

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (COLLECTIVE
INVESTMENT SCHEMES) (AMENDMENT) ORDER 2021

2021 No. 566

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 Paragraph 6A of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001¹ (the CIS Order) provides that regulated peer to peer lending platforms do not amount to a collective investment scheme and so are exempt from being authorised by the Financial Conduct Authority (“the FCA”) for this particular activity. This is referred to as “the CIS exemption”. The purpose of this instrument is to clarify that a firm that takes over lending agreements operated via a peer to peer lending platform – specifically because the original firm is being wound up - also benefits from the CIS exemption.

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 United Kingdom.
4.2 The territorial application of this instrument is the whole of 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 Part XVII of the Financial Services and Markets Act 2000 (FSMA) sets out the statutory framework for collective investment schemes. The CIS Order made under section 235(5) of FSMA prescribes particular arrangements which do not amount to a collective investment scheme. In particular, paragraph 6A of the Schedule to the CIS

¹ S.I. 2001/1062

Order provides that certain arrangements do not amount to a collective investment scheme. These are arrangements concerning the operation of an electronic system which enables the operator (a firm) to facilitate persons becoming a lender and borrower under an agreement that is subject to certain conditions. This type of activity is specified in article 36H of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001². The electronic systems which enable lending are commonly referred to as peer to peer lending platforms. In practice, this means that a firm operating a peer to peer lending platform, and which is regulated by the FCA to carry out this type of activity does not need to be regulated by the FCA as an operator of a collective investment scheme.

- 6.2 The instrument substitutes a new paragraph 6A. The purpose of the new paragraph is to clarify that arrangements with the purpose of continuing the provision of services to a lender and borrower in relation to certain agreements - specifically because the arrangements of the original firm are being wound up - also do not amount to collective investment scheme. In essence, new sub-paragraph (6) clarifies that where a firm is being wound up and its lending agreements are transferred to another firm, that other firm will also benefit from the CIS exemption. Similarly, where the lending agreements are transferred to a number of firms, the CIS exemption will apply to all those firms. In addition, if one or more of those subsequent firms is, itself, subject to winding up proceedings, a further firm to which the lending agreements are transferred will also benefit from the CIS exemption.
- 6.3 The instrument also simplifies the drafting of sub-paragraphs (2) and (4) of paragraph 6A, without changing its effect.

7. Policy background

What is being done and why?

- 7.1 At present, there is a possible lack of clarity concerning the scope of the CIS exemption; specifically whether it applies where a firm is being wound up and its peer to peer lending agreements are transferred to another firm. Therefore, as set out in paragraph 6.1, the Government is amending the instrument that provides the CIS Exemption. The amendment makes clear that a firm operating a peer to peer lending platform, or other service provider, will benefit from the CIS exemption where they take over the loans of a firm whose peer to peer lending operations are being wound up. In particular, the firm or other service provider that takes over the loans does not have to have “originated” the loan (i.e. facilitated the borrower and lender to enter into the loan) in order to benefit from the CIS exemption.
- 7.2 It is the Government’s view that if a firm taking over another firm’s peer to peer loan book needs to hold, or obtain authorisation to operate a collective investment scheme, it is likely that would significantly reduce the number of firms that can or may be willing to carry out this activity. If an effective run-off or transfer of business is not achieved, it becomes more likely that a lender (i.e. those investing via the platforms), using a peer to peer lending platform will not receive some or all of the repayment of the loans they made through the platform. There is also a risk that a disorderly platform failure could result in uncertainty for lenders which could ripple out to other platforms if lenders try to withdraw funds invested elsewhere. In the very worst case, this could possibly lead to further failures.

² S.I. 2001/544

7.3 Given the above and based on discussions with the FCA, the Government has decided that the existing CIS Exemption (described in section 2.1) requires a minor legal clarification in order to help facilitate – should the need arise – any potential failing platform loan books to be taken over. Whilst the industry has not called for such a clarification, the Government believes it is prudent to do so. This is ultimately to reduce the possibility of any potential lender (i.e. those investing via the platforms) harm in the peer to peer lending sector and to further support market stability.

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 2018.

9. Consolidation

9.1 The Treasury does not intend to consolidate the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001

10. Consultation outcome

10.1 Beyond consultation with the FCA, no further consultation was carried out. The scope of the SI is limited to a narrow technical amendment to an existing exemption from regulation by the FCA, which the government considers will not have a significant or adverse impact on businesses.

11. Guidance

11.1 Guidance is not required for 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 A De Minimis Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 This legislation applies to activities that are undertaken by very specific businesses across the UK – i.e., firms wishing to take over the loan books of failing peer to peer platforms whose operations are being wound up. As this amendment seeks only to provide legal clarity in this very specific set of circumstances - it is reasonable to conclude it has no measurable impact on small businesses.

14. Monitoring & review

14.1 In line with the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to the Treasury has confirmed that it would not be proportionate to include a statutory review clause, as the instrument is a narrow technical amendment, which would not have a significant impact on business.

15. Contact

- 15.1 Tukeer Hussain, Policy Adviser for Business Lending, at HM Treasury Telephone: 020 7270 5467 or email: tukeer.hussain@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Raw, Deputy Director for Banking and Credit, 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.