

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED
ACTIVITIES) (CORONAVIRUS) (AMENDMENT) ORDER 2020

2020 No. 480

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to remove from the scope of consumer credit regulatory regime loans of £25,000 or less that are made by commercial lenders to sole traders, unincorporated associations and partnerships of fewer than four people under the Bounce Back Loan Scheme (“the BBLs”). The effect of this instrument is that these types of loans will be exempt credit agreements and, with the exception of one type of activity explained below, will therefore not be subject to the detailed consumer credit regulatory regime set down in the Consumer Credit Act 1974 (“the CCA”), the various pieces of secondary legislation made under that Act and the relevant rules made by the Financial Conduct Authority. This will exclude the activity of entering into loans under the BBLs from the ambit of regulation under Financial Services and Markets Act 2000. However, as referenced above, there is an exception as the instrument allows for the existing regulatory regime to continue to apply to lenders who carry on the activity of debt collecting in relation to loans under the BBLs.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument will breach the 21-day rule for laying in Parliament. It will come into force on 4 May 2020.
- 3.2 This is emergency legislation in response to the coronavirus crisis. It is needed to urgently remove loans made under BBLs from a highly prescriptive consumer credit regulatory regime which is currently inhibiting lenders from granting loans to small businesses. If the Government were to abide by the 21-day rule in these circumstances, this would significantly hinder the proper operation of the BBLs which could have negative implications for the robustness of the UK’s real economy generally and, in particular, the solvency of small businesses.

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)

- 3.3 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole of 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 This instrument is being made so that loans of £25,000 or less made to sole traders, unincorporated associations and partnerships of fewer than four people by commercial lenders under the BBLs will not be subject to the detailed regulatory provisions in the Consumer Credit Act 1974 (“the CCA”), the various pieces of secondary legislation made under that Act and the relevant rules made by the Financial Conduct Authority.
- 6.2 The instrument inserts an additional exemption into Article 60C in Chapter 14A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (“the RAO”). The effect of this is to create a new category of exempt agreement which will not be subject to the detailed provisions in the CCA concerning regulated credit agreements. This new type of exempt agreement will apply to a credit agreement where (i) the lender provides the borrower with £25,000 or less, (ii) the agreement is entered into wholly for the purpose of borrower’s business and (iii) the agreement is entered into under the Bounce Back Loan Scheme. Section 8 of the CCA defines “consumer credit agreements” by reference to “regulated credit agreements” in the RAO and therefore, excluding loan agreements under the BBLs from the scope of the RAO also excludes them from the scope of the provisions in the CCA which apply to regulated credit agreements.
- 6.3 In accordance with article 60B(1) of the RAO, this new type of exempt agreement is not a “regulated activity” under the Financial Services and Markets Act 2000 (“FSMA”). Section 22(1) of FSMA provides that an activity is a regulated activity if it is of a specified kind. Under section 22(5) of FSMA, specified means specified in an order made by the Treasury. The RAO is the order made under that provision. Because we are excluding from the scope of the RAO credit agreements under the BBLs for £25,000 or less and which is for the purpose of the borrower’s business, then entering into such an agreement as borrower will not be a specified kind of activity.
- 6.4 This also means that article 60B(2) - which provides that it is a regulated activity for a lender to exercise its rights and duties under the loan agreement - will not apply either because that provision only relates to regulated credit agreements.
- 6.5 Such rights and duties referred to in article 60B(2) include debt collecting. Therefore, the instrument makes a further amendment to the RAO to provide that the specific activity of debt collecting *will remain* a regulated activity in relation to a loan under the BBLs of £25,000 or less and which is for the purpose of the borrower’s business. This is achieved as follows.
- 6.6 Article 39F(1) of the RAO provides that procuring the payment of a debt under any credit agreement is a regulated activity. However, article 39H(1) excludes this

regulated activity where it is carried on by a lender under the agreement, otherwise there would be a large overlap between article 60B(2) and article 39F.

- 6.7 The statutory instrument makes two amendments to the RAO to address this point. First, it inserts a new provision in article 39H to state that the exclusion for lenders, in relation to the activity of debt collection, does not apply to lenders of BBLs loans of £25,000 or less and which are made for the purpose of the borrower's business. This amendment is needed to specifically apply the regulated activity of debt collection because it is not caught by the wide provision in 60B(2), nor is it currently within scope of article 39F(1).
- 6.8 The second amendment is a transitional provision. It provides that a lender who, immediately before the Order came into force had permission under Part 4A of FSMA to carry on the regulated activity of debt collecting under article 60B(2) of the RAO is to be treated, from the commencement of the Order, as having permission to carry on the regulated activity of debt collecting under article 39F(1) of the RAO. This transitional provision applies only where the person enters into the exempt agreement of a loan under the BBLs for £25,000 or less for the purposes of the borrower's business.
- 6.9 This provision is not granting permission to a lender to carry out the regulated activity of debt collecting where it did not have permission to do so prior to this instrument. Rather, the lender - who was already required to have permission under Part 4A of FSMA to carry out regulated activity of debt collecting under article 60B(2) - will continue to be required to have permission to carry out this activity, but under article 39F instead.

7. Policy background

What is being done and why?

- 7.1 The instrument will remove certain legislative obstacles which would otherwise inhibit the granting of loans by lenders to small businesses under the BBLs. This is necessary in order for the provision of loans under the BBLs to be maximised in the current uncertain economic environment, and to allow lenders to provide those loans at the scale and speed required. If these obstacles were not removed this would hinder the proper operation of the BBLs which could have significant negative implications for the UK economy. More broadly, failure to act quickly would inhibit the government's response to the Coronavirus pandemic.
- 7.2 FSMA and related secondary legislation set out the requirements and procedures for financial services firms to be authorised to carry on regulated activities as 'authorised persons'. FSMA provides the Financial Conduct Authority and the Prudential Regulation Authority with the necessary functions and powers to supervise the activities of these firms, and to take enforcement action. FSMA and related secondary legislation provide the main legislative framework for setting out the activities and entities that fall within the scope of financial services regulation in the UK.
- 7.3 This instrument removes loans made under the BBLs from most of this regulation. This is necessary because the regulatory framework that governs loans of £25,000 or less to sole traders, unincorporated associations or partnerships of fewer than four people has been identified by industry as a key barrier that impedes lenders from being able to offer credit to small businesses in the way that is required under the current circumstances. Whilst most of the regulatory framework will not apply to

loans of £25,000 or less made under the BBLs, a range of requirements will be inserted in the guarantee agreement between the British Business Bank and the accredited lender that all participating firms will be required to agree to, to ensure that borrowers retain the appropriate degree of protection under the scheme.

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 This Order does not seem to consolidate the relevant legislation.

10. Consultation outcome

10.1 No formal consultation was conducted in relation to this instrument.

11. Guidance

11.1 No guidance is to be provided in connection with this instrument.

12. Impact

12.1 An Impact Assessment has not been prepared for this instrument because of the need to make and lay the instrument urgently to allow the launch of BBLs, thus enabling the quick provision of credit to small businesses.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 John Glen MP has made the following statement: “It would be disproportionate to include a statutory review clause in this legislation because of the temporary nature of the regulations, which will cease to have effect once loans made under the scheme have been satisfied”.

15. Contact

15.1 James Reah at HM Treasury Telephone: 02072701325 or email: james.reah@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Anna Harvey 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.