Draft Regulations laid before Parliament under paragraph 2(2) of Schedule 2 of the European Communities Act 1972 and paragraph 1(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament

DRAFT STATUTORY INSTRUMENTS

2019 No.

EXITING THE EUROPEAN UNION

FINANCIAL SERVICES

The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No. 2) Regulations 2019

Made - - - - ***

Coming into force in accordance with regulation 1

The Treasury are designated(**a**) for the purposes of section 2(2) of the European Communities Act 1972(**b**) in relation to financial services.

The Treasury, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018(**c**) make the following Regulations.

In accordance with paragraph 2(2) of Schedule 2 to the European Communities Act 1972 and paragraph 1(1) of Schedule 7 to European Union (Withdrawal) Act 2018, a draft of this instrument has been laid before, and approved by a resolution of, each House of Parliament.

PART 1

Citation and commencement

1.—(1) These Regulations may be cited as the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No. 2) Regulations 2019.

(**a**) S.I. 2012/1759.

(**b**) 1972 c. 68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c.51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c.7). By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51), regulations may be made under section 2(2) of the European Communities Act 1972 to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed in Brussels on 17th March 1993 (Cm 2183). The European Communities Act 1972 is repealed on exit day by section 1 of the European Union (Withdrawal) Act 2018 (c. 16).

(**c**) 2018 c. 16.

(2) This Part and Part 3 come into force on the day after the day on which these Regulations are made.

(3) Parts 2 and 4 come into force on exit day.

PART 2

AMENDMENT OF PRIMARY LEGISLATION

Amendment of the Financial Services and Markets Act 2000

2. In section 313(1) (interpretation of Part 18) of the Financial Services and Markets Act 2000(**a**), in the definition of "the EMIR Regulation"(**b**) for the words from "Regulation (EU) 648/2012" to "trade repositories" substitute "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".

PART 3

AMENDMENT OF SUBORDINATE LEGISLATION

Amendment of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

3. In Article 35A (trade repositories) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(**c**), in paragraph (2) for "Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019" substitute "Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No.2) Regulations 2019".

Amendment of the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013

4.—(1) Article 1 (interpretation) of the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013(**d**) is amended as follows.

(2) In paragraph (3)(**e**), at the beginning insert "Except as provided for in paragraph (3A)".

(3) After paragraph (3) insert—

> "(3A) In this Order a reference to the European Market Infrastructure Regulation is to be treated as a reference to that EU regulation as it has effect at the beginning of the day on which the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No.2) Regulations 2019 are made (but see regulation 2 of the European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2019, which may further update the reference)."

(**a**) 2000 c. 8.
(**b**) The definition of "the EMIR Regulation" was inserted by S.I. 2013/504 and is amended by S.I. 2019/662.
(**c**) S.I. 2001/544. Article 35A was inserted by S.I. 2013/504 and amended by S.I. 2016/715 and regulation 130 of S.I. 2019/632.
(**d**) S.I. 2013/419.
(**e**) Paragraphs 3 to 7 are inserted by regulation 187 of S.I. 2019/632.

Amendment of the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018

5. In regulation 2 (interpretation) of the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018(**a**), at the end of paragraph (e) insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018

6. In regulation 1(4) (citation, commencement and interpretation) of the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018(**b**), in the definition of "the EMIR Regulation" at the end insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018

7. The Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018(**c**) are amended as follows.

8. In regulation 3 (amendment of provision in respect of the requirements for trade repositories)—

(a) in sub-paragraph (a) for "points (a) to (p)" substitute "points (a) to (q)";

(b) omit sub-paragraph (c).

9. In regulation 4 (interpretation), at the end insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019

10. The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc., and Transitional Provision) (EU Exit) Regulations 2019(**d**) are amended as follows.

11. In regulation 1 (citation, commencement and interpretation), in paragraph (2) in the definition of "EMIR regulation" at the end insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

12. In regulation 11(definitions)(**e**)—

(a) in paragraph (7), in the new point (8) to be substituted by that paragraph, in the definition of "financial counterparty"—

(i) in sub-paragraph (d), at the end insert "unless that UCITS is set up exclusively for the purposes of serving one or more employee share purchase plans";

(ii) omit the "or" at the end of sub-paragraph (e);

(iii) in sub-paragraph (f)—

(aa) after "Regulations 2013)" insert "which is either established in the UK or";

(bb) at the end insert "unless that AIF is set up exclusively for the purpose of serving one or more employee share purchase plans or unless that AIF is a

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(**a**) S.I. 2018/1115.
(**b**) S.I. 2018/1184 is amended by S.I. 2019/405.
(**c**) S.I. 2018/1318.
(**d**) S.I. 2019/335.
(**e**) Regulation 11(7) is amended by S.I. 2019/710.

securitisation special purpose entity as defined in Article 4.1(an) of Directive 2011/61/EU, and where relevant, its AIFM is established in the United Kingdom; or";

(iv) at the end insert—

"(g) a central securities depository authorised in accordance with 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(**a**).";

(b) in paragraph (9), in the new point (13) to be substituted by that paragraph, in the definition of "competent authority", in point (a), for "paragraphs (a) to (f)" substitute "paragraphs (a) to (g)".

13. In regulation 13 (intragroup transactions)—

(a) in paragraph (2)(b), in the text to be inserted at the end of Article 3(1), for "and" substitute "or";

(b) in paragraph (3)—

(i) in sub-paragraph (a)(i)(bb), in the text to be inserted at the end of Article 3(2)(a)(i), for "and" substitute "or";

(ii) in sub-paragraph (c)(ii), in the text to be inserted at the end of Article 3(2)(d), for "and" substitute "or".

14. In regulation 14(2) (clearing obligation)—

(a) for sub-paragraph (a) substitute—

"(a) in point (a)—

(i) in points (i) and (iii), for "meet the conditions" substitute "are subject to the conditions";

(ii) in points (ii) and (iv), for "meets the conditions" wherever it appears substitute "is subject to the conditions";

(iii) in points (iv) and (v), for "Union" wherever it appears substitute "United Kingdom";";

(b) omit sub-paragraph (b).

15. In regulation 15(3) (clearing obligation procedure), in the substituted paragraph 2 of Article 5, in the first sub-paragraph, omit point (c).

16. In regulation 19 (reporting obligation), omit paragraph (5).

17. In regulation 20 (non-financial counterparties)—

(a) for paragraph (2) substitute—

"(2) In paragraph 1, in the second sub-paragraph, in point (a) for "ESMA and the relevant competent authority thereof" substitute "the FCA".";

(b) for paragraph (3) substitute—

"(3) In paragraph 2, in both places where it occurs, for "relevant competent authority" substitute "FCA".";

(c) in paragraph (4), in the text substituting paragraph 4 of Article 10, in the second sub-paragraph, after "where necessary," insert "taking into account in particular the interconnectedness of financial counterparties,".

18. In regulation 21(12) (risk-mitigation techniques for OTC derivative contracts not cleared by a CCP), in the text substituting paragraph 15 of Article 11, for "required for compliance with

(**a**) Regulation (EU) No 909/2014 is amended by S.I. 2018/1320.

paragraph 3" substitute "referred to in paragraph 3, and the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures."

Amendment of the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc.) (EU Exit) Regulations 2019

19. In regulation 1(4)(g) (interpretation) of the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc.) (EU Exit) Regulations 2019(**a**) after "trade repositories" insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019

20. In regulation 4(b)(i) (scope) of the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019(**b**), in the words to be inserted into point (c) of paragraph 2 of Article 2 of Regulation (EU) 2016/1011, after "trade repositories" insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Securitisation (Amendment) (EU Exit) Regulations 2019

21. In regulation 2 (interpretation) of the Securitisation (Amendment) (EU Exit) Regulations 2019(**c**), in the definition of "the EMIR regulation" at the end insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019

22. For regulation 4(2)(c) (definition of the EMIR regulation) of the Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019(**d**) substitute—

"(c) for the definition of "the EMIR regulation" substitute—

""the EMIR regulation" has the same meaning as in Part 18 of the Act (see section 313(1));";".

Amendment of the International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019

23. In paragraph 63 of Schedule 1 (consequential amendments) to the International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019(**e**), in sub-paragraph (1), after "trade repositories" insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

Amendment of the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019

24. In regulation 26 of the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019(**f**), after "trade repositories" insert "as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019".

(**a**) S.I. 2019/541.
(**b**) S.I. 2019/657.
(**c**) S.I. 2019/660.
(**d**) S.I. 2019/681.
(**e**) S.I. 2019/685.
(**f**) S.I. 2019/710.

PART 4

AMENDMENT OF RETAINED DIRECT EU LEGISLATION

Amendment 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

25. 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 is amended as follows.

26. In Article 2, for point (10) substitute—

"(10) 'pension scheme arrangement' means:

(a) an occupational pension scheme within the meaning of section 1(1) of the Pension Schemes Act 1993(**a**) which has its main administration in the United Kingdom, including the trustees and managers of such a scheme, and any legal entity set up for the purpose of investment of such a scheme acting solely and exclusively in its interest;

(b) occupational retirement provision businesses of insurance and reinsurance undertakings within the meaning of section 417 of FSMA, provided that all assets and liabilities corresponding to the businesses are ring-fenced, managed and organised separately from the other activities of the insurance or reinsurance undertaking, without any possibility of transfer;

(c) any other authorised and supervised entities, or arrangements, established in the United Kingdom, provided that:

(i) they are recognised under the law applying to any part of the United Kingdom; and

(ii) their primary purpose is to provide retirement benefits;".

27. In Article 4a—

(a) in paragraph 1, in the second sub-paragraph, for point (a) substitute—

"(a) immediately notify the FCA of that fact and, where relevant, the period used for the calculation;";

(b) in paragraphs 2 and 3, for "relevant competent authority" wherever it appears substitute "FCA";

(c) in paragraph 3, in the fourth sub-paragraph, after "shall" insert "seek to".

28. For Article 6a, substitute—

"*Article 6a*

Suspension of the clearing obligation

1. The Bank of England may, with the consent of the Treasury, direct that the clearing obligation referred to in Article 4(1) be suspended for specific classes of OTC derivatives or for a specific type of counterparty if one of the following conditions is met:

(a) the specific classes of OTC derivatives are no longer suitable for central clearing in accordance with the criteria referred to in the first sub-paragraph of Article 5(4) and in Article 5(5);

(b) a CCP is likely to cease clearing those specific classes of OTC derivatives and no other CCP is able to clear those specific classes of OTC derivatives without interruption;

(c) the suspension of the clearing obligation for those specific classes of OTC derivatives or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability or to the orderly functioning of financial markets in the United Kingdom and the suspension is proportionate to those aims.

(**a**) 1993 c. 48.

The Bank of England must inform the FCA of its intention to make a direction as soon as is reasonably practicable after making the decision to make a direction.

2. The FCA may inform the Bank of England that, in its opinion, there is evidence that one of the conditions for suspension of the clearing obligation set out in paragraph 1 has been met. The Bank shall consider the FCA's information, and respond as appropriate within a reasonable time from the receipt of that information.

3. A direction under paragraph 1 to suspend the clearing obligation for specific classes of OTC derivatives shall also trigger a suspension of the trading obligation laid down in Article 28(1) and (2) of Regulation (EU) No 600/2014 for the same classes of OTC derivatives that are subject to the suspension of the clearing obligation.

4. The Bank shall set the period for the suspension of the clearing obligation and the trading obligation. The suspension shall be for a period of no more than twelve months beginning with the day the decision was published on the Bank of England's website in accordance with paragraph 5.

5. A direction to suspend the clearing and trading obligations must be published on the websites of the Bank of England and the FCA and be included within the public register referred to in Article 6. The FCA must also update the register of derivatives that are subject to the trading obligation referred to in Article 34 of Regulation (EU) No 600/2014.".

29.—(1) Article 9 is amended as follows.

(2) In paragraph 1—

(a) in the first sub-paragraph, omit "in accordance with paragraphs 1a to 1f of this Article";

(b) in the third sub-paragraph, for "Union" substitute "United Kingdom";

(c) in the fourth sub-paragraph—

(i) for "their competent authorities" substitute "the FCA";

(ii) for "notified competent authorities do" substitute "FCA does";

(d) at the end insert—

"For the purposes of this Article, counterparties shall be considered to be included in the same consolidation if they both meet either of the criteria set out in Article 3(3).".

(3) In paragraph 6—

(a) for the opening words in the first sub-paragraph, substitute—

"6. The Bank of England may make technical standards for CCPs, and the FCA may make technical standards in all other cases specifying:";

(b) omit the second, third and fourth sub-paragraphs.

30. In Article 10, in paragraph 2a, after "shall" insert "seek to".

31. In Article 76a—

(a) in paragraph 1—

(i) for "Union" substitute "United Kingdom";

(ii) for "the Commission has adopted an implementing act" substitute "the Treasury has made regulations";

(b) in paragraph 2, in the opening words, for the words from "Commission" to "determining" substitute "Treasury may by regulations determine".

32. In Article 80, in paragraph 5a, omit "counterparties that are not required to report the details of their OTC derivative contracts pursuant to Article 9(1a) to (1d) and".

33. In Article 81—

(a) in paragraph 3(**a**), at the end insert—

"(f) the relevant authorities of a third country in respect of which the Treasury has made regulations under Article 76a.";

(b) in paragraph 5—

(i) in the first sub-paragraph, from the beginning to "regulatory" substitute "The FCA may make";

(ii) omit the second, third and fourth sub-paragraphs.

34. In Article 89—

(a) in paragraph 1, in the first sub-paragraph—

(i) for "18 June 2021" substitute "18 June 2023"; and

(ii) after "pension scheme arrangements" insert "or EEA pension scheme arrangements";

(b) at the end of paragraph 1 insert—

"The Treasury may make regulations extending the exemption referred to in the first sub-paragraph by a period of up to two years at a time where it concludes that no appropriate technical solution has been developed for the transfer by pension scheme arrangements and EEA pension scheme arrangements of cash and non-cash collateral as variation margins and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains.

In this paragraph, and in paragraph 2, "EEA pension scheme arrangement" means a pension scheme arrangement as defined by Article 2(10) 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 as it has effect in EU law.";

(c) for paragraph 2 substitute—

"2. This paragraph applies to:

(a) pension scheme arrangements that fall within point (c) of Article 2(10); and

(b) EEA pension scheme arrangements that fall within points (c) or (d) of Article 2(10) 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 as it has effect in EU law.

For the pension scheme arrangements and EEA pension scheme arrangements to which this paragraph applies, the exemption referred to in the first sub-paragraph of paragraph 1 shall only apply where it is granted by the FCA for types of entities or types of arrangements. The FCA shall only grant an exemption where it is satisfied that the type of entities or the type of arrangements fall within the description of those arrangements to which this paragraph applies, and that they encounter difficulties in meeting the variation margin requirements. The FCA must grant or refuse an exemption within 30 calendar days of receipt of a request for an exemption.

The FCA shall publish on its website a list of types of entities and types of arrangements which have been granted an exemption in accordance with this paragraph.".

Name
Name

Date — Two of the Lords Commissioners of Her Majesty's Treasury

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(**a**) Regulation 3 of S.I. 2018/1318 (as amended by regulation 8 of this instrument) substitutes paragraphs (a) to (c) for paragraphs (a) to (q) in Article 81(3), and regulation 56(15) of S.I. 2019/335 inserts paragraphs (d) and (e) into Article 81(3).

EXPLANATORY NOTE

(This note is not part of the Regulations)

Except for regulations 3 and 4, these Regulations are made in exercise of the powers in section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 (c.16) in order to address failures of retained EU law to operate effectively (see in particular paragraphs (a), (b) and (g) of section 8(2) of that Act) and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. Regulations 3 and 4 are made in exercise of powers under the European Communities Act 1972 (c. 68).

These Regulations are made following the amendment of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on over the counter derivatives, central counterparties and trade repositories (known as "the EMIR regulation") by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (OJ L 141 28.5.2019 p.42) (the "EMIR REFIT regulation").

Regulations 3 and 4 ensure that the references to the EMIR regulation in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) and the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013 (S.I. 2013/419) are up to date, in accordance with the United Kingdom's EU obligations prior to exit day.

The Regulations (other than regulations 3 and 4) make amendments to primary legislation, existing regulations made under section 8 of the European Union (Withdrawal) Act 2018 and to the EMIR regulation to take account of recent changes to the EMIR regulation made by the EMIR REFIT regulation.

Part 2 amends the Financial Services and Markets Act 2000 (c.8).

Part 3 amends subordinate legislation.

Part 4 amends the EMIR regulation as amended by the EMIR REFIT regulation.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

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