EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (MARKETS IN FINANCIAL INSTRUMENTS) (AMENDMENT) REGULATIONS 2025

2025 No. 860

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instrument

2. Declaration

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

2.2 Tom Duggan, Deputy Director for Securities and Markets, at the Treasury confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 David Cormack at the Treasury (Capital.Markets@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 The Financial Services and Markets Act 2023 (FSMA 2023) repeals assimilated law relating to financial services, subject to commencement.

4.2 This instrument uses powers conferred by FSMA 2023 to amend the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (MiFI Regulations), to give the Financial Conduct Authority (FCA) fuller powers of direction in relation to commodity derivatives traded in the over-the-counter (OTC) market.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (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 instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland, and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 Participants in commodity markets can hold positions in commodity derivatives traded on exchanges and those traded off-exchange in the OTC market. Positions held in either market have the potential to affect the orderly functioning of commodity

derivatives markets. OTC trading, however, is generally associated with lower levels of transparency due to its bilateral, decentralised nature.

5.2 The regulators' review into the nickel market volatility and events of March 2022 found that OTC positions could pose a risk to market orderliness, and that there was a need for greater transparency in positions held in OTC metals markets. However, these risks are not present in all commodity derivatives markets.

5.3 The purpose of this instrument is to give powers to the FCA to improve transparency about positions held in OTC markets.

5.4 To achieve this outcome, this instrument amends the powers of direction conferred on the FCA by regulations 27 (FCA power to require information) and 28 (FCA power to intervene) of the MiFI Regulations so they can be applied to a broader set of commodity derivatives traded in the OTC market.

5.5 The FCA can use its powers of direction to direct specific persons to perform specific actions. This instrument will allow the FCA to adopt a discretionary approach to the regulation of commodity derivatives markets, tailoring its approach to better reflect the varying degrees of risk in different markets.

What was the previous policy, how is this different?

5.6 Previously, the FCA's powers of direction in regulations 27 and 28 of the MiFI Regulations could only be applied to commodity derivatives falling under the definition of a financial instrument, as specified in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). In practice, this meant that some commodity derivatives traded OTC fell outside the scope of these powers.

5.7 This instrument amends regulations 27 and 28 of the MiFI Regulations to extend the FCA's powers of direction to include those other commodity derivatives set out in articles 83, 84, and 85 of the RAO. These amendments allow the FCA to exercise its powers to request information and intervene in relation to a wider range of commodity derivatives traded in the OTC market. This will provide greater transparency on positions held in OTC markets and allow the FCA, and in turn exchanges, to identify and mitigate potential risks to market integrity before they crystalise.

5.8 Because the FCA can use its powers of direction to direct specific persons to take specific actions, it will enable it to take a tailored approach to the reporting of OTC positions proportionate to the risks associated with different markets. This strikes the right balance between ensuring the FCA has the tools it needs to monitor and intervene in OTC markets when needed, learning the lessons from the events in March 2022, and upholding the international competitiveness of these markets.

6. Legislative and Legal Context

How has the law changed?

6.1 The MiFI Regulations transposed Directive 2014/65/EU of the European Parliament and of the Council into UK law.

6.2 FSMA 2023 establishes powers for the government to amend and replace assimilated law related to financial services, where necessary.

6.3 Section 3 of FSMA 2023 gives the Treasury powers to modify assimilated law before that law is revoked under section 1 of that Act. This instrument uses these powers to

extend the FCA's powers of direction to a new category of "applicable OTC commodity derivative" into regulations 27 and 28 of the MiFI Regulations.

6.4 The instrument defines an applicable OTC commodity derivative with reference to the definitions of options, futures, and contracts for differences in the RAO, which includes those traded OTC. As such, this instrument expands the scope of the FCA's existing powers of direction to a broader set of commodity derivatives.

6.5 This instrument also specifies that applicable OTC commodity derivatives can relate either directly or indirectly to commodity derivatives traded on UK trading venues. This is to capture end position holders where market participants have spread their positions across multiple counterparties, including participants who are neither members of trading venues or direct participants in the on-exchange trading of commodity derivatives.

Why was this approach taken to change the law?

6.6 This instrument defines an "applicable OTC commodity derivative" by reference to existing definitions of commodity derivatives in the RAO. Using established and well-understood definitions ensures consistency and eases compliance burdens for firms.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Treasury shared a draft instrument with relevant industry stakeholders for technical comment.

7.2 Comments on the draft instrument were carefully considered by the Treasury and addressed in the final instrument where appropriate.

7.3 The FCA have also consulted on broader changes to the commodity derivatives regulatory framework and have set out how it expects to use these in its February 2025 Policy Statement.[1]

8. Applicable Guidance

8.1 No guidance accompanies this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because in line with Better Regulation guidance, the Treasury considers that the net impact of this instrument on business will be less than £10m Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis Impact Assessment has been prepared and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

[1] https://www.fca.org.uk/publication/policy/ps25-1.pdf

9.3 The legislation applies to all businesses that operate exchanges offering trading in commodity derivatives and those that hold positions in commodity derivatives, including small or micro businesses.

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

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Treasury's approach to monitoring this legislation will be through ongoing engagement with the financial services industry to monitor its initial and ongoing impact.

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

"It is not proportionate to include a review clause in this instrument because the estimated annual net direct cost to business is less than £10 million."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This instrument will come into force immediately after paragraphs 47 and 48 of Schedule 2 to FSMA 2023 come into force. The commencement of paragraphs 47 and 48 is planned for 2026, so this instrument will not breach the 21-day convention.

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 (Markets in Financial Instruments) (Amendment) Regulations 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under EUWA, the European Union (Future Relationship) Act 2020 or the Retained Assimilated law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to the withdrawal of the United Kingdom from the European Union because this instrument replaces assimilated law using powers in FSMA 2023.