EXPLANATORY MEMORANDUM TO

THE EUROPEAN MARKET INFRASTRUCTURE REGULATION (UNITED STATES OF AMERICA REGULATED MARKET EQUIVALENCE) REGULATIONS 2022

2022 No. 406

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument is being made in order to revoke an existing equivalence decision, under Article 2a of the UK the European Markets Infrastructure Regulation (UK EMIR), for the USA's Commodity Futures Trading Commission (CFTC), and re-enacting the decision with an updated annexe. The annexe of the equivalence decision provides a list of designated contract markets (DCMs) in the USA that are authorised by the CFTC.

2.2 Since the original EU equivalence decision, which the UK retained, several additional DCMs established in the USA have: obtained authorisation from the CFTC to operate as regulated markets; vacated their authorisation; or amended their names. The original decision must therefore be revoked and re-enacted with an updated annexe to reflect these changes in order to maintain the original intention of the policy.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom

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

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 At the end of the transition period (TP) on 31 December 2020, around 270 EU equivalence decisions were retained in UK law. One of these was an existing EMIR Article 2a decision for the CFTC. The Annexe of the decision provides a list of DCMs in the USA. Since the original EU decision as retained by the UK, the list of CFTC authorised DCMs has changed, the original EU decision therefore needs to be revoked and re-enacted with an updated annexe to reflect these changes.

7. Policy background

What is being done and why?

7.1 Derivative contracts exist in several separate 'classes'. Article 2 of UK EMIR, as it forms part of retained EU law in the UK, defines an over the counter (OTC) derivative as a class of derivative where executions of trades do not take place on either a UK regulated market or a venue from an equivalent jurisdiction. It also defines Exchange Traded Derivatives (ETDs), a separate class of derivative from OTC, as derivatives contracts where trades are executed on regulated markets or in a jurisdiction found to be equivalent to the UK under EMIR Article 2a. When ETDs are traded on regulated markets in jurisdictions that have not been found equivalent to the UK, they are treated similarly to OTC derivatives under UK EMIR rules.

7.2 Granting EMIR 2a equivalence establishes that derivatives traded on overseas jurisdictions' markets can be treated as ETDs rather than OTCs. For UK firms, this is potentially beneficial as ETDs are standardised products that can be traded more quickly than OTC derivatives. By allowing their derivatives to be treated as ETDs, EMIR 2a equivalence is beneficial as it allows UK firms to meet the less onerous set of requirements for ETD trades, as compared to the requirements on OTC derivative trading. The requirements on ETD trading impose lower costs on firms than the requirements on OTC derivative trading.

7.3 A decision was made by the European Commission on 1 July 2016 to grant to the CFTC equivalence under EMIR Article 2a on the basis of regulatory and supervisory regimes in relation to their authorised markets. This decision was retained in UK law pursuant to section 3(1) of the European Union (Withdrawal) Act 2018.

7.4 The UK considers that the CFTC's regime for regulating and supervising the markets it authorises is still equivalent to the requirements in UK EMIR, on an outcomes basis.

7.5 The original EMIR 2a equivalence decision retained in UK law applied to the CFTC's regulatory and supervisory oversight of their authorised DCMs. The Annexe of the decision lists only the specific markets to which it applies. Even if further markets obtain CFTC authorisation, they will not benefit from the decision until they are listed in an Annexe to an equivalence decision.

7.6 There is, therefore, no policy rationale to continue to limit the scope of the EMIR 2a equivalence decision only to markets that were CFTC-authorised at the time it was originally made. HM Treasury remains of the view that the CFTC regime is equivalent on an outcomes basis, and is therefore comfortable extending the scope of its equivalence decision to all current CFTC-authorised markets. The full list is set out in regulation 2(2) of the instrument and the relevant lists will be updated on gov.uk and the FCA's website after this SI has been laid.

8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because the original EMIR 2a equivalence decision for the US CFTC was made when the UK was a member of the EU, and it was retained in UK law, following the end of the Transition Period.

9. Consolidation

9.1 This instrument revokes and remakes (with an updated list of DCMs) the previous equivalence determination made when the UK was a member of the EU, that was then retained in UK law.

10. Consultation outcome

10.1 HM Treasury has not undertaken a consultation on this instrument, as it is not bringing an equivalence decision with a new effect into force. It is instead amending the list of Designated Contract Markets (DCMs) from a previous equivalence decision to align with the CFTC's current list.

11. Guidance

11.1 Guidance is not required in relation to this instrument.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full impact assessment has not been prepared for this instrument because, in line with Better Regulation guidance, HM Treasury considers that the net impact of this impact will result in an Equivalent Annual Net Direct Cost to businesses of less than £5 million a year. Due to this limited impact, a de minimis impact assessment has been carried out. A copy of this assessment is published alongside this Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation will give clarity to all businesses by ensuring the list of Designated Contract Markets in the UK's equivalence decision is up to date.

14. Monitoring & review

14.1 As set out in the Memorandum of Understanding between HM Treasury, the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority, HM Treasury may review the equivalence determination periodically or at any time, or in response to changes to the applicable framework.[1] This does not prejudice HM Treasury's ability to revoke the equivalence determination at any time.

14.2 Each regulator may also recommend to HM Treasury that a review of the equivalence determination is undertaken in response to material changes in the applicable framework. Furthermore, each regulator may request a review of the equivalence determination if they have concerns arising from their statutory objectives.

15. Contact

15.1 Kieran Davis at HM Treasury (Telephone: 07977 956689, or email: Kieran.Davis@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

[1] https://www.gov.uk/government/publications/memorandum-of-understanding-equivalence-and-exemptions

15.2 John ORegan, Deputy Director for International Policy and Partnerships at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

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