

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (OVER THE COUNTER
DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES)
(AMENDMENT) REGULATIONS 2014

2014 No. 905

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The amendments made by these Regulations relate to the clearing of financial transactions through recognised clearing houses. They amend the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 to exempt Recognised Overseas Clearing Houses (“ROCHs”) from the requirement to produce and maintain recovery plans as of May 1st 2014.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Context**

4.1 Provisions amending the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013.

These regulations amend the transitional provisions contained in regulation 52 of the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations (“the 2013 Regulations”). The 2013 Regulations implemented the EMIR Regulation¹ in part by, amongst other things, amending the Financial Services and Markets Act 2000 (“FSMA”) and the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (“the 2001 Regulations”).

¹ Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on over the counter (“OTC”) derivatives, central counterparties and trade repositories (OJ no L 201, 27.7.2012, p1), (more commonly known as the European Markets Infrastructure Regulation).

Before EMIR, any clearing house which did business in the UK required recognition under FSMA and would have to comply with the 2001 Regulations. Under EMIR, clearing houses which act as central counterparties (“CCPs”) established in the EU require authorisation from their home state, and those established outside the EU (which want to operate in the EU) must be recognised by the European Securities and Markets Authority (“ESMA”).² As a result of EMIR, CCPs which are established outside the UK and have an EMIR authorisation will no longer require separate recognition from UK authorities in order to operate in the UK. Therefore the 2013 Regulations amended FSMA and the 2001 Regulations so that the relevant parts no longer apply to CCPs which are established outside the UK.

The 2013 Regulations also contain transitional provisions which apply to a clearing house while its application for EMIR authorisation is still pending determination. Those transitional provisions provide that the relevant parts of FSMA and the 2001 Regulations continue to apply to the applicant as if they had not been amended by those regulations. Therefore FSMA and the 2001 Regulations will continue to apply to overseas clearing houses who have applied for EMIR authorisation until the application for authorisation has been determined.

From May 1st 2014, the 2001 Regulations will contain an obligation on clearing houses to maintain a recovery plan.³ At the time that this amendment was made,⁴ it was expected that all EMIR applications would have been determined by May 1st and therefore the new obligation would only apply to UK established clearing houses. However, the authorisation of CCPs by the relevant authorities in other EU states has taken longer than expected so that the duty to maintain a recovery plan will inadvertently apply to overseas CCPs for a short transitional period. This was never intended.

Therefore, these Regulations amend the transitional provisions in regulation 52 of the 2013 Regulations to ensure that the duty to maintain a recovery plan does not apply to non-UK established clearing houses while they are in the course of applying for their EMIR authorisation.

All ROCHs are applying for CCP authorisation.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

² This memorandum will refer to “authorisation” to mean either authorisation of a CCP established in the EEA by a Member State authority or recognition of a third country CCP by ESMA.

³ Schedule 1, paragraph 23A.

⁴ This was inserted by the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No. 2) Regulations 2013 (S.I. 2013/1908).

6. European Convention on Human Rights

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

7. Policy background

- What is being done and why

7.1 In order to aid the recovery and resolution planning of a CCP in the event of their failing or failure the Treasury made regulations⁵ that required CCPs to have in place recovery plans by May 1st 2014. This was in line with both EMIR draft technical standards and CPSS-IOSCO Principles of Financial Market Infrastructure. The new obligation was intended to apply only to UK clearing houses. It was never the policy intention to capture ROCHs within this requirement.

- Consolidation

7.2 These Regulations make minor amendments to domestic legislation. Since the amendments are limited in scope, consolidation is not merited.

8. Consultation outcome

8.1 It was not necessary for HM Treasury to consult specifically on these regulations given that the earlier consultation on the ‘Amendments to the recognition requirements for investment exchanges and clearing houses’ stipulated that the obligation to produce and maintain recovery plans would only be applicable to UK recognised clearing houses. Therefore, no consultation for these regulations was deemed necessary as they prevent a new unintended obligation from being imposed on ROCHs.

8.2 In addition to this, ROCHs do not currently produce, nor are they expecting or expected to produce recovery plans by May 1st, further highlighting that the, consultation on these Regulations was not necessary.

9. Guidance

9.1 No further guidance for these regulations is required.

10. Impact

10.1 There is expected to be no impact as a result of removing the requirement on ROCH’s to have and maintain a recovery plan as ROCHs are not currently expected, nor

⁵ By an amendment to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (S.I. 2001/995), made by Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No. 2) Regulations 2013 (S.I. 2013/1908).

are they expecting to produce and maintain these recovery plans prior to May 1st. These amendments will prevent an unintended obligation from being imposed on ROCHs. Therefore as a result of these changes there is no impact on the costs of business or the voluntary sector, and therefore, an impact assessment is not necessary.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 There is no provision to exclude ROCHs employing up to 20 people from this carve-out for ROCHs from mandatory recovery plans.

11.3 No small businesses are directly affected by the mandate to produce and maintain recovery plans, and thus, the carve-out of ROCHs from this requirement would not directly affect any small businesses.

12. Monitoring & review

12.1 These Regulations amend the 2013 Regulations. The Treasury is required to review the 2013 Regulations (which would include the amendments made by these Regulations) within a five year period from the when they came into force, and again every five years after this period. Under Article 85 of EMIR the Commission is required to review and prepare a general report on EMIR and submit that report together with any appropriate proposals to the European Parliament and Council by 17 August 2015.

13. Contact

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Nikkita.Patel@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.