EXPLANATORY MEMORANDUM TO

THE EQUIVALENCE DETERMINATIONS FOR FINANCIAL SERVICES (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

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 This instrument is being made in order to ensure a coherent and functioning financial services equivalence framework in the United Kingdom ("UK") during and at the end of the Transition Period. This instrument adds to the temporary and transitional regime for equivalence with EEA states before the end of the Transition Period (in this instrument referred to as "IP completion day"), when retained EU law provisions will come into effect. The measures in this instrument add to those made in the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020, which was laid in May. It also contains minor amendments and deficiency fixes to existing financial services EU Exit instruments. This statutory instrument ("SI") is not linked to the ongoing UK-EU negotiations on a free trade agreement.

2.2 The instrument concerns the UK future regime for equivalence, which is a process to determine that another country's regulatory and supervisory regime is equivalent to the UK's corresponding regulatory framework. Equivalence decisions can help to reduce or eliminate overlaps in regulatory and supervisory requirements between the UK and the other country and can allow for those countries to receive improved prudential treatment. They can also facilitate the cross-border exchange of services and products and may allow UK authorities to rely on compliance with another country's regime. The regime can be seen as comprised of three elements: equivalence determinations made by HM Treasury that another state has a regulatory regime for a particular firm or product which is equivalent to that in the UK; cooperation arrangements established between the UK regulators (in the case of this instrument the Financial Conduct Authority ("FCA") and the Bank of England ("the Bank")) and their counterparts in the other state; and, recognition, registration or certification decisions made by the UK regulators to allow those firms or products covered by the first two elements, and that meet any additional criteria required by the particular financial services regime, to operate in the UK. This structure only relates to equivalence decisions that provide some form of market access.

2.3 At present equivalence functions are performed by the European Commission and the European Securities and Markets Authority ("ESMA"). At the end of the Transition Period these functions will be transferred to HM Treasury and the UK regulators as provisions in retained EU law.

Explanations - What did any relevant EU or UK law do before exit day and how is it being changed?

2.4 The Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019 ("the Equivalence Regulations 2019") would have enabled HM Treasury and UK regulators to be ready for exit day had a deal not been reached with the European Union. This instrument provided Ministers with a temporary power to make equivalence determinations (by a power of direction) for EEA states where those directions would not have entered into force until exit day. Now that the UK is in the Transition Period, it is necessary to make the Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020 in order to ensure that we have an independent and coherent equivalence framework during and at the end of the Transition Period.

2.5 This instrument makes provisions for UK regulators to establish cooperation arrangements with the relevant regulatory authority or authorities for an EEA state, which could be the relevant EU authority (such as ESMA) or the European Free Trade Association ("EFTA") supervisory authority, and to take regulatory decisions concerning EEA firms or products before the end of the Transition Period, for the following retained EU law financial services regimes:

- Article 30 of Regulation (EU) 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");
- Article 5 of Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ("CRAR");
- Article 25 of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories ("CSDR");
- Articles 75 and 77 of 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 ("EMIR");
- Articles 46 and 47 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFIR");
- Article 30 of Regulation (EU) No 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC ("the Prospectus Regulation"); and,
- Article 19 of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 ("SFTR").

The specific provisions, which reflect the provisions in retained EU law (when it comes into effect at the end of the Transition Period) relating to cooperation arrangements and regulatory decisions are set out in Schedules 2 and 3 to this instrument.

Effect of this instrument

2.6 Regulation 3 provides for the UK regulators to take such steps as they consider appropriate to establish cooperation arrangements with EEA regulators, for those retained EU law provisions set out in Schedule 2, once an equivalence determination is made by direction under the Equivalence Regulations 2019 for that particular financial services regime (such as Article 30 of the Benchmarks Regulation).

2.7 Regulation 4 allows EEA firms to apply for a regulatory decision in respect of those regimes set out in Schedule 3 before the end of the Transition Period, once HM Treasury has made an equivalence determination by direction under the Equivalence Regulations 2019 for that regime. Regulation 5, together with individual paragraphs in Schedule 3, then provides for the UK regulators to take decisions on those applications received under regulation 4. Decisions under regulation 5 must be taken by the UK regulator within the period of one year beginning with the first day on which a complete application has been submitted and cooperation arrangements have been established for the purposes of the paragraph of Schedule 3 to which the application relates.

2.8 Regulations 6 and 7 provide powers for the UK regulators that are appropriate for accepting and processing applications under this instrument. Under regulation 6, certain provisions in the Financial Services and Markets Act 2000 (c. 8) are applied to the Bank for functions in this instrument, and regulation 7 provides a power for the UK regulators to charge fees in relation to applications made to them under this instrument.

2.9 Regulation 8 provides for the effect of equivalence determinations, made before the end of the Transition Period by direction under Schedule 1 to the Equivalence Regulations 2019. After the end of the Transition Period, they will have effect as if made under the relevant provisions of retained EU law and, therefore, the other provisions of retained EU law will apply to them. Schedule 4 of this instrument contains a table which sets out each of the provisions in Schedule 1 to the Equivalence Regulations 2019, next to the corresponding provision in retained EU law.

2.10 Regulation 8 also provides for regulatory decisions made under this instrument to have effect on or after the end of the Transition Period as if made under the relevant provision of retained EU law (again, so that other provisions in retained EU law apply to them). The relationship between the provisions in Schedule 3 and their corresponding retained EU law provision is set out in Table 3 in Schedule 4.

2.11 Finally, regulation 8 makes provision for the transitional arrangements in Article 69 CSDR in retained EU law to apply in respect of applications made under regulation 4 to this instrument, which have not been decided or withdrawn at the end of the Transition Period. Consequently, those transitional arrangements in Article 69 CSDR will apply as if the application had been made under retained EU law at the end of the Transition Period.

2.12 Part 3 of this SI outlines amendments to existing secondary legislation. Regulation 9 amends the Central Securities Depositories (Amendment) (EU Exit) Regulations 2018. This relates to a provision in Article 25 CSDR, which stipulates that equivalence may only be granted to states which have a regime for the recognition of Central Securities Depositories ("CSDs") authorised in other states. The amendment ensures that the UK is one of those states.

2.13 Regulation 10 makes an amendment to the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 and regulation 13 removes part of the amendments made to MiFIR in the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 to reflect changes made by regulation 8 of this instrument.

2.14 Regulations 11 and 14 amend the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 and the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 to ensure that they deliver an appropriate retained EU law regime for the regulation of credit rating agencies after the end of the Transition Period. It makes provision requiring the FCA to take appropriate steps to establish cooperation arrangements with the relevant regulatory authority for another state where HM Treasury has made an equivalence determination under Article 5 of CRAR for that state, and also makes provision to retain the effect of equivalence determinations made by the European Commission prior to the end of the Transition Period.

2.15 Regulation 12 amends the Equivalence Regulations 2019, to clarify that advice and coordination under regulations 4 and 6 of those Regulations relating to retained EU law referred to in Schedule 1 to those Regulations is to that law as it is subsequently amended. Regulation 4 of the 2019 Equivalence Regulations 2019 makes provision for the UK regulators giving technical advice to the HMT on assessing the equivalence of another country's regulatory and supervisory regime. Regulation 6 of the Equivalence Regulations 2019 concerns establishing memorandums of understanding to provide clarity on aspects of the operational processes and coordination of activities between HM Treasury and the UK regulators. Regulation 12 also clarifies the application of part of the test for CRAR under paragraph 3 of Schedule 1 to the Equivalence Regulations 2019.

2.16 The effect of these amendments is to provide UK regulators with the necessary powers to complete the associated actions that are required to ensure that HM Treasury equivalence decisions during and after the Transition Period can take effect in practice, and that there is an appropriate framework for equivalence in retained EU law after the end of the Transition Period. It does not make policy changes, other than those necessary to reflect the UK's withdrawal from the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Some of the provisions in this instrument, as explained in paragraph 7.4 below, are dependent on the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020, laid in draft in May 2020, being made. Those Regulations make amendments to the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 and the Equivalence Regulations 2019, which are to be further amended by this instrument. This instrument will be made once the above instrument has been made, which has been approved by both Houses of Parliament.

3.2 The provisions of this instrument come into force on the day after the day on which the instrument is made. Part 2 of, and the Schedules to, this instrument create a transitional regime for equivalence to be in place before the end of the Transition Period. Part 3 makes amendments to existing EU exit instruments where those amendments would benefit from being in place as soon as possible, even if the

amendment made by the existing EU exit instrument does not come into force until the end of the Transition Period.

3.3 As outlined above, regulation 10 amends the Central Securities Depositories (Amendment) (EU Exit) Regulations 2018. In accordance with the requirement stated in paragraph 4.7.6 of the Statutory Instrument Practice, HM Treasury has consulted with the SI Registrar. As this clarificatory correction does not alter the substantive obligations contained in the CSDR on members of the public or businesses who may have purchased the Central Securities Depositories (Amendment) (EU Exit) Regulations 2018 Statutory Instrument, and as the correction only represents a small part of that instrument, the procedure for free issue has not been applied.

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)

3.4 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application.

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

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

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding Human Rights:

"In my view the provisions of the Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 Part 2 of the instrument complements existing powers under the Equivalence Regulations 2019. It provides mechanisms for the UK regulators to establish cooperation arrangements and process regulatory decisions, which are dependent on equivalence determinations made by direction under the Equivalence Regulations 2019.

6.2 This instrument amends retained EU law and related secondary legislation to address deficiencies arising from the withdrawal of the UK from the EU.

6.3 Part 3 of the instrument amends: The Central Securities Depositories (Amendment) (EU Exit) Regulations 2018; The Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019; The Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019; and the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020.

7. Policy background

What is being done and why?

7.1 Prior to exit day, HM Treasury made the Equivalence Regulations 2019 to ensure that the UK would have an independent and coherent equivalence framework from exit day (31 January 2020) in the event the UK-EU did not reach an agreement on terms of the UK's withdrawal from the European Union.

7.2 The UK has now left the EU with a deal and has entered the Transition Period lasting until 31 December 2020. During this period, common rules will continue to apply, access to each other's markets will continue as previously, and businesses, including financial services firms, will be able to trade on the same terms as previously. UK firms need to continue to comply with EU legislation, including any new EU legislation that becomes applicable during the Transition Period.

7.3 To ensure the UK has a fully functioning equivalence regime during and at the end of the Transition Period, this instrument is necessary to complement the Equivalence Regulations 2019. This SI is one of several financial services instruments that have been and will need to be laid during the Transition Period under the European Union (Withdrawal) Act 2018 ("EUWA 2018"), to remedy deficiencies and to ensure that the UK financial services regulatory regime is fully functioning during and at the end of the Transition Period.

7.4 The Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020, laid in draft in May 2020 and approved by both Houses of Parliament, will make amendments to the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 and Equivalence Regulations 2019. Regulation 9 amends the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019, providing a procedure for HM Treasury making regulations under CRAR. This procedure is to be further amended by regulation 14 of this instrument. The amendment made by regulation 9 of the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 therefore needs to be in place before it can be amended by this instrument. The amendments in the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 also provide HM Treasury with the mechanism under the Equivalence Regulations 2019 to make equivalence determinations by direction for central securities depositories and trade repositories for EEA states during and at the end of the Transition Period. These amendments also need to be in place before provisions in this instrument can be used in relation to central securities depositories and trade repositories.

7.5 This instrument puts in place complementary provisions to ensure that the UK has a functioning equivalence framework during and after the Transition Period. This instrument also contains some minor, but necessary, amendments to previous SIs to ensure that they can function as required during and after the Transition Period.

7.6 The process is that there would be an equivalence determination made by direction under the Equivalence Regulations 2019, and then cooperation arrangements and regulatory decisions would be governed by this instrument. The interrelationship between the Equivalence Regulations 2019 and the provisions of this instrument is set out in the table in Schedule 1 to this instrument.

7.7 As far as possible, HM Treasury's approach ensures that the same laws and rules that are currently in place in the UK would continue to apply at the end of the Transition Period, to provide continuity and certainty to firms and their customers.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the EUWA 2018 to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

9. Consolidation

9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

10.1 HM Treasury has not undertaken a consultation on this instrument but has engaged extensively with the Bank of England and the FCA during the drafting process.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is that some of the instruments being amended impact on the UK financial services regulators (the Bank and the FCA). Where required, impact assessments for the individual instruments being amended by this instrument have been published on legislation.gov.uk.

12.3 An Impact Assessment has not been prepared for this instrument because in line with Better Regulation guidance, HM Treasury considers that the net impact on businesses will be less than £5 million a year. Due to this limited impact, a de minimis impact assessment has been carried out.

13. Regulating small business

13.1 The legislation applies to small businesses. However, it does not introduce new regulatory requirements for small businesses, but merely ensures a consistent and coherent regulatory regime.

14. Monitoring & review

14.1 As this instrument is made under the EUWA 2018, no review clause is required.

15. Contact

15.1 Vanessa McKay at HM Treasury (Telephone: 020 7270 2427 or email: Vanessa.mckay@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Dashiell Caldwell, Deputy Director for Financial Services at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

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

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the EUWA 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the EUWA 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020 do no more than is appropriate".

1.2 This is the case because it follows the approach taken in previous instruments to fix deficiencies in retained EU law to ensure that the UK financial services regulatory regime continues to operate in a coherent, effective and transparent manner at the end of the Transition Period. Additionally, this instrument makes the appropriate amendments and revocations to EU legislation that will become redundant in a UK-only context at the end of the Transition Period.

2. Good reasons

2.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: the approach taken with this instrument is consistent with the approach previously taken in earlier instruments, and maintains the intended effect of those instruments. The amendments and clarifications made to previous instruments are necessary to ensure that legislation operates effectively at the end of the Transition Period, and the amendments go no further than what is required for this purpose.

3. Equalities

3.1 The Economic Secretary to the Treasury (John Glen) has made the following statement(s):

"The Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020, I, Economic Secretary to the Treasury, John Glen, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

5. Legislative sub-delegation

5.1 None.