

**EXPLANATORY MEMORANDUM TO**  
**THE LONG-TERM INVESTMENT FUNDS (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 address the deficiencies in retained EU law in relation to European Long-term Investment Funds (ELTIFs), arising from the withdrawal of the United Kingdom (UK) from the European Union (EU), ensuring the legislation continues to operate effectively at the point at which the UK leaves the EU.
- 2.2 This instrument relates to the ELTIF Regulation (Regulation (EU) 2015/760), which covers a sub-category of Alternative Investment Funds (AIFs) that direct investment towards long term investments, such as small and medium sized businesses and the development and operation of infrastructure, public buildings, social infrastructure, transport, sustainable energy and communications.

***Explanations***

*What did any relevant EU law do before exit day?*

- 2.3 The ELTIF Regulation covers a sub-category of AIFs that focus on providing long-term investment opportunities. The ELTIF Regulation laid down a common framework of rules regarding the use of the designation "ELTIF" for qualifying long-term investment funds in the EEA. This includes: the composition of the portfolio of funds that operate under that designation, the investment tools they may employ, and the categories of investors that are eligible to invest in them.
- 2.4 ELTIFs are a sub-category of AIFs and therefore also must comply with the Alternative Investment Fund Managers Directive ('AIFMD') (Directive 2011/61/EU), which was implemented in the United Kingdom by the Alternative Investment Fund Managers Regulations 2013 (S.I. 2013/1773). The Alternative Investment Fund Managers (Amendment etc) (EU Exit) Regulations 2018, laid in draft on 29 November 2018, address deficiencies in retained EU law relating to AIFMD, which funds will have to comply with.

*Why is it being changed?*

- 2.5 This instrument forms part of HM Treasury's contingency planning in the event that the UK leaves the EU without a deal. To prepare for a no-deal scenario, it is necessary to address deficiencies in retained EU law to ensure that the legislation continues to operate effectively at the point at which the UK leaves the EU.
- 2.6 References to EU law in UK legislation will not operate effectively after exit day unless amended. Some of these references need to be amended to reflect changes in

the versions of EU regulations which will become retained EU law when the UK leaves the EU.

- 2.7 The passporting system (under which EEA funds and fund managers are regulated by their home State supervisors and are marketed and operate throughout the EEA) relies upon a legal framework agreed between EEA Member States and implemented in their domestic legislation. If the UK leaves the EU without a deal, there will be no agreed legal framework upon which the passporting system can continue. As a result, any references in UK legislation to the EEA passporting system will become deficient at the point of exit, and therefore this instrument removes them.
- 2.8 Once the UK leaves the EU, it would no longer be appropriate for UK funds to use the ELTIF label, and therefore this needs to be addressed.
- 2.9 Provisions relating to functions of the European supervisory bodies and the European Commission will need to be amended.
- 2.10 If this instrument was not made, certain regulations would cease to apply to ELTIFs set up and registered in the UK.

What will it now do?

- 2.11 This instrument will amend retained EU law related to ELTIFs to ensure the legislation continues to operate effectively in a no deal scenario after exit day, specifically so that it only applies to qualifying long-term investment funds established within the UK.
- 2.12 Amendments that this instrument makes are outlined in section 7, however key amendments include:
  - Replacing references to the Union with references to the UK, and references to EU legislation which are no longer appropriate with references to the appropriate UK legislation and rules made by the regulators;
  - Changing the designation “ELTIF” to “Long-term Investment Fund” (LTIF);
  - Removing references to the EEA passporting system, so that qualifying long-term investment funds will no longer be able to automatically market throughout the EEA;
  - Transferring functions of the European Commission to HM Treasury, and functions of the European Securities and Markets Authority (ESMA) to the UK Financial Conduct Authority (FCA);
  - Maintaining the eligible investment arrangements of qualifying long-term investment funds established in the UK; and
  - Establishing a transitional regime for managers and funds registered with the FCA before exit day, which will automatically transfer them to the new “LTIF” designation.

### **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 UK (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 UK.
- 4.2 The territorial application of this instrument is to the whole UK.

**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 Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

**6. Legislative Context**

- 6.1 To address deficiencies of retained EU law related to ELTIFs arising from the withdrawal of the UK from the EU, this instrument amends Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds. It also amends the Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115) to specify an additional EU Regulation.
- 6.2 ELTIFs are a sub-category of AIFs and therefore also have to comply with the Alternative Investment Fund Managers Directive (AIFMD) (Directive 2011/61/EU). The Alternative Investment Fund Managers (Amendment etc) (EU Exit) Regulations 2018 (which were laid on 29 November 2018) amend retained EU law relating to AIFMD.

**7. Policy background**

*What is being done and why?*

- 7.1 The UK will leave the EU on 29 March 2019. The UK and EU negotiating teams have reached agreement on 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 there will be a deal and an implementation period 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>)

- 7.9 This SI will amend retained EU law relating to ELTIFs so that it operates effectively in a UK-only context.

#### Long-term Investment Funds Label

- 7.10 Currently, UK Alternative Investment Fund Managers (AIFMs) must register ELTIFs with the FCA in order to market funds throughout the EEA under this specific label. If the UK leaves the EU without a deal, it will no longer be possible for UK AIFMs to market these funds under the EU regime. This instrument removes references to the EEA, meaning that consequential references to passporting rights are removed.
- 7.11 This instrument creates a UK version of the ELTIF Regulation, which will only apply to UK AIFMs and funds established in the UK. The label for these funds will be changed to “Long-term Investment Funds” (LTIFs). Existing managers of UK ELTIFs that are authorised with the FCA before exit day will automatically be transferred to and authorised as managers of an ‘LTIF’ under the new UK regime. Firms will not need to notify the FCA for this to happen.

#### Eligible investments

- 7.12 The ELTIF Regulation currently sets out the investment rules for ELTIFs, which can only invest in eligible assets as defined by the Regulation. In some cases, EEA assets are given preferential treatment over third country assets, with the Regulation making a distinction between investments in EEA Member States and investments in the rest of the world. To ensure continuity for investors, this instrument will maintain the existing investment rules for ELTIFs domiciled in the UK.

#### Supervisory Cooperation

- 7.13 As the UK will no longer be part of the single market, it would not be appropriate for the UK supervisors to be obliged to share information or cooperate with EU authorities, without any guarantee of reciprocity. As such, provisions in legislation relating to cooperation and information sharing have been removed. However, this will not preclude UK supervisors from sharing information with EU authorities where necessary, as the existing domestic framework (as outlined in the Financial Services and Markets Act 2000) for cooperation and information sharing with countries outside the UK already allows for this.

#### Transfer of functions

- 7.14 EU regulation of financial services sets out a range of functions to be carried out by EU institutions. Many of these functions will need to be incorporated into the UK’s regulatory framework so that the UK has a fully functioning regulatory regime outside of the EU. Broadly speaking, these functions fall into two categories: functions for making legislation and a wide range of other functions which relate to the supervision of financial services institutions.
- 7.15 Powers to supplement EU legislation are held by the European Commission. Binding Technical Standards which specify particular aspects of EU financial services legislation are developed by the European Supervisory Authorities. This instrument transfers the responsibility for making Binding Technical Standards under the ELTIF Regulation to the FCA. This is considered appropriate as the FCA currently supervise

such activities and have the requisite technical knowledge. The FCA will have responsibility for ensuring that EU-derived technical standards and regulator rules operate effectively after exit from the EU. For example, the FCA will have the power to make technical standards specifying the circumstances on the life cycle of assets in an LTIF.

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

8.1 This instrument is being made using powers 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 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018. 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 to familiarise them with the legislation ahead of laying.

10.2 The instrument was also published in draft, along with an explanatory policy note, on the 18 October 2018 in order to maximise transparency ahead of laying.  
<https://www.gov.uk/government/publications/draft-eu-exit-sis-for-investment-funds-and-their-managers>

## **11. Guidance**

11.1 No further guidance is being published alongside this instrument. An explanatory policy note was published alongside the draft instrument.

## **12. Impact**

12.1 The impact on businesses will primarily be on fund managers and funds that currently operate under the ELTIF Regulation. The take-up of the ELTIF regime has been limited, and FCA data show that there are no ELTIF funds in the UK currently.

12.2 There is no impact on charities or voluntary bodies.

12.3 There is no impact on the public sector.

12.4 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 activities that are undertaken by small businesses if they are currently in scope of the ELTIF Regulation. Only “full scope” AIFMs, those with assets under management above the specified threshold in Article 3 of AIFMD, can manage ELTIFs; however, AIFMs with assets under management below the threshold can opt in to become “full scope” AIFMs.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses. The intention of this SI is to ensure the regulatory regime for investment funds in the UK continues to operate effectively in a UK-only context and to minimise the impact of the UK’s withdrawal from the EU on all firms, including small business.

### **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 Janice Chui at the HM Treasury (Telephone:02072701081 or email: Janice.Chui@HMTreasury.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 John Owen, Deputy Director for the Personal Finances and Funds Team at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Economic Secretary to the Treasury at HM 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) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

1.2 This is the case because: the instrument does no more than correct deficiencies arising from the UK’s exit from the EU, and treats the EU as a third country going forward. Further explanation of the policy purpose of this instrument can be found in paragraphs 7.1-7.16 of this Explanatory Memorandum.

#### **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: without this instrument, the legislation regulating long-term investment funds in the UK would contain deficiencies and cease to function appropriately after the UK’s exit from the EU. Further explanation of the policy purpose of this instrument can be found in paragraphs 7.1-7.15 of this Explanatory Memorandum.

#### **3. Equalities**

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

“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, 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 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 the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019.”

5.2 It is appropriate to delegate the power to make regulatory technical standards to the FCA because it will give them 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. This is considered appropriate as the FCA will have the requisite technical knowledge to make assessment of certain matters. For example, the FCA have the power to make technical standards specifying the circumstances in which the life of an LTIF is considered sufficient in length to cover the life-cycle of each of the individual assets of the LTIF.

5.3 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.