EXPLANATORY MEMORANDUM TO

THE TRADE REPOSITORIES (AMENDMENT AND TRANSITIONAL PROVISION) (EU EXIT) REGULATIONS 2018

2018 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 using powers in the European Union (Withdrawal) Act 2018 in order to address failures of retained European Union (EU) law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union, and to make provisions for the exercise of functions conferred upon the Financial Conduct Authority (FCA) by these Regulations.

2.2 This instrument amends 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 ("EMIR") in relation to the registration and supervision of trade repositories. Trade repositories are entities that collect and maintain the records of derivatives transactions to enhance the transparency of derivative markets and promote financial stability. The instrument also makes transitional provisions.

Explanations

What did any relevant EU law do before exit day?

2.3 EMIR ensures that information on all European derivative transactions is reported to trade repositories (TRs) and is accessible to supervisory authorities, including the European Securities and Markets Authority (ESMA) to give policy makers and supervisors a clear overview of activity in financial markets. Under EMIR, all EU trade repositories are required to be registered and supervised by ESMA. ESMA ensures TRs are compliant with the TR requirements and the reporting requirements set out in both the level 1 and level 2 text of EMIR. ESMA also provides guidance on how these requirements are meant to be interpreted.

Why is it being changed?

2.4 To ensure the legal framework for registration and supervision of TRs continues to operate effectively after the United Kingdom withdraws from the EU, various provisions must be in place. These include transferring registration and supervision functions to the relevant United Kingdom authorities, in this case the FCA.

What will it now do?

2.5 The SI addresses deficiencies in Articles 55 to 59 of EMIR by transferring ESMA's functions relating to registration and supervision of trade repositories to the FCA.

This instrument also puts in place:

- Provision for data sharing requirements for trade repositories, apart from data sharing in relation to equivalence which will be addressed in the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment) (EU Exit) Regulations 2018.
- Provision for advance applications to be made before exit day from new UK TRs who wish to gain FCA registration as a UK TR after exit. Where new UK TRs are being set up within a group that also contains a non-UK TR in the EU, which is currently ESMA-authorised, the new UK TR can benefit from a temporary registration regime. This allows the TR to provide reporting services in the UK for a period of three years, whilst the FCA considers their application in order to make a registration decision. This period could end earlier if the TR is registered by the FCA before the end of the three-year period. The FCA may also withdraw a TR from the regime if the TR does not comply with the requirements for application. Section 398 of the Financial Services and Markets Act (2000) (misleading the FCA or PRA) will apply to a TR wishing to make an application under this SI.
- Provision to allow existing ESMA-authorised UK TRs to quickly 'convert' their registration into FCA registration without a formal application process.

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 United Kingdom (see 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) has made the following statement regarding Human Rights:

"In my view the provisions of the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument addresses certain failures and deficiencies arising from the withdrawal of the United Kingdom from the European Union in relation to EMIR, specifically in respect of the registration, authorisation and supervision of TRs in the UK.

6.2 Other failures and deficiencies in relation to EMIR will be addressed in the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment)

(EU Exit) Regulations 2018 which are also intended to be made in 2018 using powers in the European Union (Withdrawal) Act 2018 under the affirmative procedure.

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. This will provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During the implementation period, common rules will continue to apply. The UK will continue to implement new EU law that comes into effect and the UK will continue to be treated as part of the EU's single market in financial services. This will mean that access to each other's markets will continue on current terms and businesses, including financial services firms, will be able to trade on the same terms as now until 31 December 2020. UK firms will 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 has every confidence that a deal will be reached and the implementation period will be in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. The government is clear that this scenario is in neither the UK's nor the EU's interest, and the government does not anticipate it arising. To prepare for this unlikely eventuality, HM Treasury intends to use powers in the European Union (Withdrawal) Act 2018 (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 In the unlikely scenario that the UK leaves 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 European Union (Withdrawal) Act. (https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act)

Background

7.9 Following the global financial crisis, G20 leaders agreed that more trades should be cleared through central counterparties (CCPs) to make over-the-counter (OTC) derivatives markets safer and more transparent. EMIR is the EU response to this G20 commitment. It covers OTC derivatives, CCPs, and TRs. The regulation is directly applicable in EU member states and came into force on 16 August 2012.

7.10 EMIR ensures that information on all European derivative transactions is reported to TRs and accessible to supervisory authorities, including ESMA, to give policy makers and supervisors a clear overview of activity in financial markets.

7.11 All TRs established in the EU are required to be registered and supervised by ESMA. ESMA ensures TRs are compliant with the TR requirements and the reporting requirements set out in the EMIR text. The UK currently has a significant market share of trade repository reporting services with 5 of 8 registered EU TRs located in the UK.

7.12 This instrument is intended to ensure that the UK's legal framework for reporting derivatives trades to TRs will continue to operate effectively after the United Kingdom withdraws from the European Union, resolving deficiencies arising from that withdrawal.

What the SI does

7.13 To ensure continuity of reporting services in the UK, this SI provides that ESMA-authorised EU TRs that currently service the UK market can set up a new legal entity in the UK. This new entity can continue servicing the UK market providing it meets the necessary requirements. It is these new legal entities that fall under the scope of the temporary registration regime.

7.14 The SI also transfers ESMA's functions relating to the requirements for the registration of TRs to the FCA. This allows the FCA to accept applications for registration from TRs and make registration decisions.

Applications for registration by the FCA in advance of exit day

7.15 This SI sets out provisions allowing trade repositories to submit applications for registration by the FCA in advance of exit day. This includes pre-exit powers for the FCA to accept and assess these applications. It also sets out that an application must be submitted to the FCA before exit day and should demonstrate that the TR meets the Title VII requirements in EMIR. The FCA will have 20 working days to assess that application and deem it complete or incomplete. If the application is incomplete the FCA will request further information from the applicant. Once a TR's application is deemed complete, the FCA has 40 working days to assess it and make a registration decision, after which the FCA will notify the applicant of their decision. A decision in respect of an advance application has effect from either when the FCA notifies the applicant of their decision or exit day, whichever is later.

The Temporary Registration Regime

7.16 The "Temporary Registration" regime provides that new TRs being set up in the UK, where the TR is part of a group that also contains an EU and ESMA-authorised TR in the EU, can make an advance application to the FCA for registration before exit day. The new UK TR will benefit from the temporary registration regime allowing the TR to provide reporting services in the UK for a period of three years. This period could end earlier if the TR is registered by the FCA before the end of the period, or the FCA determines that the TR should be withdrawn from the regime. The conditions for withdrawal are that the TR application does not comply with the application directions, or if sufficient steps have not been taken to ensure an application can be considered complete.

7.17 The purpose of the "Temporary Registration" regime set out in this SI is to provide sufficient time for the FCA to make decisions relating to an application for authorisation from a new legal TR entity in the UK.

Conversion regime

7.18 The SI creates a conversion regime whereby UK TRs who are currently registered by ESMA are registered as authorised UK TRs by the FCA from exit day. If a TR wishes to enter the conversion regime, they must notify the FCA before exit day. The FCA may direct the manner of this notification.

Criminal offences

7.19 This SI provides that section 398 of the Financial Services and Markets Act (2000) (misleading the FCA or PRA) applies to a TR wishing to make an application under this SI.

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 European Union (Withdrawal) Act 2018 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. The instrument is also made under paragraph 1 of Schedule 4, and paragraph 21 of Schedule 7 of the Act. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

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, but has engaged with relevant stakeholders on its approach to Financial Services legislation under the European Union (Withdrawal) Act 2018, including on this instrument, in order familiarise them with the legislation ahead of laying.

10.2 The instrument was also published in draft, along with an explanatory policy note, on 5th October 2018, in order to maximise transparency ahead of laying. (https://www.gov.uk/government/publications/draft-trade-repositories-amendment-and-transitional-provision-eu-exit-regulations-2018)

10.3 The financial services regulators plan to undertake public consultation in the Autumn on any changes they propose to make to Binding Technical Standards.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 The impact on business, is limited. Non-UK TRs that set up a new legal entity in the UK will require a legal expert to examine the new legislation, and will need to submit an application for authorisation to the FCA. The new process will be broadly the same as the existing EU EMIR application process.

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

12.3 The impact on the public sector is that the FCA will be responsible for implementing the temporary registration regime for new UK trade repositories.

12.4 An Impact Assessment will be published alongside the Explanatory Memorandum on the legislation.gov.uk website, when an opinion from the Regulatory Policy Committee has been received.

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 Luxmmi Varathan at the Treasury. Telephone: 0207 270 4302 or email: luxmmi.varathan@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Clare Bolingford, Deputy Director for the Securities, Markets & Banking at the Treasury, can confirm that this Explanatory Memorandum meets the required standard.

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

"In my view the Trade Repositories (Amendment and Transitional Provision) (EU exit) Regulations 2018 does no more than is appropriate."

1.2 This is the case because this instrument only does what is necessary to ensure the continuation of services by non-UK TRs to the UK market. As set out in section 2, to ensure the retained EMIR operates effectively after the UK withdraws from the EU, various provisions must be in place. These include transferring the registration and supervision functions to relevant UK authorities."

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 The policy rationale for the provisions contained within this instrument is set out in section 7 of the memorandum. The aim of the provisions is to ensure that a workable process for registering new UK TRs for the UK market is in place before exit day to enable a smooth transition over exit day and avoid disruption to financial markets".

3. Equalities

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

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

"In relation to the instrument, 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. Criminal offences

5.1 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 creation of a criminal offence and for the penalty in respect of it in the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018."

5.2 This SI provides that section 398 of the Financial Services and Markets Act (2000) (misleading the FCA or PRA) applies to a TR wishing to make an application under this SI.

6. Legislative sub-delegation

6.1 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 it is appropriate to create a relevant sub-delegated power in Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018."

6.2 It is appropriate to delegate the power to make regulatory technical standards under Article 56.3) to the FCA because it will give the FCA the necessary powers to ensure that EU-derived technical regulations for which they are responsible will operate effectively after exit, subject to mechanisms to ensure robust HM Treasury oversight.

6.3 This is in line with the approach that the government has set out in which legislative responsibility for Level 2 technical legislation in financial services will be transferred to the financial regulators, while the Treasury will have responsibility for changes to Level 1 legislation which Parliament will approve."