

EXPLANATORY MEMORANDUM TO
THE CIVIL LIABILITY ACT 2018 (FINANCIAL CONDUCT AUTHORITY)
(WHIPLASH) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

- 2.1 The Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021 (“the Regulations”) give powers to the Financial Conduct Authority (“the FCA”) to enforce the ban on the making and requesting of offers to settle road traffic accident (“RTA”) whiplash-related injury claims without a medical report, as set out in sections 6 and 8 of the Civil Liability Act 2018 (“the Act”).

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 This entire instrument applies to England and Wales only and is a financial instrument for the purposes of Standing Order No. 83T of the Standing Orders of the House of Commons relating to Public Business.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “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)”.

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 Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Civil Liability Act 2018 received Royal Assent on 20 December 2018. Section 6 of the Act restricts the settlement of whiplash claims without a medical report.
- 6.2 Section 8 of the Act provides that Treasury may make regulations to enable the FCA, where it is the relevant regulator, to take action for monitoring and enforcing compliance with the restrictions imposed on regulated persons by section 6. These regulations are to be made under the affirmative resolution procedure.
- 6.3 The regulations made under section 9 of the Act are the Civil Liability Act (Specification of Authorised Persons) Regulations 2021 which are laid alongside the Regulations.

7. Policy background

What is being done and why?

- 7.1 As set out in section 6 of the Act, all low value RTA whiplash related claims will need to be supported by a medical report provided by a MedCo accredited medical expert, otherwise known as a ban on ‘pre-medical offers’. Under section 6(3) of the Act, the Lord Chancellor will specify in the Whiplash Injury Regulations 2021 that appropriate evidence constitutes a medical report provided by a MedCo accredited medical expert. MedCo is a system for accrediting medical experts and for sourcing initial fixed cost soft tissue injury medical reports mandated by the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.
- 7.2 The requirement to make sure that a medical report is completed before any RTA whiplash related claim can be settled will provide more certainty to the costs of the settlement process. It will provide both parties with information as to the severity of the injury and an accurate assessment of the treatment required and/or duration of the injury so as to be able to assess their position on the tariff and identify the compensation payable to settle the claim.
- 7.3 This will mean an end to the practice of pre-medical offers to settle, which can lead to unmeritorious, minor or exaggerated claims being made by some claimants, including fraudulent claims by uninjured claimants. This will also reduce the risk of under-settlement as this policy will ensure that claimants with genuine injuries are properly assessed by accredited medical experts and receive compensation appropriate to the level of pain and suffering they have endured.
- 7.4 These Regulations modify the Financial Services and Markets Act 2000 to give the FCA the appropriate powers to enforce this ban.
- 7.5 The FCA’s regulatory powers will apply to all authorised persons dealing with whiplash claims, as set out in the Civil Liability (Specification of Authorised Persons) Regulations 2021.

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

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There are no plans to consolidate the legislation.

10. Consultation outcome

- 10.1 From November 2016 to January 2017, the Ministry of Justice issued a public consultation on the full suite of proposed reforms to the whiplash claims process. The Government's response to the consultation was published in February 2017, and can be found at: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims/results/part-1-response-to-reforming-soft-tissue-injury-claims.pdf>.
- 10.2 This consultation asked respondents for views on how the ban on pre-medical offers should be enforced. The majority of respondents were of the view that the ban should be enforced by the relevant regulator. In line with these responses, the Act identifies that the FCA as the appropriate regulator to enforce the ban.

11. Guidance

- 11.1 No guidance is issued with these Regulations.

12. Impact

- 12.1 The impact on business is that firms dealing with whiplash claims will no longer be able to settle these claims without a valid medical report. There is no, or no significant, impact on charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment for the Civil Liability Act 2018's reforms to the whiplash claims process, including the ban on pre-medical offers, was published in March 2018. It can be found at <https://www.gov.uk/government/publications/civil-liability-bill>.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 The main business stakeholders affected by the whiplash reforms are claimant lawyers, CMCs, and defendant insurers. Many claimant lawyers and CMCs are small or micro businesses.
- 13.3 However, as outlined in the full Impact Assessment for the whiplash reforms, if the policy was not applied to small and micro businesses then it is unlikely that the policy would be applied at all, as small and micro businesses account for a significant proportion of the industry. Non-application to any part of the industry would not meet policy objectives and would generate competition issues.

14. Monitoring & review

- 14.1 The Regulations do not include a statutory review clause.

15. Contact

- 15.1 Dominic Wheeler at the Treasury, telephone: 02072705095 or email: dominic.wheeler@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Emma Kavanagh, Deputy Director for Insurance and Pensions Markets, at the Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen, Economic Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.