EXPLANATORY MEMORANDUM TO

THE SHORT SELLING (NOTIFICATION THRESHOLDS) REGULATIONS 2021

2021 No. 5

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 amends the retained EU regulation on short selling and certain aspects of credit default swaps (EUR 2012/236, as amended by S.I. 2018/1321), commonly known as the Short Selling Regulation ("the SSR"). It lowers the initial notification threshold for the reporting of net short positions to the Financial Conduct Authority ("FCA"), in relation to the issued share capital of a company that has shares admitted to trading on a trading venue, from 0.2% to 0.1%. This change will allow the FCA to more effectively monitor short selling activity at a time of increased market volatility, and to act against any short selling activity that impacts on the integrity of the market.

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 As the instrument is subject to 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 to the whole of the United Kingdom.

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury, John Glen MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Short Selling (Notification Thresholds) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 The SSR applies to financial instruments admitted to trading or traded on a UK trading venue (unless they are primarily traded on a third country venue). It also applies to debt instruments issued by UK sovereign issuers and related credit default swaps. The SSR requires holders of significant net short positions in shares or sovereign debt to make notifications of their positions to the FCA once certain thresholds have been passed.

6.2 Article 5(2) of the SSR sets the initial notification threshold for the reporting of net short positions to the FCA, in relation to the issued share capital of a company that has shares admitted to trading on a trading venue, at 0.2%.

6.3 Article 5(4) of the SSR provides that HM Treasury may by regulations modify the thresholds referred to in Article 5(2). This instrument amends Article 5(2), lowering the initial notification threshold for the reporting of net short positions to the FCA, to 0.1%.

7. Policy background

What is being done and why?

7.1 Short selling is the practice of selling a security that is not owned by the seller with the intention of buying it back later at a lower price to make a profit. Short selling is a legitimate practice that provides benefits to the market. However, it can be potentially disruptive, undermining confidence in the market and preventing it from running effectively.

7.2 The SSR requires persons to notify the FCA of their net short positions in the issued share capital of companies once certain thresholds are passed. The baseline for this threshold is 0.2% of the issued share capital of the company concerned.

7.3 The data provided to the FCA as a result of these notifications help provide an early and accurate oversight of short selling activity, which is critical to the FCA's ability to effectively monitor short selling activity, and to take action against any short selling activity that impacts on the integrity of the market.

7.4 In March 2020, the European Securities and Markets Authority (ESMA) made a temporary decision to apply a threshold of 0.1% for shares admitted to trading on regulated markets, in response to COVID uncertainty. This decision has subsequently been renewed in June, September and December. Such decisions ceased to have effect in the UK at the end of the Transition Period (11pm on 31 December 2020) meaning the threshold reverted to 0.2% at that point.

7.5 This SI amends the initial notification threshold under Article 5 of the SSR for the reporting of net short positions to the FCA, in relation to the issued share capital of a company that has shares admitted to trading on a trading venue, from 0.2% to 0.1%. This change will ensure the FCA has the necessary data to monitor short selling activity at a time of increased market volatility and to act earlier against any disruptive short selling activity. The lower threshold will take effect from 1 February 2021 and will apply indefinitely. The FCA has stated that in the interim period between the end of the Transition Period and 1 February 2021, persons will continue to be able to make notifications to the FCA at the 0.1% threshold if they wish to do so.

7.6 Amending the threshold under Article 5 of the SSR will result in the UK requirements differing from the requirements under the EU SSR and associated ESMA decision. In the UK, the 0.1% threshold will apply in respect of shares admitted to trading on UK regulated markets and UK Multilateral Trading Facilities (MTFs), whereas in the EU the 0.1% threshold will apply only in respect of shares admitted to trading on EU regulated markets. The basis for that is a temporary ESMA decision, not a modification of Article 5(2) by virtue of Article 5(4). The government has taken this approach following engagement with reporting persons by the FCA, which has demonstrated that applying the 0.1% threshold to regulated markets and MTFs would result in a simpler and less burdensome regime for reporting persons.

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 / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate the relevant legislation. This is the first use of the power in Article 5(4) of the SSR.

10. Consultation outcome

10.1 HM Treasury has not undertaken a consultation on this instrument but has engaged extensively with the FCA. The FCA has undertaken engagement with a number of reporting persons, which has informed the preparation of this instrument.

11. Guidance

11.1 HM Treasury announced its intention to amend the notification threshold by SI, on 15 December 2020. The FCA provides information to reporting persons with respect to notification requirements under the SSR, including any changes to the notification threshold.

12. Impact

12.1 The impact of this threshold change on businesses and on the public sector will be minimal, as the majority of reporting persons have been reporting at the 0.1% threshold with respect to shares traded on regulated markets since the ESMA decision in March, and the majority have also been reporting at the 0.1% threshold voluntarily with respect to shares traded on MTFs. This instrument therefore simplifies reporting requirements, providing continuity for reporting persons, and the FCA.

12.2 There is no impact on charities or voluntary bodies.

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 instrument on businesses will be less than £5 million Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis impact assessment has been carried out, a copy of which is published alongside this Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by all businesses within scope of the SSR notification requirements, including small businesses. As set out above, the approach taken by this instrument will provide continuity for reporting persons, minimising the impact on businesses of all sizes.

14. Monitoring & review

14.1 HM Treasury and the FCA will continue to monitor whether the notification threshold remains appropriate given market conditions, and if necessary, HM Treasury will bring forward legislation to amend the threshold.

14.2 This instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Economic Secretary to the Treasury, John Glen MP, has made the following statement:

> "In my view, and in line with the statutory guidance produced by the Department of Business, Energy and Industrial Strategy, the Short Selling (Notification Thresholds) Regulations 2021 do not require a statutory review clause given the low level of impact on business. HM Treasury will continue to consider with the FCA whether the notification threshold remains appropriate given market conditions, and if necessary, will bring forward legislation to amend the threshold."

15. Contact

15.1 Arvin Jeboo at the HM Treasury, email: Arvin.jeboo@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Tom Duggan, Deputy Director for Securities and Markets at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

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