
DRAFT STATUTORY INSTRUMENTS

2018 No.

The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018

PART 2

EU Exit Instruments

Interpretation

2. For the purpose of this Part—

- (a) the “appropriate regulator” in relation to—
- (i) the EU Regulations specified in Part 1 of the Schedule, is the FCA;
 - (ii) the EU Regulations specified in Part 2 of the Schedule, is the PRA;
 - (iii) the EU Regulations specified in Part 3 of the Schedule, is the Bank of England;
 - (iv) the EU Regulations specified in Part 4 of the Schedule, is both the FCA and the PRA;
 - (v) the EU Regulations specified in Part 5 of the Schedule, is both the FCA and the Bank of England;
 - (vi) the EU Regulation specified in Part 6 of the Schedule, is the Payment Systems Regulator;
 - (vii) EU-derived provisions, means whichever of the FCA, the PRA or the Bank of England made the provisions,
- and for the purposes of this paragraph, reference to EU Regulations includes a reference to part of an EU Regulation;
- (b) “authorised persons” and “PRA-authorised persons” have the meaning given in sections 31(2) and 2B(5) respectively of the Financial Services and Markets Act 2000(1);
- (c) “central counterparty” has the meaning given in section 313 of the Financial Services and Markets Act 2000(2);
- (d) “central securities depository” has the meaning given in section 417 of the Financial Services and Markets Act 2000(3);
- (e) “the EMIR regulation” means Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories(4);

(1) Section 2B was substituted, with the rest of Part 1A for Part 1 by section 6(1) of the Financial Services Act 2012 (c.21).

(2) The definition of “central counterparty” was inserted by S.I. 2013/504.

(3) The definition of “central securities depository” was inserted by S.I. 2017/1064. There are other amendments to s.417 of the Financial Services and Markets Act 2000 which are not relevant to these Regulations.

(4) OJ L201, 27.7.2012, p.1 as last amended by Commission Regulation (EU) 2017/979, OJ L148,10.6.2017, p.1.

- (f) “EU-derived provisions” means rules and other enactments made by the FCA, the PRA or the Bank of England which fall within the definition of “EU-derived domestic legislation” within the meaning of section 2(2) of the European Union (Withdrawal) Act 2018;
- (g) “EU Exit instrument” means an instrument in writing made in accordance with regulation 3(1);
- (h) “FCA” means the Financial Conduct Authority;
- (i) “PRA” means the Prudential Regulation Authority;
- (j) “Payment Systems Regulator” means the body established under section 40 of the Financial Services (Banking Reform) Act 2013⁽⁵⁾;
- (k) “regulators” mean the FCA, the PRA, the Bank of England and the Payment Systems Regulator;
- (l) “specified EU Regulations” mean the EU Regulations or parts of EU Regulations forming part of retained EU law which are specified in the Schedule;
- (m) a person is connected with another person in the circumstances set out in section 165(11) of the Financial Services and Markets Act 2000⁽⁶⁾.

Delegation

3.—(1) The appropriate regulator (and, in the case of an EU Regulation specified in Part 4 or 5 of the Schedule, either appropriate regulator) may by an instrument in writing make such provision as the regulator considers appropriate to prevent, remedy or mitigate—

- (a) any failure of the specified EU Regulations or of EU-derived provisions to operate effectively, or
- (b) any other deficiency in the specified EU Regulations or EU-derived provisions,

arising from the withdrawal of the United Kingdom from the EU.

(2) Where the PRA and the FCA, or the FCA and the Bank of England are the appropriate regulator in relation to an EU Regulation neither may make an EU Exit instrument which amends that EU Regulation unless—

- (a) the other regulator has been consulted on the proposal to divide the EU Regulation into two parts in accordance with regulation 4(6); or
- (b) if the EU Regulation is not being divided, the other regulator consents to any amendments being made.

(3) Section 8(2), (3)(a), (4), (6)(b), (7), (8) and (9) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and any regulations made under section 8(3)(b) apply to the power in paragraph (1) as if—

- (a) references to retained EU law were references to the specified EU Regulations or to EU-derived provisions;
- (b) references to the Minister were references to the appropriate regulator;
- (c) references to regulations under section 8(1) were references to EU Exit instruments made under this regulation.

(4) An EU Exit instrument may not—

- (a) make provision falling within section 8(6)(a) of the 2018 Act;
- (b) confer any power to legislate by means of orders, rules, regulations or any other subordinate instrument;

(5) 2013 c.33.

(6) Section 165(11) was amended by paragraph 1 of Schedule 12 to the Financial Services Act 2012 (c.21).

- (c) amend any legislation other than the specified EU Regulations or EU-derived provisions.

Division of responsibilities

4.—(1) This regulation applies if—

- (a) either condition A, B or C is satisfied; and
- (b) condition D is satisfied.

(2) Condition A is that the PRA proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 4 of the Schedule, and the PRA—

- (a) proposes, in modifying the EU Regulation, to make separate provision for—
 - (i) PRA-authorized persons (within the meaning of section 2B(5) of the Financial Services and Markets Act 2000);
 - (ii) persons connected to them; or
 - (iii) a specified category of persons within paragraph (i) or (ii), or
- (b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(3) Condition B is that the Bank of England proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 5 of the Schedule, and the Bank of England—

- (a) proposes, in modifying the EU Regulation, to make separate provision for—
 - (i) central counterparties;
 - (ii) central securities depositories;
 - (iii) financial counterparties or non-financial counterparties within the meaning of the EMIR regulation; or
 - (iv) a specified category of persons within paragraph (i), (ii) or (iii), or
- (b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(4) Condition C is that the FCA proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 4 or Part 5 of the Schedule, and the FCA—

- (a) proposes, in modifying the EU Regulation, to make separate provision for—
 - (i) persons regulated solely by the FCA;
 - (ii) persons connected to them; or
 - (iii) a specified category of persons within paragraph (i) or (ii), or
- (b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(5) Condition D is that the initiating regulator considers that the separate provision referred to in paragraph (2), (3) or (4) (as the case may be) can most appropriately be made using the procedure set out in paragraph (6).

(6) If this regulation applies, the initiating regulator must when making the proposed EU Exit instrument—

- (a) amend the EU Regulation to divide it into two Parts—
 - (i) by re-designating the existing text as the first Part with the title of the EU Regulation followed by “(FCA)” as its heading; and
 - (ii) so as to secure the insertion of a second Part which repeats the text of the first Part and which has as its heading the title of the EU Regulation followed by—

- (aa) “(PRA)”, where the EU Regulation is in Part 4 of the Schedule, or
 - (bb) “(Bank of England)”, where the EU Regulation is in Part 5 of the Schedule;
 - and
 - (b) insert a provision at the beginning of each Part identifying the persons to whom that Part is to apply;
 - (c) make the modifications referred to in the opening words of conditions A, B or C (as the case may be) to the first Part of the EU Regulation (where the initiating regulator is the FCA) or to the second Part of the EU Regulation (where the initiating regulator is the PRA or the Bank of England).
- (7) The initiating regulation must consult with the other appropriate regulator in relation to the EU Regulation in question on the provision referred to in paragraph (6)(b).
- (8) In this regulation, “the initiating regulator”—
- (a) if condition A (but not condition C) is satisfied, means the PRA;
 - (b) if condition B (but not condition C) is satisfied, means the Bank of England;
 - (c) if condition C is satisfied (whether or not condition A or B is also satisfied), means the FCA.
- (9) Where an EU Regulation has been amended by an EU Exit Instrument pursuant to paragraph (6)—
- (a) the first Part of the EU Regulation is to be treated as falling within Part 1 of the Schedule; and
 - (b) the second Part of the EU Regulation is to be treated as falling within—
 - (i) Part 2 of the Schedule, where the EU Regulation originally fell within Part 4 of the Schedule; or
 - (ii) Part 3 of the Schedule, where the EU Regulation originally fell within Part 5 of the Schedule;
 - (c) neither the first Part nor the second Part of the EU Regulation may be modified by any regulator (under the power in regulation 3 or otherwise) which is not the appropriate regulator for that Part.

Procedure

5.—(1) Before a regulator other than the PRA makes any EU Exit instrument which applies to PRA-authorized persons or persons connected to them, or which may affect the exercise of the PRA’s functions under or by virtue of the Financial Services and Markets Act 2000 (“the Act”), the regulator must consult the PRA.

(2) Before a regulator other than the FCA makes any EU Exit instrument which applies to authorized persons who are not PRA-authorized persons, persons connected with them, recognised investment exchanges within the meaning of section 285 of the Act, or any other person which the FCA is responsible for regulating under the Act or under retained EU law, or which may affect the exercise of the FCA’s functions under or by virtue of the Act, the regulator must consult the FCA.

(3) Before a regulator other than the Bank of England makes any EU Exit instrument which—

- (a) applies to a central counterparty, to a financial counterparty or a non-financial counterparty within the meaning of the EMIR regulation or to a central securities depository; or
- (b) may affect the exercise of the Bank of England’s functions under or by virtue of the Act, the Banking Act 2009, or retained EU law,

the regulator must consult the Bank of England.

(4) An EU Exit instrument may only be made if it has been approved by the Treasury.

(5) The Treasury may only approve an EU Exit Instrument if the Treasury considers that the EU Exit instrument makes appropriate provision to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.

(6) An EU Exit instrument must be provided to the Treasury as soon as it has been made.

(7) An EU Exit instrument must be published by the regulator which made it in the way appearing to that regulator to be best calculated to bring it to the attention of the public.