

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2023 (RESOLUTION OF
CENTRAL COUNTERPARTIES: DEFERMENT OF PROVISIONS IN
RESOLUTION INSTRUMENTS) REGULATIONS 2023

2023 No. 1190

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument relates to the introduction of a new special resolution regime for central counterparties (CCPs) in Schedule 11 of the Financial Services and Markets Act 2023 (FSMA 2023). This instrument sets out the process by which the Bank may suspend or waive, and where suspended, subsequently enforce, a provision under a resolution instrument. This ensures that the Bank of England (the Bank) has the necessary flexibility to respond to the specific circumstances of a resolution.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument is UK-wide.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The current resolution regime for central counterparties (CCPs) was introduced in 2014, under Part 1 of the Banking Act 2009 (BA09), in sections 89B to 89G of that Act.

6.2 Schedule 11 to FSMA 2023 (Schedule 11) introduced an expanded CCP resolution regime, replacing sections 89B-89G of BA09. This provides the Bank, as the UK's Resolution Authority, with an expanded toolkit to mitigate the risk and impact of a CCP failure and the subsequent risks to financial stability and public funds. This toolkit allows the Bank to allocate losses to clearing members and the CCP itself, mitigating the risk of the loss falling to the taxpayer and aiming to prevent contagion across the financial sector.

6.3 Paragraph 85 of Schedule 11 confers a power on HM Treasury to make regulations which make provision for, and in connection with, the suspension or waiver of provisions made under a resolution instrument.

7. Policy background

What is being done and why?

7.1 These regulations make provision for, and set out the process by which, the Bank may suspend, waive, or, where suspended, subsequently enforce an obligation under a ‘resolution instrument’. Resolution instruments are defined in paragraph 79(1) of Schedule 11 and are the means by which the Bank may utilise some of its powers under the CCP resolution regime. These regulations will ensure that the Bank of England is provided the necessary flexibility to respond to various resolution scenarios and protect financial stability, having regard to relevant matters, including the impact of enforcement on the relevant person and the expected impact of the waiver or deferral on any other persons to whom the provision applies.

7.2 Regulation 2(1) provides that the Bank may suspend the application of any provision in a resolution instrument in relation to one or more relevant persons for a period no longer than eighteen months from when the provision is first suspended (maximum period). Regulation 2(2) provides that, if the Bank has suspended a provision for less than the maximum period, it may extend the suspension period on one or more occasions, or, where a suspension period has expired, suspend the application of the provision for a further period of time, providing this does not exceed the ‘maximum’ period of eighteen months. Regulations 2(4)-(6) provide the Bank with the necessary flexibility to suspend more than one provision in the same resolution instrument and specify different periods of suspension for each provision, and suspend the application in respect of any, or all, of the persons specified in a resolution instrument. Regulation 2(7) provides that the Bank may end the suspension of a provision before the specified end date of suspension after carrying out a review.

7.3 Regulation 3 provides that the Bank may waive a provision in a resolution instrument at any time, for any person, and that when a resolution instrument applies to more than one person, the Bank has flexibility as to whether it waives a provision in respect of some or all of those persons. Regulation 3(4) also provides that a suspended provision is deemed to have been waived if the Bank has not given notice of a decision to end the suspension and enforce the provision within the eighteen-month period.

7.4 Regulation 4(2) provides a list of matters to which the Bank must have regard before making a decision to suspend or to waive a provision under a resolution instrument. The Bank must also have regard to these matters before deciding, on review, to enforce a suspended provision, to waive it, or to further extend the suspension period. This ensures that, in making decisions under this power, the Bank has regard to the impacts of the decision on the relevant persons, public funds, the special resolution objectives, and the likelihood of subsequent enforcement being successful.

7.5 Regulation 5 ensures that the Bank consults HM Treasury prior to the decision suspending or waiving a provision. The Bank must also consult HM Treasury where the Bank has undertaken a review of a decision to suspend a provision with no more than three months before the end of the relevant maximum period, and intends to either further suspend the provision, or take no further action in relation to that

provision. Three months is the length of the review period, meaning that in these circumstances the maximum period would expire without a further review occurring.

- 7.6 Regulation 6 provides that any relevant person must be notified as soon as reasonably practicable after the decision to waive or suspend a provision is made. Regulation 6(2) provides for the information that must be included in the notification, including information as to the Bank's obligation to review a decision to suspend. Regulation 6(3) provides that the Bank must provide the Treasury with a copy of any notification made under this regulation.
- 7.7 Regulation 7 provides that the Bank must review a decision to suspend a provision at least every three months (starting from the beginning of the suspension, or from the previous review date). Regulation 7(4) provides that if the Bank takes no action following a review, the provision remains suspended, and the Bank is not required to notify any person.
- 7.8 Regulation 8 provides that, if the Bank decides to end the suspension of a provision and enforce it, or enforce a provision which has previously been suspended, it must notify the person in respect of whom the provision is being enforced. Regulation 8(2) states that, where a resolution instrument provides for a notice period to apply in relation to a provision, the Bank can enforce the provision on or after the first day following a period of notice equivalent to the notice period provided for in the resolution instrument. Regulation 8(3) provides that, where the resolution instrument does not provide for a notice period to apply in relation to the suspended, or previously suspended provision, the Bank can enforce the provision on the first business day which follows the date of deemed service of the enforcement notice, as determined under regulation 9. This aims to ensure that the enforcement of the suspended provision operates in the same way as the original resolution instrument.
- 7.9 Regulation 9 states that the procedure which applies to the giving of notices and documents under Schedule 11 will also apply to notices given under these Regulations. Paragraph 151 of Schedule 11 states that the procedure set out in regulations made under section 414 (service of notices) of the Financial Services and Markets Act 2000 (c. 8) will apply for these purposes; the relevant regulations are the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001 (S.I. 2001/1420).

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 This instrument is not amenable to consolidation.

10. Consultation outcome

- 10.1 A full consultation for the expanded resolution regime for CCPs was conducted. It ran from 24 February 2021 to 28 May 2021, and the government received 14 written responses, as well as running a number of engagement sessions. This consultation clarified the intention to introduce a power for the Bank to delay enforcement. One respondent enquired as to whether the delayed enforcement tool would be covered by the No Creditor Worse Off (NCWO) safeguard, which ensures that creditors and

shareholders (including clearing members) are not left worse off in a resolution than they would have been had the CCP been allowed to enter insolvency. The government outlined its response to these questions in the full consultation response published on 28 March 2022, clarifying that the NCWO safeguard would apply to deferred obligations.¹

- 10.2 As under the statutory obligation in paragraph 20 of Schedule 11 of FSMA 2023, the Treasury also consulted the CCP Resolution Liaison Panel on the policy intent behind a number of SIs it intended to lay, including these regulations. Some Panel members reiterated the above question around the NCWO safeguard, whilst another asked how the regulations will affect existing arrangements, such as netting and set-off. The full minutes were published on 16 October 2023.²

11. Guidance

- 11.1 There is no specific guidance for this SI. However, HM Treasury intends to publish a Code of Practice which provides wider guidance around the resolution regime, including the power to defer obligations.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because no significant impacts were identified. A de-minimis Impact Assessment is submitted with this statutory instrument and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

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

14. Monitoring & review

- 14.1 The government intends to monitor the legislation on an ongoing basis in light of emerging risks.

15. Contact

- 15.1 Edward Henley at HM Treasury (email: edward.henley@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 George Barnes, Deputy Director for Banking Assets and Resolution Strategy at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Economic Secretary, Andrew Griffith, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063571/Financial_Government_Response_To_Consultation_-_CCP_Resolution_digi_002_.pdf

² [CCP Resolution Liaison Panel minutes 2023 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/1063571/CCP_Resolution_Liaison_Panel_minutes_2023_-_GOV.UK_(www.gov.uk))