EXPLANATORY MEMORANDUM TO

THE BENCHMARKS (PROVISION OF INFORMATION AND DOCUMENTS) (AMENDMENT) REGULATIONS 2021

2021 No. 920

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 ("the amending regulations") amend the Benchmarks (Provision of Information and Documents) Regulations 2021 (S.I. 2021/812) (the '2021 Regulations'). The 2021 Regulations make provision in respect of a notice or permission given by the Financial Conduct Authority ("the FCA") to the administrator of a critical benchmark under certain provisions of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ("the Benchmarks Regulation"). As currently drafted, the 2021 Regulations only apply to an administrator of a benchmark that is specified as critical by regulations made under Article A20 or Article 20 of the Benchmarks Regulation. The amending regulations correct a drafting error to ensure that the 2021 Regulations also apply to an administrator of a critical benchmark that is listed in Commission Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to the Benchmarks Regulation ("the Commission Implementing Regulation").

2.2 This amendment will ensure that the 2021 Regulations will apply to LIBOR[1] , the only critical benchmark in the UK at present and which is listed under the Commission Implementing Regulation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument (the amending regulations) is subject to the negative resolution procedure. It is a convention that an instrument subject to this procedure should not be laid before Parliament less than 21 days before it comes into force. Unfortunately, the convention cannot be observed in this case. This is because the amendment to the 2021 Regulations needs to be made before they come into force on 9th August 2021. If the amending regulations were delayed in order to comply with the 21-day rule, the

[1] LIBOR is a benchmark that seeks to measure the average costs at which banks can borrow from the unsecured wholesale lending market. It is produced by ICE Benchmark Administration Limited (IBA) (the administrator) and is calculated based on submissions made to IBA each day by a number of major global banks ("panel banks"). LIBOR is regulated as a critical benchmark under the BMR because it is use in a significant volume of transactions.

2021 Regulations would come into force without achieving their stated policy objective of making provision for the administrator of LIBOR – the only benchmark specified as critical in the UK at present.

3.2 Prior to making these amending regulations, HM Treasury informed the administrator of the critical benchmark. This is the only business that will be affected by the 2021 Regulations when they come into force on 9th August 2021.

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)

3.3 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage, other than the information in paragraph 3.1.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is the whole of the United Kingdom.

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 These regulations ("amending regulations") amend the 2021 Regulations so that their provisions on the service of a notice or permission apply to all critical benchmark administrators in the UK, including LIBOR.

6.2 The 2021 Regulations were meant to make provision in respect of a notice or permission given by the FCA to an administrator of any critical benchmark under Articles 22A, 22B, 23A and 23D of the Benchmarks Regulation.

6.3 A critical benchmark is defined in Article 3(25) of the Benchmarks Regulation as a benchmark listed in:

(a) Commission Implementing Regulation (EU) 2016/1368 of 11 August 2016 establishing a list of critical benchmarks used in financial markets pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council ("the Commission Implementing Regulations" [2]); or

(b) regulations made by the Treasury under paragraphs 5 or 6 of Article A20 or paragraph 5 of Article 20 of the Benchmarks Regulation.

6.4 However, the 2021 Regulations, as currently drafted, only apply to benchmarks specified as critical under Article A20 or Article 20 of the Benchmarks Regulation. They do not apply to a critical benchmark listed as critical under the Commission Implementing Regulation. LIBOR was listed as a critical benchmark under the Commission Implementing Regulations rather than by regulations made by the Treasury under Article A20 or Article 20 of the Benchmarks Regulations. Therefore

[2] The Commission Implementing Regulation forms part of retained EU law and continues to apply in the UK with the necessary changes made by regulation 46 of the Benchmarks (Amendment and Transitional Provision (EU Exit) Regulations (S.I. 2019/657).

the 2021 Regulations do not apply to the administrator of LIBOR – the administrator of the only benchmark that is currently listed as critical in the UK.

6.5 Regulation 3 of the 2021 Regulations is a transitional provision that makes provision for the administrator of a critical benchmark where that benchmark was listed as critical before those regulations come into force. That was intended to apply to the administrator of LIBOR.

6.6 Regulation 2 of the amending regulations omits regulation 3 of the 2021 Regulations and replaces it with a new provision in a revised version of regulation 5(2)(a) of the 2021 Regulations.

6.7 It provides that the administrator of a critical benchmark must provide the FCA with an electronic address for the service of a notice or permission:

(a) before 14th August 2021 where the critical benchmark is listed under the Commission Implementing Regulation (i.e. the administrator of LIBOR), or

(b) within five working days of a benchmark being specified as critical under regulations made by the Treasury under Article 20A or Article 20 of the Benchmarks Regulation.

6.8 The effect is that the administrator of LIBOR - the only critical benchmark listed under the Commission Implementing Regulation – must provide the FCA with an electronic address within five working days of the 2021 Regulations coming into force i.e. before 14th August 2021.

7. Policy background

What is being done and why?

7.1 This instrument is being made to correct an error in the 2021 Regulations, before they come into force. The 2021 Regulations set out rules on the service of a notice or permission by the FCA on the administrator of a critical benchmark during the wind down of a critical benchmark. The policy intention was that the 2021 Regulations would apply to the administrator of any critical benchmark in the UK.

7.2 However, the 2021 Regulations do not apply to benchmarks designated as critical by the Commission Implementing Regulation made prior to the end of the Transition Period. Therefore, they did not apply to all benchmarks in the UK that have been, or will be, specified as critical. The amendment made by this instrument ensures that the 2021 Regulations achieve their stated policy objective of applying to all benchmarks in the UK that are listed as critical.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 HM Treasury does not intend to consolidate the Benchmarks Regulation or regulations made under the Benchmarks Regulation.

10. Consultation outcome

10.1 HM Treasury has engaged with the only administrator of a critical benchmark in the UK during the drafting of this instrument.

11. Guidance

11.1 Guidance is not required for this instrument.

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 An Impact Assessment has not been prepared for this instrument because it amends an error in the 2021 Regulations. Therefore, this instrument does not introduce any change to the impacts described in the de minimis impact assessment accompanying the 2021 Regulations.

13. Regulating small business

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

14. Monitoring & review

14.1 As the Regulations will not have a net impact on businesses greater than +/- £5 million annualised, it is not appropriate to have a review clause. Furthermore, as these Regulations amend an error in a previous instrument, undertaking a review would be disproportionate to the changes being made.

15. Contact

15.1 Alex Ramos Boylan at HM Treasury Telephone: 07866 059713 or email: alex.ramosboylan@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Tom Duggan, Deputy Director for Securities and Markets at the Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Glen MP, Economic Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.