements other proposals developed by HM Treasury to improve the regime following the Skeoch Review.

5.4 In December 2022, the previous Government announced its intention to consult on a series of reforms to the ring-fencing regime.[3] A public consultation ran from September to November 2023[4].

What was the previous policy, how is this different?

5.5 The previous policy was more restrictive for banks subject to the ring-fencing regime. The changes being made raise the threshold for inclusion in the ring-fencing regime and introduce new optionality for ring-fenced banks in how they structure their

[2] Ring-fencing and Proprietary Trading - Independent Review. Available at: https://rfpt.independent-review.uk/uploads/CCS0821108226-006_RFPT_Web%20Accessible.pdf
[3] Ring-fencing reforms. Available at: https://www.gov.uk/government/publications/ring-fencing-reforms
[4] A smarter ring-fencing regime: Consultation on near-term reforms. Available at: https://www.gov.uk/government/consultations/a-smarter-ring-fencing-regime-consultation-on-near-term-reforms

businesses and the products and services they can offer to customers, while maintaining financial stability safeguards.

5.6 The threshold for including banks in the ring-fencing regime is being increased. Previously the threshold of core deposits at which a bank became subject to the regime was £25bn. This is being increased to £35bn. A new exemption is also being introduced for retail-focussed banks that undertake minimal investment banking activity.

5.7 The regulatory reporting burden faced by RFBs is being reduced. Exposures to relevant financial institutions (RFI) of below £100k will no longer be considered a regulatory breach, removing the requirement to report these to the Prudential Regulation Authority (PRA).

5.8 Restrictions on the geographical operations of ring-fenced banks are being relaxed. RFBs were previously restricted to operating in the UK and EEA but will now be able to operate globally, subject to any applicable rules made by the PRA.

5.9 Regulatory barriers to RFBs engaging in mergers and acquisitions are being addressed. A new four-year transition period is being introduced to allow banks time to comply with the regime where they become subject to it following an acquisition by an RFB.

5.10 Restrictions on the products and services ring-fenced banks can offer are being relaxed in targeted ways, where doing so would improve outcomes for banks and their customers without giving rise to financial stability risks. For example, RFBs will now be able to make investments in UK SMEs and funds that invest in them (subject to certain restrictions) and enter into a greater range of trade finance arrangements.

6. Legislative and Legal Context

How has the law changed?

6.1 The Order makes changes to two existing instruments which define the operation of the ring-fencing regime.

6.2 The primary legislation for the ring-fencing regime is contained in the Financial Services and Markets Act 2000 (the Act). The Act defines "core activities" as the regulated activity of accepting deposits and requires banking groups that undertake core activities to place these activities into ring-fenced banks. The Act also gives powers to HM Treasury to define certain aspects of the regime in secondary legislation, provided that certain statutory tests are met. The Act is not amended by this Order.

6.3 The previous government made two instruments under the Act, both of which are amended by this Order. These are the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (the CAO), and the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (the EAPO). Both the CAO and the EAPO were subsequently amended by the Government, most substantially in 2016.

6.4 The CAO sets out the boundaries of the ring-fencing regime, setting the core deposits threshold at £25bn, meaning that banks which have more than £25bn of "core deposits" will be subject to the regime. The EAPO sets out the types of activity in which ring-fenced banks are not permitted to engage and the types of customers that they may service.

6.5 This Order makes several changes to the operation of ring-fencing legislation. The most material are listed below:

(i) The £25bn core deposit threshold, through which banks become subject to the regime, is increased to £35bn by amending the CAO, allowing banks outside of the regime to grow before becoming subject to the regime's requirements.

(ii) The CAO is amended to introduce a new secondary threshold to exempt predominantly retail-focussed banks from the regime. Broadly, where investment banking activity across a bank's group represents less than 10% of the group's "Tier 1 capital" (which is calculated under separate prudential requirements), a bank will be exempt from the regime (even if its total core deposits exceed the £35bn core deposit threshold). The secondary threshold also includes transition periods, so that if a bank no longer satisfies the secondary threshold condition due to a change in status or through an acquisition (whether share or business transfer) involving another undertaking, then it will have four years to comply with the ring-fencing regime.

(iii) The CAO is also amended to introduce a new four-year transition period for banks where they become subject to the regime following an acquisition by an RFB.

(iv) The Order amends the EAPO to remove global systemically important insurers (G-SIIs) and certain types of SME financial institution from the definition of "relevant financial institution" (RFI), enabling RFBs to incur exposures to these entities (with SME being defined as an undertaking with annual turnover of £50mn or less across its group). The Order also permits RFBs to incur exposures of up to £100k to any RFI.

(v) The Order amends the EAPO to remove the current prohibition on RFBs from establishing entities outside the UK or EEA. This permits RFBs to establish operations globally, subject to any applicable rules and requirements made by the PRA.

(vi) This Order also amends the EAPO to permit RFBs to invest in UK SMEs, in particular by enabling RFBs to:

- make minority direct investments in UK SMEs;
- make investments in funds or investment companies which invest at least 50% of their capital or assets in UK SMEs; and
- acquire instruments like equity warrants when providing loans to UK SMEs.

These investments are subject to a cap equal to 10% of the RFB's Tier 1 capital. Where an RFB increases its stake in a UK SME beyond a minority interest to one permitted elsewhere in the regime, then the value of its investment will not be subject to the cap. In turn, where an RFB decreases an otherwise permitted interest in a UK SME to a minority interest within scope of this new provision, the value of the minority investment will be included in the cap.

6.6 The Order makes further changes to the CAO, including:

(i) removing the requirement for NRFBs to provide an organisation with a "Notice of Determination" (i.e. a confirmation notice that an organisation meets the requirements to bank with the NRFB);

(ii) permitting NRFBs to provide banking services to certain central banks and multilateral institutions; and

(iii) introducing a 12-month grace period in which customers that cease to be classified as an RFI can be moved from an NRFB to an RFB.

6.7 The Order makes further changes to the EAPO, including:

(i) permitting RFBs to enter into a wider range of trade finance activities, such as standard forms of standby letters of credit, bills of exchange, promissory notes, and arrangements which take place under a master agreement (e.g. debt factoring);

(ii) permitting RFBs to undertake a wider range of debt restructuring transactions with borrowers, and to maintain any equity stake taken as part of such transactions;

(iii) permitting RFBs to deal inflation swaps where the time period of the swap is limited to 30 years;

(iv) permitting RFBs to hedge "mortality risk", which is the risk that a bank customer such as a mortgage holder dies sooner than expected, and "longevity risk", which is the possibility that a customer lives longer than expected;

(v) permitting RFBs to remedy or prevent the failure of a securities trade on behalf of a customer, where this was the result of an error;

(vi) permitting RFBs to conduct test trades where they intend to launch a new service or product;

(vii) permitting RFBs to offer more types of FX products, opening up more options for customers who seek to protect their business against fluctuations in currency exchange rates;

(viii) permitting RFBs to engage in correspondent banking arrangements with payment service providers rather than solely banks, and clarifying that these arrangements may involve two or more providers;

(ix) removing prohibitions on RFBs incurring exposures to specialist infrastructure companies and mutuals outside of the EEA; and

(x) providing that a structured finance vehicle (SFV) qualifies as a sponsored SFV of an RFB where its assets were created or acquired by that RFB or another RFB in the same group. SFVs are typically used to fund certain types of lending products and RFBs are generally prohibited from incurring exposures to SFVs unless they are sponsored by an RFB.

Why was this approach taken to change the law?

6.8 The ring-fencing regime is already in legislation; therefore, no non-legislative options have been considered as the policy will need to be delivered through amending the existing ring-fencing statutory instruments.

7. Consultation

Summary of consultation outcome and methodology

7.1 On 28 September 2023, the previous Government published a consultation on "A smarter ring-fencing regime" which included a draft of this Order.[5] The consultation

[5] A smarter ring-fencing regime: Consultation on near-term reforms. Available at: https://www.gov.uk/government/consultations/a-smarter-ring-fencing-regime-consultation-on-near-term-reforms

ran for two months, closing on 26 November 2023. 24 written responses were received from a range of stakeholders, including UK deposit-takers, industry representative bodies and not-for-profit organisations. While there was widespread support for the proposed reforms, a number of policy and legal issues were identified by respondents which the Government has sought to address.

7.2 The post-consultation changes and the Government's rationale are set out in the response to the consultation document published alongside this Order.

8. Applicable Guidance

8.1 The Government will not be issuing further guidance relating to these measures.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A De minimis Assessment is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 The majority of the changes in the Order do not have any direct impact on firms or the economy; rather they create new optionality for firms and their indirect impact will be mediated through the commercial decisions of firms subject to the ring-fencing regime.

9.3 Two of the changes in the Order have a direct impact. One introduces a secondary threshold which creates an exemption from the ring-fencing regime for retail-focussed banks. Any firms which exit the ring-fencing regime as a result of this measure will likely experience direct cost-savings as a result. The Order will also remove the "Notice of Determination" (NoD) requirement placed on NRFBs, which currently requires these entities to provide potential customers with a notice that they meet the qualifying conditions to be banked by the NRFB and the reasons why the NRFB has made that decision. This may result in some minimal direct cost savings, however this limited by the fact that NRFBs will still need to determine whether potential customers satisfy the conditions to be banked by an NRFB.

9.4 Except for the secondary threshold and removal of the NoD requirement, none of the changes will create a direct saving for firms or require a firm to make a change to the way they run their business.

9.5 There is no, or no significant, impact on charities, voluntary bodies, or the public sector. The legislation may have a small positive impact on small or micro businesses. This is because the Order enables RFBs to invest in and provide services to certain types of SME. If an SME is an RFI that meets the criteria set out in paragraph 6.5(iv) of this document, then they can be banked by RFBs that are better able to service their needs. RFBs can invest in SMEs as well as funds that invest in SMEs (in line with the provisions set out in paragraph 6.5(vi) of this document), therefore this provision should improve access to and cost of finance.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Government will monitor the effect of the changes made by this instrument and keep them under review.

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

"It would be disproportionate to include a statutory review clause in this legislation as it does not introduce new ongoing regulatory burdens on businesses."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 There are a number of statutory tests in the ring-fencing regime's primary legislation that must be considered by HM Treasury when making secondary legislation. The Government has considered these tests when developing the ring-fencing reforms made by this Order and believes they have been satisfied.

12. European Convention on Human Rights

12.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of The Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023.