EXPLANATORY MEMORANDUM TO

THE MARKETS IN FINANCIAL INSTRUMENTS (EQUIVALENCE) (UNITED STATES OF AMERICA) (COMMODITY FUTURES TRADING COMMISSION) REGULATIONS 2024

2024 No. 638

1. Introduction

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

2. Declaration

2.1 Bim Afolami MP, Economic Secretary to the Treasury at HM Treasury, confirms that this Explanatory Memorandum meets the required standard.

2.2 Tom Duggan, Deputy Director of Securities and Markets at HM Treasury, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Roisin Gadd at HM Treasury (email: roisin.gadd@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument will revoke an existing equivalence decision, under Article 28(4) of the UK Markets in Financial Instruments Regulation (UK MiFIR), for the United States of America (USA)'s Commodity Futures Trading Commission (CFTC) and re-enact the decision with an updated annex. The annex of the equivalence decision provides a list of the designated contract markets (DCMs) and swap execution facilities (SEFs) in the USA that are authorised by the CFTC and are therefore able to fulfil the Derivatives Trading Obligation (DTO) for the UK.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The Derivatives Trading Obligation (DTO), set out in Article 28(4) of the Markets in Financial Instruments Regulation (Regulation EU 600/2014 as assimilated into UK law), requires financial counterparties, and some non-financial counterparties above a clearing threshold, to conclude transactions of certain, specified classes of derivative,

only on specified UK trading venues or specified trading venues in an overseas jurisdiction that have been deemed equivalent through a HMT determination.

5.2 The trading venues on which such transactions may be concluded are limited to regulated markets, multilateral trading facilities (MTFs), organised trading facilities (OTFs), and specified trading venues located in an equivalent overseas jurisdiction.

5.3 The DTO aims to increase transparency of derivatives trading and market integrity, by improving information on prices and liquidity in the derivatives markets.

5.4 The European Union in December 2017 granted equivalence to USA CFTC trading venues under Article 28(4) of MiFIR on the basis that the CFTC's regulation and supervision of authorised DCMs and SEFs is equivalent to the requirements in MiFIR. This decision was assimilated into UK law pursuant to section 3(1) of the European Union (Withdrawal) Act 2018.

5.5 The equivalence decision for the CFTC establishes that the legal and supervisory arrangements and regulation of DCMs and SEFs established in the USA and authorised by the CFTC are subject to legally binding requirements which are equivalent to the requirements for UK trading venues and verifies that DCMs and SEFs are subject to effective supervision and enforcement by the CFTC.

5.6 Having the CFTC's regime approved as an equivalent overseas jurisdiction for these purposes ensures that UK counterparties can continue to fulfil their DTO obligations, when they trade derivatives instruments on DCMs and SEFs in the USA that are authorised by the CFTC.

5.7 The UK considers that the CFTC's regime for regulating and supervising the trading venues it authorises is still equivalent to the requirements of UK MiFIR, on an outcomes basis.

5.8 The original MiFIR 28(4) equivalence decision retained in UK law applied to the CFTC's regulatory and supervisory oversight of their authorised DCMs and SEFs. The Annex of the decision lists only the specific trading venues to which the equivalence decision applies. Even if further trading venues obtain CFTC authorisation, they will not benefit from the decision until they are listed in the annex to the decision.

5.9 HM Treasury remains of the view that the CFTC regime is equivalent on an outcomes basis, and is therefore comfortable extending the scope of its equivalence decision to all current CFTC-authorised markets. There is, therefore, a policy rationale to ensure that the list of trading venues remains up-to-date and includes all CFTC authorised trading venues that have subsequently changed names or received authorisation.

What was the previous policy, how is this different?

5.10 Since the original EU equivalence decision, assimilated by the UK, several additional DCMs and SEFs established in the USA obtained authorisation from the CFTC to operate as regulated markets or amended their names. The original decision therefore needs to be revoked and re-enacted with an updated annex to reflect these changes in order to maintain the original intention of the equivalence decision.

6. Legislative and Legal Context

How has the law changed?

6.1 In December 2017, the EU granted jurisdictional equivalence to USA trading venues authorised by the CFTC under Article 28(4) of MiFIR by means of Commission

implementing decision 2017/2238. The EU equivalence decision (including the list of recognised trading venues set out in the annex of the decision) was automatically on-shored by the UK as part of EU exit, becoming part of assimilated EU law. Since the UK onshored the EU's DTO equivalence decision for the USA, certain venues have requested to be added to the Annex as equivalent or changed their names. The original EU decision therefore needs to be revoked and re-enacted with an updated annex to reflect these changes.

Why was this approach taken to change the law?

6.2 This is the only available approach to make the necessary changes to the annex of SEFs and DCMs and ensure the UK equivalence decision is applicable to an up-to-date list of venues.

7. Consultation

Summary of consultation outcome and methodology

7.1 HM Treasury has not undertaken a consultation on this instrument.

8. Applicable Guidance

8.1 Guidance is not required in relation to this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 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 SI will result in an Equivalent Annual Net Direct Cost to businesses of less than £5 million a year. Due to this limited impact, a de minimis impact assessment has been carried out. A copy of this assessment is published alongside this Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

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

9.2 The legislation does not impact small or micro businesses.

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

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 HM Treasury, the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority have a Memorandum of Understanding in place that states that HM Treasury may review the equivalence determination periodically or at any time, or in response to changes to the applicable framework. This does not prejudice HM Treasury's ability to revoke the equivalence determination at any time.

10.2 Each regulator may also recommend to HM Treasury that a review of the equivalence determination is undertaken in response to material changes in the applicable framework. Furthermore, each regulator may request a review of the equivalence determination if they have concerns arising from their statutory objectives.

10.3 The 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 HM Treasury (Bim Afolami) has made the following statement:

"It is not proportionate to include a review clause in this instrument because the estimated annual net direct cost to business is less than £5 million and the instrument does not apply to activities that are undertaken by small businesses."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to the withdrawal of the United Kingdom from the European Union because the original MiFIR 28(4) equivalence decision for the USA CFTC was made when the UK was a member of the EU, and it was assimilated into UK law, following the end of the Transition Period.