

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES (MISCELLANEOUS) (AMENDMENT) (EU EXIT)
(NO. 2) 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 Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made in order ensure a coherent and functioning financial services regulatory regime once the United Kingdom (UK) leaves the European Union (EU). It makes amendments to a number of financial services EU exit statutory instruments and to an EU delegated regulation, correcting errors identified in legislation after it was made, making amendments to ensure consistency between EU exit instruments and introducing a transitional provision. These amendments will ensure that these instruments operate effectively after the UK leaves the EU.
- 2.2 This instrument also amends retained EU law that would not be appropriate to retain on the statute book once the UK is no longer a member of the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.3 This instrument makes amendments to the following financial services EU exit instruments and EU delegated regulation. Further information on these instruments can be found in the EMs accompanying the instruments on legislation.gov.uk:
- 2.4 Part 2 amends the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (S.I. 2018/1149), as amended by the draft Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019. The Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 inserts provisions into the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 in order to provide a run-off mechanism to the temporary permissions regime. It also inserts provisions into other temporary regimes, allowing EEA financial services firms to continue to service existing contracts with their UK customers post-exist, and mitigating risks faced by UK firms using services provided by non-UK central counterparties and trade repositories.
- 2.5 Part 3 amends the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (S.I. 2018/1201). These regulations make amendments to ensure that the UK's payments and e-money regime continues to operate effectively at the point at which the UK leaves the EU, including by establishing a temporary permissions regime (TPR) for EEA firms which currently use the EEA passport to provide services in the UK under

the Payment Services Regulations 2017 (S.I. 2017/752) and Electronic Money Regulations 2011 (S.I. 2011/99). Subsequent amendments to these regulations by the Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 create a run-off regime, which would enable firms which either do not enter the TPR, or exit the TPR without full UK authorisation or registration, to continue to service pre-existing contracts with UK customers for a limited period, in order to avoid disruption to the parties to these contracts.

- 2.6 Part 4 of this instrument introduces a transitional provision into the Financial Conglomerates and Other Financial Groups (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/264). These regulations amend legislation related to financial conglomerates to address deficiencies arising as a result of the UK leaving the EU, to ensure that the UK's regulation of financial conglomerates and other financial groups continues to operate as intended in the UK after exit.
- 2.7 Part 5 amends the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/336). These regulations amend retained EU law related to European Long-term Investment Funds (ELTIFs) to ensure the legislation continues to operate effectively in a no deal scenario after exit day, specifically so that it only applies to qualifying long-term investment funds established within the UK.
- 2.8 Part 6 amends Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions. This Delegated Regulation supplements Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ("the Capital Requirements Regulation") by setting out detailed requirements relating to the liquidity coverage requirement for banks throughout the EU. This affects liquidity supervision and subsequent reporting for credit institutions.

Why is it being changed?

- 2.9 Amendments to other EU exit instruments and retained EU law outlined above are required in order to ensure that the legislation operates effectively following the UK's withdrawal from the EU.
- 2.10 A transitional provision in relation to financial conglomerates is provided in order to limit disruption to the financial services industry once the UK leaves the EU. This transitional provision addresses the fact that, without this amendment, the UK regulators would effectively be required to duplicate some elements of the supervision of cross-border firms after exit, which would be impracticable and burdensome for firms.

What will it now do?

- 2.11 The amendments to other EU exit instruments as described above ensure that these instruments deal effectively with deficiencies in retained EU law after the UK leaves the EU. These changes do not make any broader changes to the policy intent or effect of the amended instruments.
- 2.12 In particular, transitional provisions, as described in paragraphs 7.14 and 7.15 of this EM, will help minimise disruption to the financial services industry in the event that the UK leaves the EU without a deal or an implementation period.

- 2.13 Additionally, this instrument clarifies the scope of Article 5 of the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019, as described in paragraph 7.16; and removes references to redundant powers conferred on competent authorities in Commission Delegated Regulation (EU) 2015/61, as described in paragraph 7.17.
- 2.14 Other amendments will ensure that the instruments being amended operate as intended - for example by ensuring consistency between different instruments, and correcting a number of errors or omissions. A number of the changes, described in paragraphs 7.10 to 7.13, are designed to improve consumer protection and increase consumer awareness where firms are in transitional regimes.
- 2.15 Further details on the specific amendments made by this instrument can be found in Section 7.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was proposed for sifting on 27 February 2019. The Commons sifting committee (the European Statutory Instruments Committee (ESIC)) disagreed with the government and recommended that this statutory instrument should be laid before, and approved by a resolution of, each House of Parliament before it is made (i.e. follow the affirmative procedure).
- 3.2 The ESIC stated that the amendments made by this instrument are potentially significant and they considered it would usually be appropriate to use the affirmative procedure when amending EU exit instruments which were themselves originally subject to the affirmative procedure.
- 3.3 The Lords sifting committee (the Secondary Legislation Scrutiny Committee (SLSC)) did not recommend this instrument be upgraded.

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)

- 3.4 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.5 The powers under which this instrument is made cover the entire United Kingdom (see section 2(2) of Schedule 2 to the European Communities Act 1972, and section 8(1) of, and paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited by either act or by the instrument.

4. Extent and Territorial Application.

- 4.1 The territorial extent of this instrument is to the whole United Kingdom.
- 4.2 The territorial application of this instrument is to the whole United Kingdom.

5. European Convention on Human Rights

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

“In my view the provisions of the Financial Services (Miscellaneous) (Amendment) (EU Exit) (No. 2) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument amends several pieces of secondary legislation, including the implementation of a transitional provision, and amends retained EU law to address deficiencies from the withdrawal of the UK from the EU.
- 6.2 The instrument amends the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018, the Financial Conglomerates and Other Financial Groups (Amendment etc.) (EU Exit) Regulations 2019, and the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019.
- 6.3 The instrument additionally amends Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions.

7. Policy background

What is being done and why?

- 7.1 The UK and EU negotiating teams have agreed the terms of an implementation period that will start on exit day and last until 31 December 2020. Should a deal be approved, the implementation period 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 an implementation period, common rules will continue to apply. The UK would continue to implement new EU law that comes into effect and the UK would continue to be treated as part of the EU's single market in financial services. This would 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 would 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 UK and EU negotiating teams have agreed a deal and an implementation period, the government must continue to plan for all eventualities, including a 'no deal' scenario. HM Treasury intends to use powers in the European Union (Withdrawal) Act 2018 (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 SIs. These contingency preparations for financial services legislation are sometimes referred to as ‘onshoring’. These SIs 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. HM Treasury has laid a package of EU Exit statutory instruments, making these changes. The majority of these instruments have now been made, and would come in to force on exit day, if the UK did not enter an implementation period.
- 7.6 If the UK were to leave 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 This instrument is part of a wider package of statutory instruments laid by HM Treasury from July 2018 onwards in order to ensure the UK continues to have a functioning financial regulatory framework after the UK leaves the EU. This particular instrument addresses errors and omissions in earlier instruments, and makes amendments that do not fall within the remit of changes made by other instruments, such as revocations of retained EU law that have no relevance in a UK-only context.

Amendments to financial services EU exit statutory instruments

- 7.10 Part 2 amends the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018. A provision is added to place an obligation on firms that enter the contractual run-off (established in amendments made by Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019) to inform their UK consumers of their status as an exempt firm, and of any changes to consumer protection. This ensures that EEA providers must

inform their UK customers if, for example, there are changes to consumer protection legislation in the firms' home state or in the EEA, which affect UK customers.

- 7.11 Additionally, in order to correct an inconsistency with the Collective Investment Schemes (Amendment, etc.) (EU Exit) Regulations 2019 (S.I. 2019/325) and the Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/328), references to EEA fund managers, such as references to "AIFM" and "UCITS" are removed from regulation 70 and 71, as EEA fund managers will not be able to enter the contractual run-off, as they need to comply with the above Regulations.
- 7.12 Part 3 amends the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018. The amendment places additional requirements for EEA firms in the contractual run-off regime (established in amendments made by Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019) to notify UK consumers that they have entered the contractual run-off, and disclose any material consumer protection changes post-exit as they arise. This amendment ensures consistency with the proposed consumer notification requirements on firms in the contractual run-off outlined in Part 2 of this instrument, for firms regulated under the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018.
- 7.13 In addition, regulation 7(3) of this instrument adds an additional cancellation criterion to Schedule 3 of the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018, in order to close a gap in the law that meant that EEA account information service providers with temporary deemed registration in the UK were not required to maintain insurance obligations that currently apply to inward passporting EEA firms.
- 7.14 Part 4 introduces a transitional provision in relation to group supervision into the Financial Conglomerates and Other Financial Groups (Amendment etc.) (EU Exit) Regulations 2019. That SI makes amendments to UK legislation implementing FICOD. FICOD requires that where a financial conglomerate operates in more than one EU member state, a single supervisory authority is appointed to coordinate overall supervision. These regulations place certain obligations on UK regulators to supervise conglomerates in accordance with FICOD rules, which are being temporarily modified by this instrument in order for regulators to use the temporary transitional power to mitigate the disruption that firms affected by FICOD onshoring changes might otherwise face.
- 7.15 These provisions introduce transitional arrangements that ensure that, when a group is supervised by an EEA supervisor, the relevant provisions that impose requirements on the competent authority as coordinator do not apply for a period of two years after exit day. This is to address the fact that, without this amendment, the UK regulators would effectively be required to duplicate some elements of the supervision of cross-border firms after exit, which would be impracticable and burdensome for firms. However, the modifications preserve the ability of UK regulators to apply the relevant additional forms of supervision to financial conglomerates at their discretion, where it would nonetheless be appropriate to do so (for example where they believe this is in the interests of UK consumers or UK financial stability).
- 7.16 Part 5 of this instrument makes a minor amendment to the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019, addressing a minor error identified

after the SI was laid. The amendment clarifies the scope of regulation 8(2)(b) (application for authorisation as an LTIF) of the above Regulations as applying to Long-term Investment Funds (LTIFs) rather than European Long-term Investment Funds (ELTIFs).

Amendments to retained EU law

- 7.17 Part 6 amends Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions. Paragraph 29 of Article 2 of the Commission Delegated Regulation confers a power on competent authorities, including the Bank of England. Once the UK has left the EU, the Bank will be unable to use this power, as a result of the amendments made by the Capital Requirements (Amendment) (EU Exit) Regulations 2018 (S.I 2018/1401), and this paragraph will therefore be redundant. The paragraph is deleted by this instrument.

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 European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

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. The financial services EU exit instruments that are amended under this instrument have been published and laid in draft beginning in July 2018. This instrument only makes minor amendments, to ensure a coherent and consistent regulatory regime on exit.

11. Guidance

- 11.1 No further guidance is being published alongside this instrument

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is that some of the instruments being amended impact on the UK financial services regulators (the Bank of England/Prudential Regulation Authority and the Financial Conduct Authority and the Payment Systems Regulator). Impact assessments for the individual instruments being amended by this instrument have been published on legislation.gov.uk, apart from those that have been deemed to be de minimis.
- 12.3 An Impact Assessment has not been prepared for this instrument because in line with Better Regulation guidance, HM Treasury considers that the net impact on businesses will be less than £5 million a year. Due to this limited impact, a de minimis impact assessment has been carried out.

13. Regulating small business

- 13.1 The legislation applies to small businesses, however it does not introduce new regulatory requirements for small businesses, but merely ensures a consistent and coherent regulatory regime.

14. Monitoring & review

- 14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Rachel Mumford at HM Treasury Telephone: 020 7270 5636 or email: Rachel.Mumford@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Katie Fisher, Deputy Director for Financial Services EU Exit Domestic Preparation at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen MP, Economic Secretary to the Treasury 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 MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Financial Services (Miscellaneous) (Amendment) (EU Exit) (No. 2) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because: it follows the approach taken in previous instruments to fix deficiencies that arise as a result of the UK leaving the EU. This instrument makes amendments and corrections to ensure that UK financial markets continue to operate in a fair, stable and transparent manner post EU withdrawal. Additionally, this instrument makes the appropriate amendments to EU legislation that will become redundant once the UK is no longer a member of the EU.

2. Good reasons

- 2.1 The Economic Secretary to the Treasury, John Glen MP, 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 These are: the approach taken with this instrument is consistent with the approach previously taken in earlier instruments, and maintains the intended effect of those instruments. The corrections made to the instruments are necessary to ensure that legislation operates effectively once the UK leaves the EU, and the amendments go no further than what is required for this purpose.

3. Equalities

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

“The draft 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 MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, John Glen MP, Economic Secretary to the Treasury, 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.