

EXPLANATORY MEMORANDUM TO
THE CAPITAL REQUIREMENTS REGULATION (AMENDMENT) (EU EXIT)
REGULATIONS 2021

2021 No. 558

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's 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 The Regulations are being made to address failures of retained EU law in the Capital Requirements Regulation (Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013) ('the CRR') to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In particular, these Regulations address the deficiencies under paragraphs (a) and (g) of section 8(2) of that Act. These Regulations will ensure that the CRR continues to operate effectively now that the UK has left the EU and before the UK's Investment Firms Prudential Regime (IFPR) is introduced.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The CRR makes provision, through Articles 493 and 498, to exempt investment firms whose main and exclusive business is the provision of investment services or activities in relation to commodity derivatives (i.e. commodities dealers) from specific prudential requirements.
- 2.3 The exemptions in Article 493 and 498 CRR, to own funds requirements and large exposure limits, relieve commodities dealers of three notable obligations: first, to hold regulatory capital equal to at least 8% of total risk exposures; second, to calculate and report exposures to any individual counterparty equal to or greater than 10% of a firm's eligible capital; and third, a prohibition from incurring exposures of more than 25% of eligible capital or EUR 150 million, whichever is higher, to a counterparty or group of counterparties.

Why is it being changed?

- 2.4 These provisions were amended by the EU by way of a corrigendum to the EU's Investment Firm Regulation (the EU's 'IFR'; Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms) on 2 December 2020¹, to align with the planned

¹ Corrigendum to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ 2.12.2020, L 405/79)

introduction of the EU's new regime for Investment Firms on 26 June 2021. The changes form part of retained EU law, but do not now operate effectively in the UK.

- 2.5 Following the recent corrigendum, the CRR now makes provision for these exemptions to apply until 26 June 2021. This is the date when the EU's IFR will apply, and it ensures that EU commodities dealers are not required to comply with the provisions of the CRR in the above paragraph before the IFR applies to them. But the UK's equivalent regime for investment firms and commodities dealers – the IFPR – will not be introduced until 1 January 2022. Both the EU's IFR and the UK's IFPR introduce a more proportionate capital requirements regime for some investment firms including commodities dealers and is less onerous than the CRR. Without amendment, Articles 493 and 498 of the CRR will require UK commodities dealers to comply with the prudential requirements of the CRR set out above between 26 June and 31 December 2021. They would then need to comply with a different prudential regime, the IFPR, from 1 January 2022. Such a development would amount to a significant regulatory burden for these firms.
- 2.6 HMT therefore considers that retained EU law does not operate effectively in the UK in this instance, and it is therefore appropriate to extend the expiry date for CRR exemptions for UK commodities dealers to dovetail with the introduction of the UK's IFPR regime.

What will it now do?

- 2.7 These Regulations amend retained EU law and regulations made under section 8 European Union (Withdrawal) Act 2018, and they will ensure that the CRR continues to operate effectively now that the UK has left the EU and before the UK's Investment Firms Prudential Regime (IFPR) is introduced.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was laid for sifting by the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee under Schedule 7 to the European Union (Withdrawal) Act 2018 (c.16). It was considered on 15 April 2021 by the Secondary Legislation Scrutiny Committee and on 20 April 2021 by the European Statutory Instruments Committee. No recommendation to upgrade to the affirmative procedure was made.

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 to the whole United Kingdom.
- 4.2 The territorial application of this instrument is to the whole 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 Prior to the planned introduction date of the EU's IFR on 26 June 2021, the CRR remains a core part of the EU's prudential regulation regime for banks, building societies and investment firms. The EU's prudential policy regime consists of the CRR (Regulation 2013/575/EU) and the Capital Requirements Directive IV (Directive 2013/36/EU), together with a range of Binding Technical Standards. These were amended by CRR II (Regulation 2019/876/EU) and Capital Requirements Directive V (Directive 2019/878/EU).
- 6.2 The CRR directly applied in the UK as a Member State from 2013 while the CRDIV and CRDV were implemented by UK legislation, predominantly through the Capital Requirements (Country-by-Country Reporting) Regulations 2013 (SI 2013/3118), the Capital Requirements (Capital Buffers and, Macro-prudential Measures) Regulations 2014 (SI 2014/894), the Capital Requirements Regulations 2013 (SI 2013/3115), and the Financial Holding Companies (Approval etc.), and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1406), and regulator rules.
- 6.3 A number of instruments amending the CRR have been made using section 8(1) of the European Union (Withdrawal) Act 2018 to correct deficiencies as a result of the withdrawal of the UK from the EU. These include the Capital Requirements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1401) and Capital Requirements (Amendment) (EU Exit) Regulations 2019 (SI 2019/1232).
- 6.4 This instrument uses section 8(1) of European Union (Withdrawal) Act 2018 to revoke previous EU Exit amendments to Articles 493 and 498 in SI 2018/1401, referenced above. Those amendments are no longer appropriate, as a result of the latest amendments made to those Articles by way of EU Corrigendum of 2 December 2020, which were made before Implementation Period Completion Day (IPCD). Specifically, this instrument also uses section 8(1) powers of the European Union (Withdrawal) Act 2018 to make new amendments to those Articles to ensure they operate effectively in the UK context.
- 6.5 The Financial Conduct Authority (FCA) will use its existing rule-making powers under the Financial Services and Markets Act 2000 to implement the IFPR, supplemented by further legislation, currently being considered by Parliament, which removes investment firms prudentially regulated by the FCA from the scope of the CRR, obligates the FCA to have regard to specific considerations as part of its rule-making for investment firms, and which extends their rule-making powers to the holding companies of investment firms. The IFPR will apply to investment firms prudentially regulated by the FCA and their holding companies. The FCA and the Prudential Regulation Authority announced on 16 November 2020 that the IFPR will come into force on 1 January 2022.

7. Policy background

What is being done and why?

- 7.1 Since July 2018, HM Treasury has been using the powers in the European Union (Withdrawal) Act to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios. There have been amendments made to EU law which became operative in the period immediately before IPCD, and which have become retained EU law under the EUWA on IPCD. Further statutory instruments under the EUWA are therefore necessary to deal with these changes to ensure the UK's regulatory regime works in the UK context. The powers to make these amendments are available for two years following IPCD.
- 7.2 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, such as legislation implementing EU Directives. This body of law is referred to as "retained EU law". The EUWA gives ministers a power to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, through statutory instruments. Amendments made using powers in the EUWA are not intended to make policy changes, other than to reflect the UK's new position outside of the EU.
- 7.3 As the content of this instrument is not covered by the UK-EU Trade and Cooperation Agreement reached on 24 December 2020, it is right and necessary that further statutory instruments under the EUWA are used to ensure the UK continues to have a functioning financial services regulatory regime after EU exit. This instrument does not seek to make policy changes, but instead smooth transition for UK commodities dealers until the planned introduction of the IFPR, which will subject these firms to new prudential rules.

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

- 8.1 This instrument is being made using the power 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. 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 There has been no public consultation about this instrument, as it does not seek to make any substantive policy changes.
- 10.2 HMT has discussed this instrument with the Financial Conduct Authority to inform the development of this instrument.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the impact of this SI is small (the cost to businesses is < £5m per year). A de minimis Impact Assessment has been prepared, which shows that by maintaining the legal status quo the effect of this instrument will not have more than a minimal impact on commodities dealers.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses, if they currently fall within the scope of the CRR.

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 Jos Kelly at Her Majesty's Treasury, Jos.Kelly@hmtreasury.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Fayyaz Muneer, Deputy Director for Green and Prudential at Her Majesty's Treasury, can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Glen MP at Her Majesty's 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 14, 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 15, 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. Sifting statements

- 1.1 This instrument was laid for sifting by the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee under Schedule 7 to the European Union (Withdrawal) Act 2018 (c.16). It was considered on 15 April 2021 by the Secondary Legislation Scrutiny Committee and on 20 April 2021 by the European Statutory Instruments Committee. No recommendation to upgrade to the affirmative procedure was made.

2. Appropriateness statement

- 2.1 The Economic Secretary to HM Treasury, John Glen MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view The Capital Requirements Regulation (Amendment) (EU Exit) Regulations 2021 does no more than is appropriate.”

- 2.2 This is the case because of the reasons set out in 2.5, 2.6, 6.3 and 6.4.

3. Good reasons

- 3.1 The Economic Secretary to HM Treasury, John Glen MP 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.”

- 3.2 These are for the reasons set out in 2.5, 2.6, 6.4, 7.1 and 7.3.

4. Equalities

- 4.1 The Economic Secretary to HM Treasury, John Glen MP has made the following statement(s):

“The draft 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.”

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.