EXPLANATORY MEMORANDUM TO

THE FINANCIAL REGULATORS' POWERS (TECHNICAL STANDARDS ETC.) AND MARKETS IN FINANCIAL INSTRUMENTS (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument is being made in order to ensure that recently adopted Binding Technical Standards (BTS) continue to operate effectively after the United Kingdom (UK) withdraws from the European Union (EU). This instrument will achieve this by amending the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115) ("the 2018 Regulations") to add these BTS to the list of BTS in that instrument which the regulators may amend to correct deficiencies.

2.2 The instrument also makes some minor amendments to the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1403) ("the MiFI Regulations 2018") to ensure that it effectively addresses deficiencies in retained EU law relating to markets in financial instruments, so that it continues to operate effectively after exit.

Explanations

What did any relevant EU law do before exit day?

2.3 Part 2 of the instrument amends the 2018 Regulations. BTS set out very specific requirements and standards in order to ensure that financial services institutions are able to comply with the EU's financial regulation. European Supervisory Authorities are currently responsible for drafting BTS. An appropriate UK body will need to take on responsibility for these standards after exit. Having played a major role in developing these standards, UK regulators are the most appropriate bodies to take on that responsibility.

2.4 The 2018 Regulations give the UK financial services regulators powers to fix deficiencies in BTS so that they operate effectively from exit day. It also gives them ongoing responsibility for making any technical standards required under retained EU law on financial services, and amending these standards so they remain fit for purpose in the future.

2.5 Part 3 of the instrument makes minor technical amendments to correct the MIFI Regulations 2018. Those Regulations address deficiencies in retained EU law in relation to markets in financial instruments arising from the withdrawal of the UK from the EU, to ensure that it continues to operative effectively after exit, by amending key pieces of EU and domestic legislation relating to markets in financial instruments. The amendments affect new Schedule 3 (which was inserted into Regulation (EU) No

600/2014 by regulation 37 of the MiFI Regulations 2018)., which sets out the powers transferred to the Treasury and the regulators from the Commission and ESMA.

Why is it being changed?

2.6 The 2018 Regulations listed, in a Schedule, the BTS that would be transferred to the UK statute book on exit day by the EU (Withdrawal) Act 2018 ("EUWA"). It gave the appropriate UK regulators responsibility for addressing any failure to operate effectively after exit day.

2.7 Since the 2018 Regulations were laid, additional BTS have come into force and will therefore be transferred to the UK statute book on exit day. These will also contain deficiencies that will need to be addressed so that they continue to operate effectively after exit.

2.8 Minor technical amendments are needed to the MIFI Regulations 2018 to ensure that they deal effectively with deficiencies in retained EU law after exit.

What will it now do?

2.9 This instrument amends the Schedule to the 2018 Regulations to add BTS that have come into force since they were laid. This has the effect of giving the UK regulators the necessary powers to address any failure of those BTS to operate effectively after exit.

2.10 This instrument also amends the MIFI Regulations 2018 to ensure that they deal effectively with deficiencies in retained EU law after exit. The minor corrections made to this instrument do not make any broader changes to the policy intent or effect of the MIFI Regulations 2018 (see further paragraph 7.14).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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)

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

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 2(2) of Schedule 2 to the European Communities Act 1972, and section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

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 MP) has made the following statement regarding Human Rights:

"In my view the provisions of the Financial Regulators' Powers (Technical Standards etc.) and Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument amends the Schedule to the 2018 Regulations. It adds a number of EU BTS to that Schedule, in order to provide that the delegation in Regulation 3 of those Regulations applies to these BTS.

6.2 It also amends the MiFI Regulations 2018 to make minor corrections to new Schedule 3 (which was inserted into Regulation (EU) No 600/2014 by regulation 37 of the MiFI Regulations 2018) which sets out the powers transferred to the Treasury and the regulators from the Commission and ESMA

7. Policy background

What is being done and why?

7.1 The UK will leave the EU on 29 March 2019. The UK and the EU have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020. Therefore, should a deal be approved, the implementation period would provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During an implementation period, common rules would continue to apply. The UK would continue to implement new EU law that comes into effect and the UK would continue to be treated as part of the EU's single market in financial services. This would mean that access to each other's markets would continue on current terms and businesses, including financial services firms, would be able to trade on the same terms as now until 31 December 2020. UK firms would need to comply with any new EU legislation that becomes applicable during the implementation period.

7.2 The government is seeking a deep and special future partnership with the EU, which should be greater in scope and ambition than any such agreement before and encompass financial services. Given the highly regulated nature of financial services, the volume of trade between UK and EU markets, and a shared desire to manage financial stability risks, the UK proposes a new economic and regulatory arrangement that will preserve mutually beneficial cross-border business models and economic integration for the benefit of businesses and consumers. Decisions on market access would be autonomous in our proposed model, but would be underpinned by stable institutional processes in a bilateral agreement and continued close regulatory and supervisory cooperation.

7.3 While the government believes that there will be a deal and an implementation period in place, it must plan for all eventualities, including a 'no deal' scenario. Therefore, HM Treasury intends to use powers in the EUWA to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios.

7.4 The EUWA repeals the European Communities Act 1972 and converts into UK domestic law the existing body of directly applicable EU law (including EU Regulations). It also preserves UK laws relating to EU membership – e.g. legislation implementing EU Directives. This body of law is referred to as "retained EU law". The EUWA also gives ministers a power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through SIs. These contingency preparations for financial services legislation are sometimes referred

to as ‘onshoring’. These SIs are not intended to make policy changes, other than to reflect the UK’s new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose and is subject to further restrictions, such as the inability to use the power to impose or increase taxation, or establish a public authority. The power is also time-limited and falls away two years after exit day.

7.5 Wherever practicable, the proposed approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, if the UK does not enter an implementation period, some changes would be required to reflect the UK’s new position outside the EU from 29 March 2019.

7.6 If the UK were to leave the EU without a deal, the UK would be outside the EU’s framework for financial services. The UK’s position in relation to the EU would be determined by the default Member State and EU rules that apply to third countries at the relevant time. The European Commission has confirmed that this would be the case.

7.7 In light of this, the approach in this scenario cannot and does not rely on any new, specific arrangements being in place between the UK and the EU. As a general principle, the UK would also need to default to treating EU Member States largely as it does other third countries, although there are cases where a different approach would be needed including to provide for a smooth transition to the new circumstances.

7.8 HM Treasury published a document on 27 June 2018, which sets out in more detail HM Treasury’s approach to financial services legislation under the EUWA. (https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act)

7.9 The 2018 Regulations give the UK financial services regulators powers to fix deficiencies in BTS so that they operate effectively from exit day. It also gives them ongoing responsibility for making any technical standards required under retained EU law on financial services, and amending these standards so they remain fit for purpose in the future.

7.10 The 2018 Regulations listed all BTS that were known at the point where those Regulations were laid, and which will be transferred to the UK statute book at exit, by operation of the EUWA, which will transfer the existing body of directly applicable EU law to the UK statute book on exit.

7.11 Since the 2018 Regulations were laid, further BTS have been adopted, and in order to maintain consistency with the approach set out in the 2018 Regulations, responsibility for fixing any deficiencies in these new BTS should also be transferred to the UK regulators.

7.12 This instrument does that by adding the new BTS to the Schedule of the 2018 Regulations, bringing them into scope of those Regulations.

7.13 Specifically, it adds BTS relating to the Benchmarks Regulation ((EU) 2016/1011), the European Long-Term Investment Funds Regulation ((EU) 2015/760)), the Market Abuse Regulation (EU) 596/2014), the Bank Recovery and Resolution Directive (2014/59/EU) and the Capital Requirements Regulation ((EU) 575/2013).

7.14 The amendments made to the MiFI Regulations 2018 correct a typographical error and certain inaccurate cross references, remove an inappropriate provision which relates to “host Member State” and replace an erroneous reference to “notifications”.

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

8.1 This instrument is being made using the power in section 8 of the EUWA in order to address failures of retained EU law to operate effectively or 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 the instrument. The 2018 Regulations were published in draft in April 2018 and laid on 16th July 2018, and this instrument makes only minor updates to those Regulations. The MiFI Regulations 2018 were published in draft on 5th October 2018, laid in draft on 17 October 2018 and made on 19 December 2018. This instrument only makes minor corrections to those Regulations, and will not change any of the regulatory requirements that apply to regulated entities.

10.2 The financial services regulators plan to undertake public consultation on any changes they propose to make to BTS or rules made under the powers conferred upon them by the Financial Services and Markets Act 2000 using the powers delegated to them by the 2018 Regulations.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies, as this instrument relates to maintenance of existing regulatory standards,

12.2 The impact on the public sector is that UK financial services regulators (the Bank of England/Prudential Regulation Authority, the Financial Conduct Authority and the Payment Systems Regulator) will be responsible for fixing deficiencies in BTS so that they operate effectively from exit day, and will have ongoing responsibility for making any technical standards required under retained EU law on financial services, and amending these standards so they remain fit for purpose in the future. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain them after the UK's exit from the EU. This allocation of responsibility is therefore a manageable impact.

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

14. Monitoring & review

14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Lee O'Rourke at HM Treasury Telephone: 020 7270 6436 or email: lee.o'rourke@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Katie Fisher, Deputy Director for Financial Services EU Exit Domestic Preparation at HM 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.

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 European Union (Withdrawal) Act 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 European Union (Withdrawal) Act 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 MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Financial Regulators' Powers (Technical Standards etc.) and Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2019 instrument does no more than is appropriate".

1.2 This is the case because: it follows the approach taken in the Financial Regulators' Powers (Technical Standards etc.) (EU Exit) Regulations 2018 ("the FRP Regulations"), and the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 ("MiFI Regulations"). It updates the FRP Regulations to maintain the original policy intention of transferring responsibility for all BTS to the UK regulators, and makes minor amendments to the MiFI Regulations to ensure that they are able to ensure that the UK financial markets continue to operate in a fair, stable and transparent manner post EU withdrawal.

1.3 Nothing has been done to alter the role that BTS or regulators' rules perform in the regulation of financial services. They will continue to apply to UK firms as they do now, save for any correction of deficiencies which is necessary to ensure these rules continue to operate effectively after exit. The post-exit transfer of responsibility for BTS to UK financial regulators is necessary to ensure these standards remain fit for purpose in the future. Only the financial regulators have the necessary expertise and resource to perform this role."

2. Good reasons

2.1 The Economic Secretary to the Treasury, John Glen MP, 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 the FRP Regulations and the MiFI Regulations, and maintains the intended effect of those instruments. Having played an important role in the EU to develop BTS, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators are best placed to maintain them after the UK's exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA. Delegation of the EU (Withdrawal) Act deficiency-fixing power to regulators is also proposed as a sensible course of action. Delegating the power is the most effective way of ensuring that BTS and regulator rules will continue to function properly at exit. The corrections made to the MiFI Regulations, though minor,

are necessary to ensure that instrument operates effectively, and go no further than what is required for this purpose.

3. Equalities

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

"The draft instrument 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 MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, John Glen MP, Economic Secretary to the Treasury, 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 The Economic Secretary to the Treasury has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view it is appropriate to create a relevant sub-delegated power in Financial Regulators' Powers (Technical Standards etc.) and Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2019."

5.2 This is appropriate because it will give UK regulators the responsibility of ensuring that the full set of EU-derived technical standards and regulator rules operate effectively after exit from the European Union. It is necessary for the regulators to perform this task, given that the required corrections for BTS and regulator rules will be of a highly technical nature. This sub-delegation is also appropriate as, as the amendments needed to correct deficiencies in BTS and regulator rules will be aligned with the changes that Parliament will be asked to approve in Level 1 legislation. Responsibility for most BTS was transferred to the UK regulators in the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018, and this instrument is consistent with the approach taken in that instrument, transferring responsibility for any BTS that came into force after that instrument was laid."