EXPLANATORY MEMORANDUM TO

THE OVER THE COUNTER DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES (AMENDMENT, ETC., AND TRANSITIONAL PROVISIONS) (EU EXIT) REGULATIONS 2019

2019 No. 335

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 is being made in order to address deficiencies in retained European Union (EU) legislation, in particular the European Market Infrastructure Regulation ("EMIR") - Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, arising from the withdrawal of the United Kingdom (UK) from the EU, ensuring the legislation continues to operate effectively when the UK leaves the EU.

2.2 Other aspects of EMIR are being dealt with in separate instruments. Powers to make equivalence and recognition decisions that enable non-UK central counterparties (CCPs) to continue to provide services in the UK after EU exit are provided in the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (S.I. 2018/1184) (the "CCP Regulations"). The Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 (S.I. 2018/1318) transfers powers from the European Securities and Markets Authority (ESMA) to the Financial Conduct Authority (FCA) in relation to UK and non-UK trade repositories (TRs).

Explanations

<u>What did any relevant EU law do before exit day?</u>

2.3 EMIR mandates the use of CCPs for certain over the counter (OTC) derivative transactions, the reporting of derivative transactions to TRs and the application of risk mitigation techniques in bilateral derivative transactions. EMIR was the EU's response to the G20 Pittsburgh commitment in 2009, that more derivatives trades should be cleared through CCPs and reported to TRs, and is widely recognised as an important regulatory measure to improve the resilience of CCPs and address deficiencies in global derivatives markets. EMIR was implemented in part by the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulation 2013 (S.I. 2013/504), which ensured that EMIR was fully effective and enforceable in the UK.

<u>Why is it being changed?</u>

2.4 This instrument addresses deficiencies within EMIR and the related UK legislation – the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (S.I. 2013/504) – to ensure

that the UK continues to have an effective regulatory framework for OTC derivatives, CCPs and TRs after the UK has left the EU.

2.5 If these deficiencies are not addressed, then significant aspects of the UK's financial markets infrastructure regulatory framework relating to OTC derivatives, CCPs and TRs would become less effective or legally inoperable. Without an operable regime in place for OTC derivatives, CCPs and TRs, the UK's ability to regulate the financial sector effectively will be compromised, affecting market confidence and creating instability. As well as being exposed to significant financial stability risk, the UK would not be meeting its international commitments, agreed as part of its membership of the G20.

What will it now do?

2.6 This instrument is intended to ensure that the UK remains compliant with its international agreements and supports the global effort to make derivatives markets safer and more transparent, once the UK has left the EU. It will ensure the UK has a legally robust regime to supervise UK CCPs and UK TRs after exit.

2.7 This instrument transfers functions deriving from EMIR which are currently carried out by EU institutions, to UK institutions, i.e. the European Commission functions are transferred to HM Treasury and the ESMA functions are transferred to the relevant UK regulator. It creates the temporary intragroup exemption regime ("the intragroup regime"), to ensure that intragroup transactions which are exempted from the requirements in EMIR before exit day can continue to be exempted after exit, for a transitional period, to allow time for a permanent equivalence determination to be made. It also removes a number of provisions from EMIR that will no longer apply to the UK after exit and revokes two pieces of EU tertiary legislation made under the powers in EMIR. It expands the existing criminal offence of misleading the FCA to UK and non-UK TRs that apply for registration and recognition from the FCA after exit.

2.8 Further details and explanations of changes being made by this instrument are set out in paragraphs 7.9 to 7.25 of this memorandum.

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.

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 Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument primarily amends EMIR, as that Regulation will be retained EU law by virtue of section 3 of the European Union (Withdrawal) Act 2018 ("the EUWA"). It also revokes two pieces of delegated legislation made under that Regulation – Commission Delegated Regulation (EU) No 1003/2013 and Commission Delegated Regulation (EU) No 667/2014. Other failures and deficiencies in EMIR are addressed in the legislation referred to in paragraph 2.2.

6.2 This instrument also amends the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 which relates to EMIR and modifies certain parts of the Financial Services and Markets Act 2000 (c.8) to allow enforcement of EMIR to take place under that Act.

6.3 The amendments, revocations and modifications referred to in paragraphs 6.1 and 6.2 are made to address failures of the retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU.

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 European Union

(Withdrawal) Act 2018 (c.16) (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 (c.68) 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 retained 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 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 EUWA. (https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act)

7.9 Consistent with the government's objective of providing continuity to businesses and consumers as far as possible, the policy approach set out in EMIR will not change after the UK has left the EU. However, to ensure that the regime in EMIR continues to operate effectively once the UK is outside of the EU, certain deficiency fixes to the legislation will be necessary.

Transfer of functions

7.10 Firstly, this instrument ensures that requirements imposed by EMIR continue to apply in the UK and transfers responsibilities from EU authorities to the appropriate UK authorities. Functions under EMIR that are carried out by EU authorities, principally ESMA, will no longer apply in the UK after EU withdrawal. This instrument removes

these deficiencies by transferring the functions of ESMA to the relevant UK regulator and the functions of the Commission to HM Treasury.

Equivalence

7.11 Under EMIR, a third country's regulatory or supervisory regime may be deemed by the European Commission to be equivalent to the approach set out in EMIR. For example, a third-country regime may be 'equivalent' in relation to its supervision of TRs. Equivalence decisions reduce duplication in regulatory or supervisory requirements between the EU and third-countries and facilitate international trade in financial services.

7.12 To ensure the EMIR equivalence regimes can continue to operate effectively in the UK, HM Treasury will take on the Commission's function of making equivalence decisions for third-country regimes. Where the Commission has taken equivalence decisions for third countries before exit day, these will be incorporated into UK law and will continue to apply to the UK's regulatory and supervisory relationship with those third countries – with the exception of those taken under Article 25 EMIR as set out in the CCP Regulations.

7.13 Part 3 of this instrument transfers the power to make equivalence decisions for TRs from the Commission to HM Treasury, by amending Article 75 of EMIR, and transfers the power and functions to recognise non-UK TRs from ESMA to the Financial Conduct Authority (the FCA). This instrument also removes the requirement as set out in Article 75(2) for an international agreement concerning the cross-border transfer of data. HM Treasury, under its new powers in Article 75(1) as amended by this instrument, will determine whether non-UK TR regimes meet equivalent standards, such as enforcement by non-UK supervisors of the transfer data to UK regulators.

Continuation of EMIR requirements and transfer of functions

7.14 The instrument ensures requirements imposed by EMIR continue to apply in the UK, by transferring relevant responsibilities to the UK regulators. For example, UK firms will be obliged to continue to clear certain derivative contracts through CCPs authorised or recognised by the Bank of England ("the Bank") after exit day (this is known as the clearing obligation). For all financial and non-financial counterparties, the power to set the clearing obligation for different types of asset classes will be transferred from ESMA to the Bank. The Bank will also have the power to specify the timing for any phase-in of any new clearing obligations to apply to Prudential Regulation Authority (PRA) regulated entities, while the FCA will have the power to specify the timing of entry of any changes to the clearing obligation for other counterparties.

7.15 Under EMIR, UK firms and CCPs entering into derivative contracts are obliged to report details of those trades to a TR which has been registered, or recognised, by ESMA (this is known as the reporting obligation). Part 2 of this instrument also amends that requirement so that, after exit day, they must report details to a TR which has been registered, or recognised, by the FCA. The responsibility for further specifying reporting requirements will be transferred from EU institutions to the relevant UK regulators. The Bank will be responsible for setting them for CCPs and the FCA will be responsible for all other firms.

7.16 Part 2 of this instrument also introduces a power for the FCA to suspend the reporting obligation for a period of up to one year and with the agreement of HM Treasury, in a scenario where there is no registered or recognised UK TR available. The FCA will also be able to specify when firms would be expected to report previous trades undertaken during the suspension period once the suspension ends.

7.17 Uncleared OTC derivative contracts are subject to a range of risk mitigation requirements. Clearing members are obliged to make payments to CCPs to cover potential losses in the event of a clearing member default (the margin obligation). These margin obligations will continue to apply to firms trading in the UK after exit day and rule setting powers will be transferred from EU institutions to the PRA and FCA.

Temporary Exemptions

7.18 Under EMIR, intragroup exemptions may be granted to allow parts of corporate groups to trade with each other without having to go through clearing at a CCP. After exit day, permanent intragroup exemptions between UK and EU firms (which will become third-country firms), and all temporary intragroup exemptions granted before exit day, will no longer apply in the UK. This would impact UK firms who are currently trading via intragroup exemptions as it would disproportionately increase costs and would put UK firms at competitive disadvantage.

7.19 To mitigate this, Part 5 of the instrument establishes the intragroup regime to ensure that intragroup transactions can continue to be exempted from the requirements in EMIR, where this is the case before exit. This regime will last three years and may be extended by HM Treasury. The regime will allow enough time for the consideration of equivalence decisions – a prerequisite for a permanent exemption.

7.20 This instrument also provides a temporary exemption from the clearing and margining obligations imposed by Articles 4 and 11 of EMIR (which can be found in Part 3 of the instrument), for certain energy derivative contracts, until 3 January 2021. This exemption is currently contained within Article 95 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (known as MIFID II). The FCA will grant this exemption and publish a list of the energy derivative contracts to which it applies.

EMIR Processes

7.21 Provisions relating to TR appeals, fines, supervisory fees, penalties and other supervisory requirements are being omitted and replaced with provisions that align with those already contained in the Financial Services and Markets Act 2000 (FSMA) concerning supervision and enforcement (see Part 4).

7.22 Part 4 of the instrument also expands the criminal offence of misleading the FCA, to UK and non-UK TRs that apply for registration and recognition from the FCA after exit. This is necessary to ensure that the TRs comply with the various authorisation requirements.

7.23 Under EMIR, EU CCPs are supervised by colleges – groups of EEA regulators that oversee the jurisdiction in which CCPs and their members are based. Colleges assess compliance with the requirements in EMIR. Once the UK leaves the EU, the UK will be independent from the EU jurisdiction and the college system as defined in EMIR will no longer be relevant to the UK. Instead, regulatory oversight will continue to be

provided by the Bank. The related provisions in EMIR are therefore omitted by this instrument in Part 3 of the instrument.

7.24 EMIR includes specific requirements and obligations on competent authorities to cooperate and share information with EEA authorities. As the UK will no longer be part of the EU supervisory regime this instrument omits those provisions (see Part 3). However, this will not preclude UK supervisors from sharing information with EU authorities where necessary, as the UK's existing domestic framework for cooperation and information sharing with countries outside the UK already allows for regulatory cooperation and information sharing on a discretionary basis. Indeed, it is the UK's firm intention to maintain a high level of mutually beneficial supervisory cooperation with EU and EEA authorities.

Binding Technical Standards

7.25 Under the EU system of financial regulation, drafts of Binding Technical Standards (BTS) are developed by European Supervisory Authorities. Part 3 of this instrument transfers responsibility for making BTS under EMIR to the relevant UK regulators (the Bank, PRA and FCA). This will ensure that they operate effectively, immediately on exit day and that they remain fit for purpose thereafter. This is in line with the approach taken across financial services regulation, where HM Treasury is transferring responsibility for making BTS to UK regulators, as set out in the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115).

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

8.1 This instrument is being made using the powers in section 8 of the EUWA to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU, and in paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to that 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.

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 this instrument, but has engaged extensively with the Bank and the FCA during the drafting process. HM Treasury has engaged with relevant stakeholders on its approach to Financial Services legislation under the EUWA, including on this instrument, to familiarise them with the legislation ahead of laying.

10.2 The instrument was also published in draft, along with an explanatory note, on 22 October 2018, to maximise transparency ahead of laying. (https://www.gov.uk/government/publications/draft-over-the-counter-derivatives-central-counterparties-and-trade-repositories-amendment-etc-and-transitional-provision-eu-exit-regulations).

10.3 The financial services regulators are undertaking public consultations on changes they propose to make to Binding Technical Standards and rules made under the powers

conferred upon them by the FSMA. The Bank and PRA published their consultations on 25 October 2018. The Bank's consultation paper can be found at: https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/uk-withdrawal-from-eu-changes-to-fmi-rules-and-onshored-bts-complete.pdf?la=en&hash=DA90F953E776AA06A9C76C620325284050630BCDh. The PRA's consultation paper can be found at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp2618-complete.pdf?la=en&hash=2A1C385C5C157974FDDE36FC5D72F515AD667AA1. The FCA published its consultation paper on 23 November 2018 and this can be found at https://www.fca.org.uk/publication/consultation/cp18-36.pdf.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 This instrument will affect CCPs, CCP clearing members and their clients, TRs, TR users and firms using derivative markets. It is difficult to quantify the size of the market affected as the instrument covers both the financial sector and non-financial counterparties. These firms will need to understand the changes to the regulatory environment. This will involve legal experts examining the instrument, and the relevant sections of legislation amended, to advise firms of the impact on their business, and how they should respond. We expect this will be a one-off cost.

12.2 The instrument stipulates different appeal, penalty and fine processes for TRs than those in EMIR, reflecting the wider remit of the FCA as a UK supervisor relative to ESMA. Specifically, EMIR processes will be replaced by the equivalent FSMA processes. As these processes relate to the penalties paid by TRs, they will affect TRs, but not their users.

12.3 The intragroup regime will allow permanent intragroup exemptions between UK and EU firms granted before exit, temporary intragroup exemptions granted between UK and non-EU third country firms before exit, and new temporary intragroup exemptions between UK and non-UK firms applied for after exit, to benefit from exemptions – special derogations – for a period after exit. During the intragroup regime, equivalence decisions will be sought, allowing for the establishment of new permanent exemptions. This regime does not impose any additional burden on UK firms (i.e. they will not need to re-apply to the FCA for exemptions). This will in fact benefit UK firms, as exemptions that would have fallen away will continue to be in place.

12.4 This instrument has an impact on the public sector as, after the UK leaves the EU, the Bank, PRA and FCA will take on responsibility for carrying out functions under EMIR that are currently carried out by ESMA, and HM Treasury will take on the European Commission's functions. There is no material impact on charities or voluntary bodies.

12.5 An Impact Assessment has been prepared and 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. Although CCPs and TRs are not small businesses themselves, the population of firms that are required to comply with the EMIR requirements on OTC derivatives – for example investment companies, insurance companies, credit institutions and banks – will include some small businesses.

13.2 The instrument makes amendments to EMIR and other relevant legislation to ensure that it continues to operate effectively once the UK has left the EU, and to help smooth the transition for all businesses, irrespective of their size. This instrument therefore aims to minimise the impact of these regulatory changes on all firms, including small businesses.

14. Monitoring & review

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

15. Contact

15.1 Greg Stump at Her Majesty's Treasury (Telephone: 0207 270 5749 or email: Greg.Stump@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Clare Bolingford, Deputy Director for Financial Services at Her Majesty's Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury (John Glen) 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 Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because: it is in line with the European Union (Withdrawal) Act 2018 in serving to make those changes necessary to provide a functioning statute book in relation to the financial markets infrastructure's regulatory framework relating to over-the-counter derivatives, central counterparties and trade repositories on the day we leave the EU. This instrument does only what is necessary to ensure that the relevant legislation relating to over-the-counter derivatives, central counterparties and trade repositories continues to operate effectively at the point at which the UK leaves the EU. This can only be achieved through making the amendments to EMIR and the associated legislation contained in this instrument and through making the transitional provisions contained in this instrument. The explanation of the provisions made in this instrument is set out in section 7 of the memorandum.

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 reasons are: if the government were not to proceed with this legislation, then significant aspects of the UK's regulatory regime for over-the-counter derivatives, central counterparties and trade repositories would become legally inoperable. The UK would risk not meeting international commitments made as part of its membership of the G20. This could affect UK market confidence and create financial instability.

3. Equalities

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

"The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019 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 Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019 instrument, I, Economic Secretary to the Treasury, John Glen MP, 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 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 creation of a criminal offence and for the penalty in respect of it in the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2019."

5.2 Part 4 of the instrument expands the criminal offence of misleading the Financial Conduct Authority (FCA) to UK and non-UK trade repositories that apply for registration and recognition from the FCA after exit. This is necessary to ensure that the trade repositories comply with the various authorisation requirements and will bring the requirements on trade repositories in line with the requirements on other authorised firms.

6. Legislative sub-delegation

6.1 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 it is appropriate to create relevant sub-delegated powers in the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2019".

6.2 The instrument transfers powers to the Bank of England, FCA and the PRA to make binding technical standards. This is appropriate because the relevant regulator will have the necessary technical knowledge to make assessments of certain matters contained within EMIR and will ensure that EU-derived technical regulations for which they are responsible will operate effectively after exit, subject to mechanisms to ensure robust HM Treasury oversight. This is in line with the approach that the government has set out in the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), in which legislative responsibility for Level 2 technical legislation in financial services will be transferred to the financial regulators.