EXPLANATORY MEMORANDUM TO

THE FINANCIAL MARKETS AND INSOLVENCY (AMENDMENT AND TRANSITIONAL PROVISION) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument amends the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979) ("SFR") and the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) ("FCAR") and makes consequential amendments to legislation including the Companies Act 1989, the Banking Act 2009 and the Financial Markets and Insolvency Regulations 1991 (SI 1991/880). This instrument is being made using powers in the European Union (Withdrawal) Act 2018 ("the EUWA") in order to address failures of retained European Union (EU) law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom (UK) from the EU. It also makes provisions for the exercise of functions conferred upon the Bank of England by this instrument.

2.2 This instrument also uses powers under Section 2(2) of the European Communities Act 1972 to ensure that clarifications to the operation of the legislation being amended are made in an efficient manner and to remove discrepancies with the approach in other related legislation, ensuring a clearer regime is in place on exit day.

Explanations

What did any relevant EU law do before exit day?

2.3 The SFR, Part 7 of the Companies Act 1989, FCAR, the Banking Act 2009 and the Financial Markets and Insolvency Regulations 1991 make provisions under UK domestic law concerning financial market infrastructure insolvency that implement EU law (the Settlement Finality Directive 98/26/EC (SFD), the Financial Collateral Arrangements Directive 2002/47/EC, the European Market Infrastructure Regulation (EU) No. 648/2012, the Markets in Financial Instruments Directive 2004/39/EC and the Banking Recovery and Resolution Directive 2014/59/EU).

2.4 These provisions provide essential insolvency protections to Financial Market Infrastructure entities (FMIs). FMIs reduce risk within the market. An example of an FMI is a central counterparty (CCP). CCPs are financial institutions which firms use to reduce the risk arising from trades, including derivatives. The CCP guarantees that transactions will be honoured if a party defaults. CCPs do this by standing between the parties of a trade, becoming the buyer to every seller and the seller to every buyer. Other FMIs include central securities depositories (CSDs) and trade repositories (TRs).

2.5 The existing legislation ensures that FMIs designated under the SFD ("systems") are protected from transfers of funds or securities being clawed back by a creditor of a participant in the FMI, if that participant is subject to insolvency proceedings. This

principally relates to cash and securities settlement transfer orders and collateral transactions. The SFD also gives these protections to central banks, to ensure collateral held in central banks cannot be clawed back. Without this protection, participants in FMIs would have less certainty of the finality of a trade. This would reduce confidence in the system, and provide a mechanism for the failure of one participant to cause wider problems for the financial system.

Why is it being changed?

2.6 To ensure the legal framework for settlement finality protections continues to operate effectively after the UK withdraws from the EU, deficiencies in the existing legislation, including the scope of the legislation and references to EU bodies, need to be addressed. Currently, the UK automatically recognises SFD designations made by other EU Member States and extends UK SFR protections to central banks in these Member States. When the UK leaves the EU, it will no longer automatically recognise SFD designations made by other EU Member States of their domestic systems or extend UK SFR protection to EU central banks.

2.7 The instrument gives the Bank of England powers to designate systems not governed by UK law ('non-UK systems') under the SFR and to extend UK SFR protection to non-UK central banks. The instrument also introduces a temporary regime (set out in section 2.8) that will enable the current treatment of EU systems and central banks to be maintained, provided that the relevant conditions are met. It will also enable this protection to be extended to non-EEA countries.

What will it now do?

2.8 The instrument amends deficiencies arising from the UK's withdrawal from the EU in the SFR, FCAR, Companies Act 1989, the Banking Act 2009 and the Financial Markets and Insolvency Regulations 1991. The instrument also includes an extension of the Bank of England's existing power to designate UK systems, to allow it to designate non-UK systems (i.e. to allow them to benefit from UK settlement finality protection). This instrument includes:

- Provision for a Temporary Designation Regime ("TDR") to ensure that non-UK systems currently benefitting from SFR protection (existing EEA systems designated in other EEA states) will continue to do so for three years from exit day. The purpose of the TDR is to allow time for applications from such EEA systems to be considered by the Bank of England. Systems intending to use the TDR will be required to notify the Bank of England before exit day to enter the regime. Details of the TDR are set out in sections 7.15, 7.16 and 7.17 of this memorandum.
- Provision giving the Bank of England power to designate non-UK systems under the SFR, including both EEA systems and non-EEA systems. This will help to maintain the effect of the regime after exit by enabling EEA systems to apply to be recognised in the UK. It will also assist UK firms in accessing the global market and ensures the UK remains an attractive place to do business to the rest of the world. The instrument extends the Bank of England's powers beyond their current scope under which they have the power to receive applications from, to charge fees to, and to designate, UK systems only. The Bank of England's ability to charge a fee will also extend to any designation of a non-UK system.

- Provisions amending primary legislation mainly remove references to EU legislation or entities and replace them with UK equivalents. These are detailed in paragraph 7.10.

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 powers under which this instrument is made cover the entire UK (see the EUWA) and the territorial application of this instrument is not limited either by the EUWA or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the UK.

4.2 The territorial application of this instrument is the whole of the UK.

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 Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument addresses certain failures and deficiencies arising from the withdrawal of the UK from the EU in relation to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979), specifically in respect of the designation of non-UK systems under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, and the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226) . The instrument also makes consequential amendments to legislation including the Companies Act 1989, the Banking Act 2009 and the Financial Markets and Insolvency Regulations 1991.

7. Policy background

What is being done and why?

7.1 The UK will leave the EU on 29 March 2019. The UK and the EU have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020. This will provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During the implementation period, common rules will continue to apply. The UK will continue to implement new EU law that comes into effect and the

UK will continue to be treated as part of the EU's single market in financial services. This will mean that access to each other's markets will continue on current terms and businesses, including financial services firms, will be able to trade on the same terms as now until 31 December 2020. UK firms will need to comply with any new EU legislation that becomes applicable during the implementation period.

7.2 The government is seeking a deep and special future partnership with the EU, which should be greater in scope and ambition than any such agreement before and encompass financial services. Given the highly regulated nature of financial services, the volume of trade between UK and EU markets, and a shared desire to manage financial stability risks, the UK proposes a new economic and regulatory arrangement that will preserve mutually beneficial cross-border business models and economic integration for the benefit of businesses and consumers. Decisions on market access would be autonomous in our proposed model, but would be underpinned by stable institutional processes in a bilateral agreement and continued close regulatory and supervisory cooperation.

7.3 While the government has every confidence that there will be a deal and an implementation period in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. The government is clear that this scenario is in neither the UK's nor the EU's interest, and the government does not anticipate it arising. To prepare for this unlikely eventuality, HM Treasury intends to use powers in the EUWA to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios.

7.4 The EUWA repeals the European Communities Act 1972 and converts into UK domestic law the existing body of directly applicable EU law (including EU Regulations). It also preserves UK laws relating to EU membership – e.g. legislation implementing EU Directives. This body of law is referred to as "retained EU law". The EUWA also gives ministers a power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through statutory instruments. These contingency preparations for financial services legislation are sometimes referred to as 'onshoring'. These statutory instruments are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose and is subject to further restrictions, such as the inability to use the power to impose or increase taxation, or establish a public authority. The power is also time-limited and falls away two years after exit day.

7.5 Wherever practicable, the proposed approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, if the UK does not enter an implementation period, some changes would be required to reflect the UK's new position outside the EU from 29 March 2019.

7.6 In the unlikely scenario that the UK leaves the EU without a deal, the UK would be outside the EU's framework for financial services. The UK's position in relation to the EU would be determined by the default Member State and EU rules that apply to third countries at the relevant time. The European Commission has confirmed that this would be the case.

7.7 In light of this, the approach in this scenario cannot and does not rely on any new, specific arrangements being in place between the UK and the EU. As a general

principle, the UK would also need to default to treating EU Member States largely as it does other third countries, although there are cases where a different approach would be needed including to provide for a smooth transition to the new circumstances.

7.8 HM Treasury published a document on 27 June 2018, which sets out in more detail HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act. (https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act)

7.9 The SFD regulates FMIs used to transfer securities and cash. These FMIs are systems designated under the SFD, which guarantees that once an order for a transfer has been entered into such designated systems, the transfer cannot be revoked or clawed back by liquidators even if one participant in a trade becomes insolvent. It does this by ensuring the system's rules will take effect in accordance with their terms and notwithstanding the commencement of insolvency proceedings under the insolvency law of any Member State. This gives EEA market participants certainty that they will receive transfers of funds or securities even if their counterparty defaults. In the UK, the SFD is implemented by the SFR.

7.10 Part 2 of this instrument amends the Banking Act 2009 and Part 7 of the Companies Act 1989. These changes make technical fixes such as removing references to EU legislation or entities and replacing them with UK equivalents. This predominantly involves removing references to EEA Central Securities Depositories, and EEA central counterparties, terms which will no longer be applicable after exit. In the Banking Act, the changes reflect the fact that after exit, designation decisions will be made under the amended SFR, rather than the SFD, and that regulations may need to be made by HM Treasury in connection with FCAR, rather than the Directive implemented by FCAR.

7.11 Part 3 of the instrument also amends the SFR and FCAR. It amends the scope of the SFR, amends definitions to ensure they work in a UK context, and removes references to EU bodies and EU legislation.

7.12 Currently, the SFR only allows systems established in the UK to apply to the Bank of England for designation and SFR protection. These designation decisions are notified by the Bank of England to the European Securities and Markets Authority (ESMA), which holds a central list of systems designated for SFD purposes. The ESMA list contains systems designated in other Member States, which the UK automatically recognises for settlement finality purposes.

7.13 Once the UK leaves the EU, the UK will no longer automatically recognise systems on the ESMA list, as the UK will no longer be part of the EU regulatory framework.

7.14 To ensure continuity of the SFR legal framework, this instrument amends the SFR to give the Bank of England the power to make designation decisions relating to non-UK systems. This will include both EEA and non-EEA systems. The Bank of England's powers are being extended to non-UKsystems as the recognition of only UK systems would fail to address the main deficiency in this area. It could leave participants in non-UK systems facing additional costs or other difficulties in accessing those systems, as transactions in those systems would be subject to UK insolvency law, and trades could be unwound. This would undermine the policy intention of the SFD and it would not be appropriate to maintain special treatment for the EEA in this scenario. Therefore, this instrument extends the scope of the SFR to all UK and non-UK

systems. Any system that has SFR protections at the point of the UK's exit from the EU will continue to receive these protections under UK law after exit day. EEA systems that benefit from UK protections under the SFR will continue to receive settlement finality protections for a temporary period under a temporary regime, the TDR, subject to notifying the Bank of England.

7.15 The TDR is established by Part 4 of the instrument, and its purpose is to allow time for applications from non-UK systems to be considered by the Bank of England after exit. The regime will last for three years from exit day, with a power for HM Treasury to make regulations to extend the regime by up to 12 months on each occasion if it is necessary and proportionate to avoid disruption to the financial stability of the UK. HM Treasury will be able to extend the regime through a statutory instrument subject to the negative resolution procedure. Systems intending to use the TDR will be required to notify the Bank of England before exit day to enter the regime. After exit day, these systems will have 6 months to make a full application under the SFR to continue to benefit from SFR protections. The three-year period of the regime ensures the Bank of England has sufficient time to assess applications and make designation decisions.

7.16 This instrument requires the Bank of England to maintain a public list of systems in the TDR.

7.17 This instrument allows the Bank of England to remove a system from the TDR if: the Bank of England considered that there would be an adverse effect on financial stability in the UK if the system was kept in the regime; the system renounced the temporary designation; or the system made false statements in relation to its application. A system will also cease to be a temporarily designated system if it has not submitted an application by the end of the 6-month period beginning on the day after exit day, it ceases to be within scope of the SFD, or it withdraws its application under the SFR.

7.18 Central banks can be designated prior to exit if within the EEA. After exit, SFR protection can be extended to any central bank outside the UK. The Bank of England will maintain a public list of central banks that are within the SFR.

7.19 Part 4 of the instrument also extends the scope of section 398 of the Financial Services and Markets Act 2000 (FSMA), which will be applied to systems that apply for the TDR, in relation to the information they provide to the Bank of England as part of the application process. Section 398 of FSMA makes it a criminal offence to mislead a regulator. This is appropriate for two reasons. Firstly, it incentivises system operators to provide accurate information to the Bank of England. Secondly, it ensures that an established sanction is available to the Bank of England if false information is provided. The penalty for misleading a regulator is a fine.

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

8.1 This instrument is being made using the power in section 8 of the EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the European Union. The instrument is also made under paragraph 1 of Schedule 4, and paragraph 21 of Schedule 7 of the Act. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

8.2 Alongside the EUWA powers, the instrument is being made under section 2(2) of the European Communities Act 1972. This is to ensure that clarifications to the operation of the SFR are made in an efficient manner and to remove discrepancies with the approach in other related legislation, ensuring a clearer regime is in place on exit day.

9. Consolidation

9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

10.1 HM Treasury has not undertaken a consultation on the instrument, but has engaged with relevant stakeholders on its approach to Financial Services legislation under the EUWA, including on this instrument, in order to familiarise them with the legislation ahead of laying.

10.2 The instrument was also published in draft, along with an explanatory policy note, on the 31st October 2018 (https://www.gov.uk/government/publications/draft-financial-markets-and-insolvency-amendment-and-transitional-provision-eu-exit-regulations-2018), in order to maximise transparency ahead of laying.

10.3 We have engaged extensively with the Bank of England and the Financial Conduct Authority to draft this legislation, and the measure covered by this instrument was announced in December 2017, by HM Treasury (https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-20/HCWS382/).

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 The impact on business is limited. One intention of the instrument is to ensure continuity of SFR protections for EEA systems that currently benefit from those protections. Consequently, we anticipate this would require minimal operational and administrational changes to businesses and expect the overall impact on small businesses to be minimal. Systems that enter the TDR, and other firms impacted by this instrument, will need to understand changes to the regulatory environment, which will involve legal experts examining the SI and the relevant sections of legislation amended by this instrument. This is expected to be a one-off cost. EEA systems will need to make an application to the Bank for the first time and pay a new fee.

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

12.3 The impact on the public sector is that the Bank of England will be responsible for implementing the temporary designation regime for EEA systems that currently benefit from UK SFR protection.

12.4 An Impact Assessment will be published alongside the Explanatory Memorandum on the legislation.gov.uk website, when an opinion from the Regulatory Policy Committee has been received.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The legislation will primarily impact FMIs, which are not small businesses. However, the activities of small businesses may be affected through their trade transactions with FMIs. No specific action is proposed to minimise the effects of this instrument in relation to small businesses. The instrument implements amendments to UK law that would otherwise no longer operate effectively once the UK has left the EU, and in order to help smooth the transition for all businesses participating in the UK's financial markets, irrespective of their size.

14. Monitoring & review

14.1 As this instrument is made under the EUWA, no review clause is required.

15. Contact

15.1 Luxmmi Varathan at the Treasury. Telephone: 0207 270 4302 or email: luxmmi.varathan@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Clare Bolingford, Deputy Director for Securities, Markets and Banking at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury, John Glen MP, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019 does no more than is appropriate."

1.2 This is the case because this instrument only does what is necessary to ensure the continuation of the SFR framework for designations in the UK. This includes a transitional provision to allow time for applications from non-UK systems to be considered by the Bank of England, safeguarding financial stability, as well as extending the Bank of England's current powers to designate EEA and non-EEA systems.

2. Good reasons

2.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view, there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action."

2.2 The policy rationale for the provisions contained within this instrument is set out in section 7 of the memorandum. The aim of the provisions is to ensure that there is workable process for the continuation of SFR protections for systems before exit day, to ensure there is a workable framework to designate non-UK systems after exit and to avoid disruption to financial markets..

3. Equalities

3.1 The Economic Secretary to the Treasury (John Glen) has made the following statement(s):

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

3.2 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Economic Secretary to the Treasury (John Glen) have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

5. Criminal offences

5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view, there are good reasons for the extension of a criminal offence and for the penalty in respect of it in the Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019."

5.2 This instrument provides that section 398 of the Financial Services and Markets Act (2000) (misleading the FCA or PRA) is expanded to apply to a system providing information to the Bank of England in relation to the Temporary Designation Regime. This is appropriate because it incentivises such systems to provide accurate information to the Bank of England. It also provides a sanction for the Bank of England where misleading information is provided by such a system. The penalty for misleading either regulator is a fine.