Rt Hon Nicky Morgan MP, Chair of the Treasury Select Committee
House of Commons
London
SW1A 0AA

Dear Nicky,

18th
April 2018

Financial Services EU Exit – publication of a draft statutory instrument covering the responsibilities of UK regulators

As you know, the European Union (Withdrawal) Bill will incorporate directly applicable EU law into UK law, save relevant domestic legislation as we leave the EU, and provide Ministers with powers to ‘fix deficiencies’ in that law using secondary legislation. In Financial Services, a significant part of the regulatory and supervisory framework is within EU law and we propose to domesticate this framework in a way that aligns with the UK’s existing framework, as approved by Parliament in successive pieces of legislation.

An important element of this approach is the allocation of responsibility to UK authorities for ‘onshored’ financial services regulation. EU ‘Level 1’ legislation and ‘Level 2’ Delegated Acts, which have been developed by the Commission and negotiated through the European Council and European Parliament, would be treated as framework legislation and would become the responsibility of the UK Parliament. This level of EU regulation sets the policy direction for financial services so it is appropriate that responsibility for deciding how deficiencies are fixed in this legislation should rest with Parliament. The Treasury will propose amendments to this legislation, using powers to make secondary legislation under the EU (Withdrawal) Bill, ensuring that Parliament is asked to approve the changes that are needed to ensure this legislation operates effectively after exit. It is expected that the vast majority of the statutory instruments needed to correct deficiencies in this legislation will be laid under the affirmative procedure.

Underneath EU Level 1 legislation is a large body of EU technical rules, or Binding Technical Standards (BTS). The Treasury proposes to allocate responsibility for these rules to UK regulators, with that responsibility to be exercised in the same way that UK regulators are already responsible for domestic technical rules. Today the Treasury is publishing a draft statutory instrument which we plan to make under the EU (Withdrawal) Bill and lay before Parliament using the affirmative procedure. The instrument sets out the basis on
which Parliament will be asked to approve this allocation of responsibility to UK regulators. A copy of the draft instrument is attached.

In summary, the instrument will:

- Allow UK financial regulators to use the deficiency fixing power in the EU (Withdrawal) Bill to correct deficiencies in onshored Binding Technical Standards (BTS), and in UK technical rules that currently implement EU law. The regulators will be given the task of ensuring that deficiencies in these rules are corrected to be consistent with the fixes that Parliament will be asked to approve in Level 1 legislation.

- After exit from the EU, UK regulators will be given the responsibility for maintaining BTS on the same basis as they currently exercise their function for making domestic rules, following established requirements approved by Parliament in the Financial Services and Markets Act 2000 (FSMA).

- Specify all of the BTS that will ‘onshored’ and which UK regulator will become responsible for each of them. Where UK regulators will have joint responsibility for BTS, there will be a procedure that must be followed to ensure that both regulators are appropriately involved when amendments need to be made.

Published alongside the draft statutory instrument is an explanatory note which gives a more detailed explanation of the instrument’s provisions. A copy of this note is attached.

While this instrument is a working draft, and the drafting approach may need to change before the final version is laid later this year, I want to set out the detail of our approach as early as possible and seek the views of Parliament. I hope you and members of the Treasury Select Committee find this useful. I know that my predecessor had a very helpful meeting with you to discuss this issue in December and I would be very happy to meet with you to discuss further.

with very best regards

John P. Glen

 JOHN GLEN
Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018

Made - - - - ***

Coming into force in accordance with regulation 1

The Treasury, in exercise of the powers conferred by section 7 of the European Union (Withdrawal) Act 2018, makes the following Regulations:

A draft of these Regulations has been approved by a resolution of each House of Parliament in accordance with paragraph 1 of Schedule 7 to the European Union (Withdrawal) Act 2018.

PART 1

Citation and commencement

1.—(1) These Regulations may be cited as the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.

(2) These Regulations come into force on the day after the day on which they are made.

PART 2

EU Exit Instruments

Interpretation

2. For the purpose of this Part—

(a) the “appropriate regulator” in relation to—

(i) the EU Regulations specified in Part 1 of the Schedule, is the FCA;
(ii) the EU Regulations specified in Part 2 of the Schedule, is the PRA;
(iii) the EU Regulations specified in Part 3 of the Schedule, is the Bank of England;
(iv) the EU Regulations specified in Part 4 of the Schedule, is both the FCA and the PRA;
(v) the EU Regulations specified in Part 5 of the Schedule, is both the FCA and the Bank of England;
(vi) the EU Regulation specified in Part 6 of the Schedule, is the Payment Systems Regulator;
(vii) EU-derived provisions, means whichever of the FCA, the PRA or the Bank of England made the provisions,
and for the purposes of this sub-paragraph, reference to EU Regulations includes a reference to part of an EU Regulation;
(b) “central counterparty” has the meaning given in section 313 of the Financial Services and Markets Act 2000;
(c) “the EMIR regulation” means Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories;
(d) “EU-derived provisions” means rules and other enactments made by the FCA, the PRA or the Bank of England which fall within the definition of “EU-derived domestic legislation” within the meaning of section 2(2) of the European Union (Withdrawal) Act 2018;
(e) “EU Exit instrument” means an instrument in writing made in accordance with regulation 3(1);
(f) “FCA” means the Financial Conduct Authority;
(g) “PRA” means the Prudential Regulation Authority;
(h) “Payment Systems Regulator” means the body established under section 40 of the Financial Services (Banking Reform) Act 2013;
(i) “regulators” mean the FCA, the PRA, the Bank of England and the Payment Systems Regulator;
(j) “specified EU Regulations” mean the EU Regulations or parts of EU Regulations forming part of retained EU law which are specified in the Schedule;
(k) a person is connected with another person in the circumstances set out in section 165(11) of the Financial Services and Markets Act 2000.

Delegation

3.—(1) The appropriate regulator (and, in the case of an EU Regulation specified in Part 4 or 5 of the Schedule, either appropriate regulator) may by an instrument in writing make such provision as the regulator considers appropriate to prevent, remedy or mitigate—

(a) any failure of the specified EU Regulations or of EU-derived provisions to operate effectively, or

(b) any other deficiency in the specified EU Regulations or EU-derived provisions, arising from the withdrawal of the United Kingdom from the EU.

(2) Where the PRA and the FCA, or the FCA and the Bank of England are the appropriate regulator in relation to an EU Regulation neither may make an EU Exit instrument which amends that EU Regulation unless—

(a) the other regulator has been consulted on the proposal to divide the EU Regulation into two parts in accordance with regulation 4(6); or

(a) 2013 c.33.
(b) if the EU Regulation is not being divided, the other regulator consents to any amendments being made.

(3) Section 7(2), (3)(a), (4), (6)(a)(ii), (7), (8) and (9) of, and paragraph 16 of Schedule 7 to, the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and any regulations made under section 7(3)(b) apply to the power in paragraph (1) as if—

(a) references to the retained EU law were references to the specified EU Regulations or to EU-derived provisions;

(b) references to the Minister were references to the appropriate regulator;

(c) references to regulations under the 2018 Act were references to EU Exit instruments made under this regulation.

(4) An EU Exit instrument may not—

(a) make provision falling within section 7(6)(a) or (b) of the 2018 Act;

(b) confer any power to legislate by means of orders, rules, regulations or any other subordinate instrument;

(c) amend any legislation other than the specified EU Regulations or EU-derived provisions.

Division of responsibilities

4.—(1) This regulation applies if—

(a) either condition A, B or C is satisfied; and

(b) condition D is satisfied.

(2) Condition A is that the PRA proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 4 of the Schedule, and the PRA—

(a) proposes, in modifying the EU Regulation, to make separate provision for PRA-authorised persons (within the meaning of section 2B(5) of the Financial Services and Markets Act 2000), persons connected to them, or a specified category of such persons, or

(b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(3) Condition B is that the Bank of England proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 5 of the Schedule, and the Bank of England—

(a) proposes, in modifying the EU Regulation, to make separate provision for—

(i) central counterparties; or

(ii) financial counterparties or non-financial counterparties within the meaning of the EMIR regulation, or

(b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(4) Condition C is that the FCA proposes to exercise the power in regulation 3 to modify an EU Regulation specified in Part 4 or Part 5 of the Schedule, and the FCA—

(a) proposes, in modifying the EU Regulation, to make separate provision for persons regulated solely by the FCA or persons connected to them or a specified category of such persons, or

(b) considers that the EU Regulation may need to be modified to make such provision in future (whether under the power in regulation 3 or otherwise).

(5) Condition D is that the initiating regulator considers that the separate provision referred to in paragraphs (2), (3) or (4) (as the case may be) can most appropriately be made using the procedure set out in paragraph (6).

(6) The initiating regulator must, if using the procedure set out in this paragraph, when making the proposed EU Exit instrument—

(a) amend the EU Regulation to divide it into two Parts by—
(i) re-numbering the existing text as the first Part with the title of the EU Regulation followed by “(FCA)” as its heading; and

(ii) inserting a second Part which repeats the text of the first Part and which has as its heading the title of the EU Regulation followed by—

(aa) “(PRA)”, where the EU Regulation is in Part 4 of the Schedule, or

(bb) “(Bank of England)”, where the EU Regulation is in Part 5 of the Schedule; and

(b) make the modifications referred to in the opening words of conditions A, B or C (as the case may be) to the first Part of the EU Regulation (where the initiating regulator is the FCA) or to the second Part of the EU Regulation (where the initiating regulator is the PRA or the Bank of England).

(7) In this regulation, “the initiating regulator”—

(a) where this regulation applies as a result of conditions A and D being satisfied, means the PRA;

(b) where this regulation applies as a result of conditions B and D being satisfied, means the Bank of England;

(c) where this regulation applies as a result of conditions C and D being satisfied, means the FCA.

(8) Where an EU Regulation has been amended by an EU Exit Instrument pursuant to paragraph (6)—

(a) the first Part of the EU Regulation is to be treated as falling within Part 1 of the Schedule; and

(b) the second Part of the EU Regulation is to be treated as falling within—

(i) Part 2 of the Schedule, where the EU Regulation originally fell within Part 4 of the Schedule; or

(ii) Part 3 of the Schedule, where the EU Regulation originally fell within Part 5 of the Schedule;

(c) neither the first Part nor the second Part of the EU Regulation may be modified by any regulator (under the power in regulation 3 or otherwise) which is not the appropriate regulator for that Part.

Procedure

5. (1) Before a regulator makes any EU Exit instrument—

(a) which applies to PRA-authorised persons or persons connected to them, or which may affect the exercise of the PRA’s functions under the Financial Services and Markets Act 2000 (“the Act”), the regulator must consult the PRA;

(b) which applies to other authorised persons, persons connected with them, recognised investment exchanges within the meaning of section 285 of the Act, or any other person which the FCA is responsible for regulating under the Act or under retained EU law, or which may affect the exercise of the FCA’s functions under the Act, the regulator must consult the FCA;

(c) which—

(i) applies to a central counterparty, to a financial counterparty or a non-financial counterparty within the meaning of the EMIR regulation or to a central securities depository within the meaning of section 417 of the Act; or

(ii) may affect the exercise of the Bank’s functions under the Act, the Banking Act 2009, or retained EU law,

the regulator must consult the Bank of England.

(2) An EU Exit instrument may only be made if it has been approved by the Treasury.
(3) The Treasury may only approve an EU Exit Instrument if the Treasury considers that the EU Exit instrument makes appropriate provision to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law,
arising from the withdrawal of the United Kingdom from the EU.

(4) An EU Exit instrument must be provided to the Treasury as soon as it has been made.

(5) An EU Exit instrument must be published by the regulator which made it in the way appearing to that regulator to be best calculated to bring it to the attention of the public.

PART 3
STANDARDS INSTRUMENTS


6. In Schedule 6A to the Bank of England Act 1998, in paragraph 17(9)—

(a) after paragraph (f), insert—

“(fa) making technical standards in accordance with Chapter 2A of Part 9A of that Act;”

(b) after paragraph (g), insert—

“(h) making EU exit instruments under the Financial Regulators Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.”.

Amendment of the Financial Services and Markets Act 2000

7.—(1) The Financial Services and Markets Act 2000 is amended as follows.

(2) In section 1A(6)—

(a) at the end of paragraph (ca), omit “or”;

(b) at the end of paragraph (d), insert—

“or

e regulations made by the Treasury under section 7 of the European Union (Withdrawal) Act 2018.”.

(3) In section 1B(6), at the end of sub-paragraph (a), insert—

“(aa) its function of making EU Exit instruments under regulations made by the Treasury under section 7 of the European Union (Withdrawal) Act 2018;

(ab) its function of making technical standards under retained EU law;”.

(4) In section 2AB, in subsection (3)—

(a) at the end of paragraph (c), omit “or”;

(b) at the end of paragraph (d), insert—

“or

e regulations made by the Treasury under section 7 of the European Union (Withdrawal) Act 2018.”

(5) In section 2J(1), at the end of sub-paragraph (a), insert—

“(aa) its function of making EU Exit instruments under regulations made by the Treasury under section 7 of the European Union (Withdrawal) Act 2018;

(ab) its function of making technical standards under retained EU law;”.

(6) In section 137A (the FCA’s general rules), after subsection (5), insert—
“(6) The FCA’s general rules may not modify, amend or revoke any retained direct EU legislation (except retained direct EU legislation which takes the form of FCA rules).”

(7) In section 137G (the PRA’s general rules), after subsection (5), insert—

“(6) The PRA’s general rules may not modify, amend or revoke any retained direct EU legislation (except retained direct EU legislation which takes the form of PRA rules).”

(8) After section 138O, insert—

“CHAPTER 2A
TECHNICAL STANDARDS

Technical standards

138P.—(1) This Chapter applies where a power for the FCA, the PRA, the Bank of England, or any combination of them to make technical standards is substituted for the power of an EU entity to make EU tertiary legislation (within the meaning of section 14(1) of the European Union (Withdrawal) Act 2018) (“the original EU power”) by regulations made under section 7 of that Act.

(2) The power to make technical standards includes power to modify, amend or revoke—

(a) any technical standards made by the regulator under that power;

(b) any EU tertiary legislation made by an EU entity under the original EU power which forms part of retained EU law.

(3) Where power to make a technical standard for the same purposes (as set out in the provision creating the power) and applying to the same persons or class of persons has been given to more than one regulator, no regulator may exercise the power without the consent of the other regulator or regulators.

(4) Before a regulator makes a technical standard in which another regulator has an interest, it must consult the other regulator.

(5) For the purposes of subsection (4)—

(a) the PRA has an interest in a technical standard which—

(i) applies to PRA-authorised persons or other persons connected to them, or

(ii) may affect the exercise of the PRA’s functions under this Act or under retained EU law;

(b) the FCA has an interest in all technical standards which a regulator or the Payment Systems Regulator has power to amend;

(c) the Bank of England has an interest in technical standards which—

(i) apply to central counterparties, to financial counterparties or non-financial counterparties within the meaning of the EMIR regulation or to central securities depositories, or

(ii) may affect the exercise of the Bank’s functions under this Act, the Banking Act 2009 or retained EU law.

(6) For the purposes of this Chapter—

(a) “regulator” means the FCA, the PRA or the Bank of England;

(b) a person is connected with another person in the circumstances set out in section 165(11).

Standards instruments

138Q.—(1) The power to make technical standards is to be exercised by the regulator by making an instrument under this section (a “standards instrument”).

(2) A standards instrument must specify the provision under which the instrument is being made.
(3) To the extent that a standards instrument does not comply with subsection (2), it is void.

(4) A standards instrument must be published by the regulator making the instrument in the way appearing to the regulator to be best calculated to bring it to the attention of the public.

(5) The Treasury must lay before Parliament a copy of each standards instrument made under this section.

(6) The regulator making the instrument may charge a reasonable fee for providing a person with a copy of a standards instrument.

Treasury approval

138R.—(1) A standards instrument may be made only if it has been approved by the Treasury.

(2) The Treasury may refuse to approve a standards instrument if subsection (3) or (5) applies.

(3) This subsection applies if it appears to the Treasury that the instrument would—

(a) have implications for public funds (within the meaning of section 78(2) of the Banking Act 2009); or

(b) prejudice any current or proposed negotiations for an international agreement between the United Kingdom and one or more other countries, international organisations or institutions.

(4) For the purposes of subsection (3), “international organisations” includes the European Union.

(5) This subsection applies if it appears to the Treasury that they may direct the regulator not to make the standards instrument under section 410 (international obligations).

(6) The Treasury must notify the regulator in writing whether or not they approve a standards instrument within four weeks after the day on which that instrument is submitted to the Treasury for approval (“the relevant period”).

(7) Provision of a draft standards instrument to the Treasury for consultation does not amount to submission of the instrument for approval.

(8) If the Treasury do not approve the instrument, they must—

(a) set out in the notice given under subsection (6) the Treasury’s reasons for not approving the instrument;

(b) lay before Parliament—

(i) a copy of that notice;

(ii) a copy of any statement made by the regulator as to its reasons for wishing to make the instrument.

(9) If the Treasury do not give notice under subsection (6) before the end of the relevant period, the Treasury is deemed to have approved the standards instrument.

Application of Part 9A

138S.—(1) The sections listed in subsection (2) apply, subject to the modifications specified in that subsection, to—

(a) technical standards made by the FCA or the PRA as they apply to rules made by the FCA or the PRA;

(b) technical standards made by the Bank of England, as they apply to rules made by the Bank under this Act in accordance with paragraph 10(1), (3) and (4) of Schedule 17A to this Act.

(2) The sections referred to in subsection (1) are—
(a) section 137T (general supplementary powers), as if the reference in paragraph (a) to authorised persons were a reference to persons;
(b) section 138C (evidential provisions);
(c) section 138E (limit on effect of contravening rules);
(d) section 138F (notification of rules);
(e) section 138H (verification of rules), treating the reference in subsection (2)(c) to section 138G(4) of the Act as a reference to section 138Q(4);
(f) section 138I (consultation by the FCA), as if—
   (i) subsection (1)(a) were omitted, and
   (ii) references to making rules were references to submitting a standards instrument to the Treasury for approval;
(g) section 138J (consultation by the PRA), as if—
   (i) subsection (1)(a) were omitted, and
   (ii) references to making rules were references to submitting a standards instrument to the Treasury for approval;
(h) section 138K (consultation: mutual societies);
(i) section 138L (consultation: general exemptions), as if references to making rules were references to submitting a standards instrument to the Treasury for approval.

(9) In Schedule 1ZA—
   (a) in paragraph 8(3), after paragraph (e), insert—
       “(f) making technical standards in accordance with Chapter 2A of Part 9A;
       (g) making EU Exit instruments under the Financial Regulators Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018];”;

   (b) in paragraph 23(2)(a), after “(ca)” insert “and (e)”.

(10) In Schedule 1ZB, in paragraph 31(2)(a), for “other Acts” substitute “other enactments”.

(11) In Schedule 17A—
   (a) in paragraph 10, after sub-paragraph (4), insert—
       “(5) Rules made by the Bank under any provision made by or under this Act may not modify, amend or revoke any retained direct EU legislation (except retained direct EU legislation which takes the form of rules made by the Bank).”;

   (b) in paragraph 36—
       (i) at the end of sub-paragraph (2)(b), omit “and”;
       (ii) after sub-paragraph (b), insert—
           “(ba) its functions under or as a result of regulations made under section 7 of the European Union (Withdrawal) Act 2018; and”;

Amendment of the Banking Act 2009

8. In section 244 (Immunity) of the Banking Act 2009, in subsection (2)(c), after “Markets Act 2000” insert “; of its functions under or as a result of regulations made under section 7 of the European Union (Withdrawal) Act 2018”.

Amendment of the Financial Services Act 2012

9. In section 85 of the Financial Services Act 2012—
   (a) in subsection (4), after paragraph (f), insert—
       “(g) making technical standards in accordance with Chapter 2A of Part 9A of FSMA 2000;
(h) making EU exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.”;

(b) in subsection (5), after paragraph (e), insert—

“(f) making technical standards in accordance with Chapter 2A of Part 9A of FSMA 2000;

(g) making EU exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.”.

Amendment of the Financial Services (Banking Reform) Act 2013

10.—(1) In section 39 (overview) of the Financial Services (Banking Reform) Act 2013 (“the Act”), in subsection (10), for “96 and 97” substitute “96 to 97D”.

(2) After section 97 (Reports) of the Act, insert—

“Technical Standards

97A.—(1) This section, section 97B, section 97C and section 97D apply where a power for the Payment Systems Regulator to make technical standards is substituted for the power of an EU entity to make EU tertiary legislation (the “original EU power”) by regulations made under section 7 of the European Union (Withdrawal) Act 2018.

(2) A power to make technical standards includes power to modify, amend or revoke—

(a) any technical standards made by the Payment Systems Regulator under that power;

(b) any EU tertiary legislation made by an EU entity under the original EU power which forms part of retained EU law.

(3) Before making any technical standards in which the FCA, the PRA or the Bank of England has an interest (within the meaning of section 138P(5) of the Financial Services and Markets Act 2000), the Payment Systems Regulator must consult the regulator concerned.

Standards instruments

97B.—(1) The power to make technical standards is to be exercised by the Payment Systems Regulator by making an instrument under this section (a “standards instrument”).

(2) A standards instrument must specify the provision under which the instrument is being made.

(3) To the extent that a standards instrument does not comply with subsection (2), it is void.

(4) A standards instrument must be published by the Payment Systems Regulator in the way appearing to the regulator to be best calculated to bring it to the attention of the public.

(5) The Treasury must lay before Parliament a copy of each standards instrument made under this section.

(6) The Payment Systems Regulator may charge a reasonable fee for providing a person with a copy of a standards instrument.

Treasury approval

97C.—(1) A standards instrument may be made only if it has been approved by the Treasury.

(2) The Treasury may refuse to approve a standards instrument if subsection (3) applies.

(3) This subsection applies if it appears to the Treasury that the instrument would—
have implications for public funds (within the meaning of section 78(2) of the Banking Act 2009); or
(b) prejudice any current or proposed negotiations for an international agreement between the United Kingdom and one or more other countries, international organisations or institutions.

For the purposes of subsection (3), “international organisations” includes the European Union.

The Treasury must notify the Payment Systems Regulator in writing whether or not they approve a standards instrument within four weeks after the day on which that instrument is submitted to the Treasury for approval (“the relevant period”).

Provision of a draft standards instrument to the Treasury for consultation does not amount to submission of the instrument for approval.

If the Treasury do not approve the instrument, they must—
(a) set out in the notice given under subsection (5) the Treasury’s reasons for not approving the instrument;
(b) lay before Parliament—
(i) a copy of that notice;
(ii) a copy of any statement made by the Payment Systems Regulator as to its reasons for wishing to make the instrument.

If the Treasury do not give notice under subsection (5) before the end of the relevant period, the Treasury is deemed to have approved the standards instrument.

Application of section 104 of this Act and Part 9A of the Financial Services and Markets Act 2000

Section 104 (consultation in relation to generally applicable requirements) applies to making technical standards as it applies to imposing a generally applicable requirement within the meaning of section 104(1).

The provisions of the Financial Services and Markets Act 2000 listed in subsection (3) apply to technical standards made by the Payment Systems Regulator as they apply to rules made by the FCA subject to the modifications specified in subsection (3).

The provisions referred to in subsection (2) are—
(a) section 137T (general supplementary powers) (ignoring paragraph (b));
(b) section 138E (limit on effect of contravening rules) (ignoring subsection (3));
(c) section 138F (notification of rules) (ignoring subsection (2));
(d) section 138H (verification of rules) (treating the reference in subsection (2)(c) to section 138G(4) of the Act as a reference to section 97B(4)).”

In Schedule 4, in paragraph 5(3), after paragraph (b), insert—
“(c) making technical standards under section 97A; and
(d) making EU Exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.”

Amendments of the Payment Card Interchange Fee Regulations 2015

The Payment Card Interchange Fee Regulations 2015(a) are amended as follows.

In regulation 3—

(a) S.I. 2015/1911.
(a) in paragraph (2), at the end insert “any Regulation made under them which forms part of retained EU law, or by a technical standard made under section 97A of the 2013 Act”;

(b) in paragraph (5)—

(i) at the end of sub-paragraph (a), omit “and”;
(ii) at the end of sub-paragraph (b), insert—

“(c) the function of making technical standards under section 97A of the 2013 Act; and
(d) the function of making EU Exit instruments under the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018.”

Name
Name

Date

Two of the Lords Commissioners of Her Majesty’s Treasury

SCHEDULE

PART 1

EU Regulations for which the FCA is the appropriate regulator

1. The Financial Conduct Authority is the appropriate regulator for the EU Regulations specified in paragraphs 2 to 77.

   Alternative Investment Funds Managers Directive


   Credit rating agencies regulation


European Markets Infrastructure Regulation


European Social Entrepreneurship Fund Regulation


European Venture Capital Funds Regulation


Insurance Distribution Directive


Market Abuse Regulation


regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications.

19. [Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions.]

20. Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.


25. [Commission Implementing Regulation (EU) 2017/1158 of 29 June 2017 laying down implementing technical standards with regards to the procedures and forms for competent authorities exchanging information with the European Securities Market Authority].

Markets in financial instruments directive


with regard to regulatory technical standards for the determination of a material market in terms of liquidity in relation to notifications of a temporary halt in trading.


46. Commission Implementing Regulation (EU) 2017/988 of 6 June 2017 laying down implementing technical standards with regard to cooperation arrangements in respect of a trading venue whose operations are of substantial importance in a host Member State.


49. Commission Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators.


Markets in financial instruments regulation


Mortgage Credit Directive

Packaged Retail and Insurance-Based Investment Products

67. Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents.

Prospectus Directive


Short Selling Regulation

70. Commission Delegated Regulation (EU) 826/2012 of 29 June 2012 supplementing Regulation (EU) 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the European Securities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted shares.

71. Commission Implementing Regulation (EU) 827/2012 of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps.


Transparency Directive


Undertakings for Collective Investment in Transferable Securities


**PART 2**

EU Regulations for which the Prudential Regulation Authority is the appropriate regulator

78. The Prudential Regulation Authority is the appropriate regulator for the EU Regulations specified in paragraphs [79] to [101].

**Capital Requirements Directive**


**Capital Requirements Regulation**

81. Commission Implementing Regulation (EU) 2014/1030 of 29 September 2014 laying down implementing technical standards with regard to the uniform formats and date for the disclosure of the values used to identify global systemically important institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council.

**Central Securities Depositories Regulation**


**Institutions for Occupational Pension Provision Directive**


**Solvency II**


85. Commission Implementing Regulation (EU) 2015/461 of 19 March 2015 laying down implementing technical standards with regard to the process to reach a joint decision on the

86. Commission Implementing Regulation (EU) 2015/462 of 19 March 2015 laying down implementing technical standards with regard to the procedures for supervisory approval to establish special purpose vehicles, for the cooperation and exchange of information between supervisory authorities regarding special purpose vehicles as well as to set out formats and templates for information to be reported by special purpose vehicles in accordance with Directive 2009/138/EC of the European Parliament and of the Council.


PART 3

EU Regulations for which the Bank of England is the appropriate regulator

102. The Bank of England is the appropriate regulator for the EU Regulations specified in paragraphs 103 to 121.

Bank Recovery and Resolution Directive


105. Articles 22 to 32, 37 to 41 and 50 to 109 of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges.


109. Commission Delegated Regulation (EU) 2016/1712 of 7 June 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms with regard to regulatory technical standards specifying a minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed.


Central Securities Depositories Regulation


116. Commission Implementing Regulation (EU) 2017/394 of 11 November 2016 laying down implementing technical standards with regard to standard forms, templates and procedures for authorisation, review and evaluation of central securities depositories, for the cooperation between authorities of the home Member State and the host Member State, for the consultation of authorities involved in the authorisation to provide banking-type ancillary services, for access involving central securities depositories, and on the format of the records to be maintained by central securities depositories in accordance with Regulation (EU) 909/2014 of the European Parliament and of the Council.
European Markets Infrastructure Regulation


PART 4
EU Regulations for which both the PRA and FCA are appropriate regulators

122. The FCA and the PRA are appropriate regulators for the EU Regulations specified in paragraphs 123 to 173.

Bank Recovery and Resolution Directive


124. Articles 1 to 21, 33 to 36, 42 to 49 Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges.

Capital Requirements Directive


126. Commission Delegated Regulation (EU) 2014/527 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.


167. Commission Delegated Regulation (EU) 2017/1230 of 31 May 2017 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards further specifying the additional objective criteria for the application of a preferential liquidity outflow or inflow rate for cross-border undrawn credit or liquidity facilities within a group or an institutional protection scheme.


European Markets Infrastructure Regulation


Financial Conglomerates Directive


Markets in Financial Instruments Directive


PART 5

EU Regulations for which the appropriate regulator is both the FCA and the Bank of England

Markets in Financial Instruments Regulation

175. The FCA and the Bank of England are appropriate regulators for the EU Regulations specified in paragraphs 175 to 184.


European Markets Infrastructure Regulation


181. Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 supplementing Regulation (EU) 648/2012 of the European Parliament and of the Council with regard to indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP.


PART 6
EU Regulations for which the Payment Systems Regulator is the appropriate regulator

Interchange Fee Regulation

186. The Payment Systems Regulator is the appropriate regulator for the Commission Delegated Regulation (EU) 2018/72 of 4 October 2017 supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process.

EXPLANATORY NOTE
(This note is not part of the Regulations)

These Regulations are made in exercise of the powers in section 4 of the [European Union (Withdrawal) Act 2018] in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. Part 1 of the Regulations delegates the Treasury’s powers under section 7 of the European Union (Withdrawal) Act 2018 to the Financial Conduct Authority, the Prudential Regulation Authority, the Bank of England and the Payment Systems Regulator (“the regulators”) to enable the regulators to remove deficiencies in those binding technical standards identified in the Schedule to the Regulations. The delegation is subject to the restrictions set out in regulation 3(4).

Part 2 of the Regulations amends the Financial Services and Markets Act 2000 and the Financial Services (Banking Reform) Act 2013 to provide for the way in which the regulators are to exercise legislative functions of EU bodies which may be transferred to them under the European Union (Withdrawal) Act 2018. It also makes consequential amendments to the Payment Card Interchange Fee Regulations 2015.
Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018

1. The attached draft statutory instrument is published by HM Treasury to help inform Parliamentary scrutiny of the European Union (Withdrawal) Bill (EUWB), and to provide Parliament with as much detail as possible on HM Treasury’s proposal to allocate responsibility for ‘onshored’ EU financial services regulation to UK authorities. The draft instrument is still in development. The drafting approach, and other technical aspects of the proposal, may need to change before the final instrument is laid before Parliament. In particular, the allocation of Binding Technical Standards (BTS) to the different parts of the Schedule to the instrument is still under consideration.

2. HM Treasury plans to lay this instrument before Parliament using the affirmative procedure as soon as possible after the EUWB has received Royal Assent. Early making of this instrument will maximise the time that UK regulators will have available to correct deficiencies in onshored BTS and domestic regulator rules, in order to provide industry with clarity on these changes ahead of the UK’s withdrawal from the EU.

HM Treasury’s proposed approach to the allocation of responsibility for ‘onshored’ EU financial services regulation

3. The European Union (Withdrawal) Bill will incorporate directly applicable EU law into UK law, and save relevant domestic legislation relating to EU membership, as we leave the EU. The Bill will also provide a power to Ministers to make statutory instruments to ‘fix deficiencies’ that arise in that law as a result of the UK’s withdrawal from the EU. For financial services, a significant part of the regulatory and supervisory framework is derived from EU law. HM Treasury’s proposal seeks to ensure that the post-exit financial services regime reflects the UK’s existing domestic
regulatory framework, as previously approved by Parliament in successive pieces of legislation.

4. HM Treasury proposes to follow the model used by the Financial Services and Markets Act 2000 (FSMA), the key piece of framework legislation for regulation of financial services in the UK. FSMA establishes the objectives, functions and responsibilities of the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). FSMA then delegates responsibility to these regulators for making the detailed rules that apply to firms in order to operationalise the framework which Parliament has set in legislation.

5. Following this model will mean that EU ‘Level 1’ legislation (which was developed by the European Commission and negotiated through the Council and European Parliament) and ‘Level 2’ legislation (apart from BTS and certain other technical elements of Level 2), will become the responsibility of the UK Parliament. This body of EU legislation includes provisions which set the policy direction for financial services, so it is appropriate that responsibility for deciding how deficiencies are fixed in this legislation should rest with Parliament. HM Treasury will propose amendments to this legislation, using the powers under the EUWB, ensuring that Parliament is able to scrutinise all of the changes. It is expected that the majority of the statutory instruments needed to correct deficiencies in this legislation will be laid under the affirmative procedure.

6. For certain EU ‘Level 2’ technical rules, known as Binding Technical Standards (BTS), HM Treasury proposes to transfer ongoing responsibility from the European Supervisory Authorities to the UK financial regulators – the Bank of England, the PRA, the FCA and the Payment Systems Regulator (PSR). BTS, running to several thousand pages, do not set overall policy direction but fill out the technical detail of how the requirements set at Level 1 are to be met. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain them after the UK’s
exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA.

7. As HM Treasury proposes to transfer ongoing responsibility for BTS to the UK regulators, it also makes sense that the regulators perform the task of making corrections to deficiencies in existing BTS so that these rules operate effectively in the UK at exit. HM Treasury therefore proposes to delegate to UK financial regulators the power to correct deficiencies in BTS arising from EU withdrawal.

8. In addition, HM Treasury proposes to delegate the EUWB deficiency-fixing power to UK financial regulators so as to allow them to correct deficiencies in existing regulator rules (or FSMA rules) that arise as a result of the UK’s withdrawal from the EU. Under the existing FSMA framework, the PRA and FCA already have powers to amend these rules. However, the procedures to use these powers were not designed to deliver the volume of rule amendments that will be needed as a result of leaving the EU and these procedures may not always be appropriate for the task. Delegating the EUWB deficiency-fixing power in this way will give UK regulators the flexibility to ensure that the full set of EU-derived rules for which they are responsible will operate effectively after exit.

9. As well as the proposed approach to transferring responsibility for BTS, HM Treasury proposes to use affirmative procedure statutory instruments under the EUWB to transfer various supervisory functions, currently performed by the EU Supervisory Authorities, to UK regulators. For example, the Bank of England would take on the function currently performed by the European Securities and Markets Authority (ESMA) of “recognising” non-UK Central Counterparties (CCPs) so that they can provide services in the UK.

10. HM Treasury believes that the approach outlined here is an appropriate allocation of responsibilities which respects the existing regulatory framework set by Parliament, ensures democratic accountability for
framework legislation which sets the direction of policy, and fits with the existing responsibilities of UK financial regulators.

**Correcting deficiencies in EU Binding Technical Standards and FSMA rules – Part 2 of the draft statutory instrument**

11. Part 2 of the draft statutory instrument would delegate the EUWB power for fixing deficiencies in BTS and FSMA rules to the Bank of England, the PRA, the FCA and the PSR. It applies analogous requirements and constraints that would apply to HM Treasury’s exercise of that power (including the 2–year time limit on the power) to the fixing of deficiencies by the specified regulators. Therefore, under this delegated power, the regulators would only be able to make changes to correct deficiencies that arise as a result of the UK’s withdrawal from the EU.

12. As well as specifying the UK regulators that will be able to correct deficiencies in BTS and FSMA rules, Part 2 and the Schedule to the statutory instrument will specify the appropriate regulator for each BTS. The Schedule will provide a list of BTS and the EU directives or regulations under which they were made. The draft Schedule is not final and has been provided here for illustrative purposes only.

13. The instruments that the regulators will use to correct deficiencies in BTS and FSMA rules will be called “EU Exit Instruments”. This statutory instrument will be used to seek Parliament’s approval for the regulators to make these instruments without laying them before Parliament. HM Treasury believes this is appropriate as the required corrections for BTS and FSMA rules will be of a highly technical nature and will, in any case, be aligned with the changes that Parliament will be asked to approve in onshored Level 1 legislation.

14. Part 2 sets out the procedure with which the regulators must comply when making an EU Exit Instrument. This includes:
a. HM Treasury must approve every EU Exit Instrument and may only approve an instrument if it considers that the instrument makes appropriate provision to fix deficiencies arising from the UK’s withdrawal from the EU, in accordance with the provisions of the EUWB;
b. HM Treasury must be provided with a copy of an EU Exit Instrument once it has been made; and
c. The EU Exit Instrument must be published by the appropriate regulator in the way best calculated to bring the instrument to the attention of the public.

15. A limited number of BTS will be relevant to financial services firms or activities that are the responsibility of more than one UK regulator. These BTS, which will have more than one appropriate regulator, are identified in the Schedule. The statutory instrument provides a power for the regulators to introduce an EU Exit Instrument to modify these BTS so as to make separate provision for the purposes of the different regulators’ remits. When a BTS is modified in this way, the appropriate regulators can make separate amendments, obtaining consent from the other on the respective changes, or the BTS can be divided into two parts, with the first part making provision for FCA remit and the second part making provision for either PRA regulated firms or for activities that are the responsibility of the Bank of England. Where a regulator proposes to make separate BTS provision using the second procedure, it must consult the other appropriate regulator.

UK regulators' exercise of their responsibility for BTS after exit – Part 3 of the draft statutory instrument

16. Part 3 of the draft statutory instrument sets out the basis on which UK regulators are to exercise their on-going functions in relation to BTS, including the procedure for making “standards instruments” which will be used to make BTS in the future. Responsibility for making and amending BTS will be transferred to the appropriate UK regulator by ‘onshoring’ and amending each mandate for BTS that currently exists in EU law. For
example, responsibility for developing BTS on the form and content of the financial reports that firms must submit to supervisors under the Capital Requirements Regulation is currently delegated to the European Banking Authority (EBA), with the European Commission responsible for bringing the final BTS into law. A statutory instrument made under the EUWB will amend this so that the responsibility for the specified BTS is transferred to the PRA and FCA.

17. By incorporating into UK law all of the specific legislative mandates for making BTS, UK regulators’ responsibility for BTS will be limited to the purposes set out in those mandates. Parliament will be asked to approve the transfer of each mandate for BTS via the affirmative procedure, so that UK regulators would only take on responsibility for BTS once this has been approved by Parliament.

18. When making a standards instrument in order to amend a BTS, the appropriate regulator must comply with the following procedure:

a. A standards instrument must be submitted to HM Treasury for approval;

b. The instrument must specify the provision under which the instrument is being made – this will be one of the specific mandates to make BTS that will have been approved by Parliament, as explained above;

c. HM Treasury will have four weeks from submission of a standards instrument to decide whether the instrument is approved or not. If after four weeks from submission HM Treasury has not given notice that the instrument is approved or not approved, the instrument will be deemed approved by HM Treasury;

d. If HM Treasury decides not to approve a standards instrument, HM Treasury must notify the appropriate regulator in writing setting out the reasons for not approving the instrument;

e. A copy of the Treasury notice referred to above, along with an explanation from the appropriate regulator as to why the standards instrument was proposed, will be laid before each House of Parliament;
f. If approved by HM Treasury, the instrument must be published by the regulator in the way best calculated to bring it to the attention of the public; and

g. HM Treasury must lay before Parliament a copy of each standards instrument.

19. As set out above, the instrument can only be made if it has been approved by HM Treasury. HM Treasury may only refuse to approve a standards instrument if it appears to HM Treasury that the instrument would have implications for public funds, or would prejudice negotiations for an international agreement. This role for HM Treasury to approve proposed amendments to BTS is not intended to supplant consideration of the UK regulators’ statutory objectives, but to complement them. It is appropriate that the Treasury is able to ask a regulator to think again about any proposed change to BTS which would have consequences for public funds (as defined in the Banking Act 2009), or could affect negotiations for an international agreement (for example, negotiations for a trade agreement) in a way that HM Treasury believes would not serve the interests of the UK. FSMA already allows HM Treasury to direct UK regulators to take action that is necessary for the UK to comply with its existing international obligations.

20. Consistent with the approach of aligning the regulators’ new function for BTS with the existing PRA and FCA responsibility for FSMA rules, the statutory instrument will make onshored BTS subject to analogous requirements in FSMA that currently apply to the making of FSMA rules. For example, the BTS standards making power will be subject to the statutory objectives which Parliament has given to the regulators, and there will be requirements for the regulators to consult on any proposal to make changes to BTS.

21. The vast majority of BTS will become the responsibility of the Bank of England, the PRA and the FCA. There is also one BTS relating to the EU Interchange Fee Regulation which will need to be transferred to the UK’s Payment Systems Regulator (the PSR). The statutory basis for the PSR is
the Financial Services (Banking Reform) Act 2013, which will be amended by this statutory instrument as part of conferring the new standard-making power on the PSR. As much as possible, this new power will follow the model used in FSMA for the PRA and FCA’s rule-making responsibilities.

Excluding the use of the regulators’ general rule-making powers to amend retained direct EU legislation

22. Schedule 8, paragraph 3 of the EUWB provides that where there are existing powers to make subordinate legislation (such as the regulators’ existing powers to make FSMA rules), such powers may in certain instances be used for the purpose of amending retained direct EU legislation. However, as set out above, HM Treasury believes that it would not be appropriate for the regulators to amend on-shored Level 1 and non-BTS Level 2 legislation (which both fall within the definition of retained direct EU legislation) without Parliament debating and approving this explicitly. Part 3 of the statutory instrument therefore amends FSMA so that the regulators may not use their general rule-making power to amend retained direct EU legislation, except where this has been specifically authorised by Parliament.

23. It should be noted that amendments to the EUWB tabled by the Government would change the operation of schedule 8, paragraph 3 and HM Treasury may therefore need to revise the drafting approach for this statutory instrument. HM Treasury will want to ensure that the FSMA rule-making powers cannot be used to amend retained direct EU legislation without approval from Parliament.

HM Treasury 18 April 2018