

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS (DISCLOSURE OF INFORMATION
TO THE EUROPEAN SECURITIES AND MARKETS AUTHORITY ETC. AND
OTHER PROVISIONS) REGULATIONS 2016

2016 No. 1095

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM 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 These Regulations are mainly concerned with the implementation of certain obligations laid down in Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 (“the Omnibus Directive”), which, among other things, amends other Directives in respect of the powers of the European Securities and Markets Authority (“ESMA”). The obligations concerned require specified matters to be notified and specified information to be given to ESMA and, in some cases, to the European Commission, the European Systemic Risk Board, other EEA States or the competent authorities established in those States.
- 2.2 These Regulations also correct an error in the Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 By a letter dated 2 December 2015, the Joint Committee on Statutory Instruments requested a memorandum from HM Treasury in relation to the European Long-Term Investment Funds Regulations 2016 (S.I. 2015/1882), on the following point:

In regulation 7(2), is the failure to insert a definition of “ELTIF Regulation” an oversight? If not, why is such a definition not considered necessary?

- 3.2 HM Treasury replied with a memorandum dated 7 December 2015 which stated:

The Treasury accept that the omission of a definition of “ELTIF Regulation” is an oversight. The ELTIF Regulation (Regulation (EU) No 2015/760) is referred to in the definition of “ELTIF” in regulation 7(2), so it is considered that a reader of S.I. 2001/1783 (which regulation 7 amends) would be able to work out the meaning of “ELTIF Regulation” from the definition of “ELTIF”, but it is accepted that “ELTIF Regulation” should also have been defined for clarity.

The Treasury apologise for this error and are grateful to the Committee for drawing it to the Treasury’s attention. The Regulations will be corrected at the earliest opportunity.

- 3.3 The European Long-Term Investment Fund Regulations 2016 was therefore reported by the Joint Committee on Statutory Instruments in their thirteenth report, published on 18 December 2015 (HL Paper 74). These regulations make the necessary correction.
- 3.4 As the provision correcting the error is minor in terms of its substance, significance and proportion of the overall instrument, HM Treasury has taken the decision that it remains justifiable to charge a fee for issuing the instrument. The SI Registrar has been consulted in taking that decision.

Other matters of interest to the House of Commons

- 3.5 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The obligations about giving notice and information to ESMA etc. arise from the amendment by the Omnibus Directive of:
- Directive 98/26/EC on settlement finality in payment and securities settlement systems;
 - Directive 2003/71/EC on the prospectus to be published when securities are published to the public or admitted to trading;
 - Directive 2004/39/EC on markets in financial instruments;
 - Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; and
 - Directive 2009/65/EC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.
- 4.2 Those obligations are implemented by amending the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979) (regulation 2) and the Financial Services and Markets Act 2000 (c. 8) (regulation 3) in exercise of the powers conferred by section 2(2) of the European Communities Act 1972
- 4.3 Regulation 4 concerns the implementation of Regulation (EU) No. 760/2015 of the European Parliament and of the Council of 29th April 2015 on European Long-Term Investment Funds (OJ No. L 123, 19.5.2015, p.98). It amends the Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001 (S.I. 2001/1783) to correct an error in those Regulations.
- 4.4 Regulation 4 is made in exercise of the powers conferred by sections 213(10), 214(5), 224(4) and 417(1) of the Financial Services and Markets Act 2000 (“FSMA”).

5. Extent and Territorial Application

- 5.1 This instrument extends to all of the United Kingdom.
- 5.2 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Directive 98/26/EC aims to reduce risks associated with participation in payment and securities settlement systems by minimising disruption caused by insolvency proceedings brought against a system participant. Implementing regulations require the designating authority (the Bank of England or FCA) to inform the Treasury if the court makes an order for bankruptcy, sequestration, administration or winding up of a participant or if a participant passes a resolution for creditors' voluntary winding up. The amendment made by the Omnibus Directive requires the designating authority also to inform the European Systemic Risk Board, ESMA and other EEA States. The amendments of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 by regulation 2 implement this requirement in UK law.
- 7.2 Directive 2003/71/EU (the Prospectus Directive) provides for a single regime throughout the EU governing the content, format, approval and publication of a prospectus, which is required where either an offer of securities is made to the public or securities are admitted to trading on a regulated market. The prospectus must be approved by the relevant competent authority before it is published. Article 13.2 of the Prospectus Directive requires a competent authority to notify ESMA of the approval of the prospectus (and any supplement to the prospectus) at the same time as that approval is notified to the issuer, offeror or person asking for admission to trading on a regulated market. The amendment made by the Omnibus Directive requires the national competent authority to provide ESMA with a copy of the prospectus and any supplement. The amendment of section 87D of FSMA by regulation 3(2) implements this requirement in UK law.
- 7.3 Directive 2004/39/EC (MiFID) established a new regulatory regime for securities and derivatives markets and replaced the Investment Services Directive (93/22/EEC). The amendments made by the Omnibus Directive include the following requirements:
- the regulator (the FCA or the Prudential Regulation Authority) must inform the Commission and ESMA where UK investment firms are experiencing difficulty establishing or providing services to third countries;
 - the FCA must give ESMA and other EEA States a list of the regulated markets for which the UK is the home state regulator;
 - where the FCA is the competent authority of the most relevant market in terms of liquidity for particular shares, the FCA should notify ESMA which class of shares it belongs to;
 - where a regulator suspects that a firm which it does not supervise is acting contrary to MiFID in another EEA State, the FCA must notify ESMA and the competent authority of that State;
 - where the UK is notified by another competent authority that a firm supervised by either regulator is acting contrary to MiFID, the FCA must inform that competent authority and ESMA of the steps being taken by the regulator; and

- the Treasury must inform the Commission, ESMA and competent authorities of other EEA States of the identity of the competent authority (or authorities) for the time being designated by the Treasury (i.e. the FCA), and that the FCA, as UK competent authority, is the single point of contact for MiFID purposes.

The insertion of section 354D and 354E of FSMA by regulation 3(3) implements these requirements in UK law.

7.4 Directive 2004/109/EC (the Transparency Directive) established minimum pan-European standards of transparency for issuers of securities traded on regulated markets. It aims to secure appropriate transparency through a regular flow of information to the markets, including regular financial information, information on major holdings of voting rights and information pursuant to the Market Abuse Directive. Article 21.3 of the Transparency Directive states that the national competent authority of the home Member State of a third country issuer can exempt the issuer from certain requirements under the Directive if the law of the third country imposes equivalent requirements, or where an issuer complies with the law of a third country that the competent authority has deemed equivalent. The amendment made by the Omnibus Directive requires the national competent authority to inform ESMA of the exemption being granted. The insertion of section 354F of FSMA by regulation 3(3) implements this requirement in UK law.

7.5 Directive 2009/65/EC (the UCITS Directive) sets out common rules for funds which are Undertakings for Collective Investments in Transferable Securities (a type of regulated investment fund for retail investors), including rules on investment policy, risk management and investor disclosure. Funds that meet the rules may be marketed across the EU based on home state authorisation. The amendments made by the Omnibus Directive:

- require the Financial Conduct Authority (FCA) to report to the Commission and ESMA information about any difficulties that UK UCITS encounter in marketing their units anywhere other than an EEA state, as well as the lists and notices that the FCA is required to send to the Commission and ESMA as referred to in the third sub-paragraph of Article 52.4 of the UCITS Directive (namely lists of the categories of bonds issued by credit institutions that are subject by law to special public supervision designed to protect bond-holders, lists of the categories of authorised issuers, and the notice to be attached to those lists specifying the status of guarantees offered);
- require the Treasury to inform the Commission and ESMA of the identity of the competent authority (or authorities) for the time being designated by the Treasury under Article 97.1 of the UCITS Directive, and where more than one authority is designated (as in the UK) of the division of responsibilities between the authorities;
- require the Treasury to notify the Commission, ESMA and other EEA States of the names of the authorities with which the designated competent authority may exchange information pursuant to Article 103.1 and 103.4 of the UCITS Directive.

The insertion of section 354G of FSMA by regulation 3(3) implements these requirements in UK law.

Consolidation

- 7.6 The Treasury does not intend to consolidate the FSMA 2000 or the statutory instruments which are being amended by the Regulations.

8. Consultation outcome

- 8.1 The measures implemented are laid down in the Omnibus Directive by way of amendment of other directives which the Government has already implemented following consultation. Also, those measures require steps to be taken by the Treasury or the regulators, mostly involving the communication of information. The view was taken that it would not be appropriate to conduct any further consultation.

9. Guidance

- 9.1 HM Treasury do not plan to issue guidance.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
10.2 There is no impact on the public sector.
10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 This instrument does not provide for the review of the amendments it makes.
12.2 It does not make regulatory provision in relation to a qualifying activity or amend any regulatory provision relating to a qualifying activity.

13. Contact

- 13.1 Tim Baynham at the Treasury Telephone: 02072701837 or email: timothy.baynham@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.