

**EXPLANATORY MEMORANDUM TO**  
**THE COMPANIES ACT 1989 (FINANCIAL MARKETS AND INSOLVENCY)**  
**(AMENDMENT) REGULATIONS 2017**

**2017 No. 1247**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 These Regulations make amendments to Part 7 of the Companies Act 1989 as a consequence of revised Regulatory Technical Standards (RTS) on indirect clearing made under Article 4 of 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) and the adoption of an equivalent new RTS made under Article 30(2) of the Markets in Financial Instruments Regulation (“MIFIR”) (Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments).

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None

*Other matters of interest to the House of Commons*

- 3.2 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 Part 7 of the Companies Act 1989 provides for the disapplication of relevant insolvency law requirements in specified circumstances for the purpose of safeguarding the operation of certain financial markets.
- 4.2 The two RTSs mentioned in paragraph 2.1 above require new segregated account structures to be provided by the central counterparty (CCP) and the clearing members of the CCP for indirect clients for both over the counter (OTC) and exchange-traded (ETD) derivative transactions cleared by a CCP in accordance with EMIR and MIFIR respectively.
- 4.3 These Regulations amend the provisions in Part 7 which facilitate the segregation and porting of indirect clients’ assets and positions on the failure of a client providing indirect clearing services. References in Part 7 to Commission Delegated Regulation (EU) No. 149/2013 are updated, and new references to Commission Delegated Regulation (EU) 2017/2154 are inserted.

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

## **6. European Convention on Human Rights**

- 6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights: “In my view the provisions of the Companies Act 1989 (Financial Markets and Insolvency) (Amendment) Regulations 2017 are compatible with the Convention rights.”

## **7. Policy background**

### *What is being done and why*

- 7.1 CCPs are systemically important financial market infrastructures that underpin the functioning of derivatives markets. They act as both the buyer and the seller between two counterparties for an OTC derivative contract. The CCP reduces the risk of an OTC derivative contract by guaranteeing the contract obligation between two counterparties. If one counterparty defaults, the other counterparty is protected through the default management procedures of the CCP. Exchange-traded derivatives are also cleared by a CCP.
- 7.2 EMIR sets out a regulatory regime for CCPs in the EU. As a directly applicable EU regulation, EMIR requires very little implementation in domestic law, but Member States are obliged to ensure their domestic legislation is compatible with its provisions and may need to facilitate certain provisions with supplementary domestic legislation.
- 7.3 Subsequent to the entry into force of EMIR in August 2012, a set of regulatory technical standards was made under Article 4(4) of EMIR. The technical standards include the types of account segregation which should be offered to indirect clients, and the steps which should be taken by clearing members with respect to indirect clients’ assets and positions on the default of the client.
- 7.4 Consequently, changes were made in the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No.2) Regulations 2013 (S.I. 2013/1908) to Part 7 of the Companies Act 1989 to ensure that the domestic regime on insolvency protections adequately facilitated the provisions in the EMIR RTS, in particular account segregation and transfers of assets and positions on client default.
- 7.5 The EMIR RTS has now been revised, and aligned with a new RTS made under MiFIR, which provides for equivalent provisions on indirect clearing for ETDs. Therefore, some minor technical amendments to Part 7 Companies Act 1989 are necessary.

### *Consolidation*

- 7.6 There are no current plans to consolidate the legislation amended by this instrument.

## **8. Consultation outcome**

- 8.1 The European Securities and Markets Authority (ESMA) carried out a consultation in 2015 on the RTSs and received 21 responses. ESMA took these responses into account before publishing the RTSs.

## **9. Guidance**

9.1 It is not considered necessary to issue specific guidance in connection with these Regulations.

## **10. Impact**

10.1 There is no direct impact on business, charities or voluntary bodies. Any impact stemming from the enforcement of these powers is as a direct result of the RTS, not from these domestic amendments.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared as there are no direct costs on business associated with this instrument.

## **11. Regulating small business**

11.1 The legislation does apply to activities that are undertaken by small business but it does not impose a regulatory burden.

11.2 It is possible that some indirect clients may be small businesses, however the RTS mainly affects clearing members and clients, which are not small businesses. We do not consider that small businesses will be disproportionately affected.

## **12. Monitoring & review**

12.1 After considering the relevant statutory guidance, the department has decided a review clause will not be included as the measure has low impact on businesses and there are no other reasons to justify a need for review.

## **13. Contact**

13.1 Luxmmi Varathan at HM Treasury, telephone: 02072704302 or email: [Luxmmi.Varathan@HMTreasury.gsi.gov.uk](mailto:Luxmmi.Varathan@HMTreasury.gsi.gov.uk) can answer any queries regarding the instrument.