EXPLANATORY MEMORANDUM TO

THE CREDIT RATING AGENCIES (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

2019 No. 266

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument is being made in order to address deficiencies in retained EU law in relation to credit rating agencies and existing UK legislation arising from the withdrawal of the United Kingdom (UK) from the European Union (EU), ensuring the legislation continues to operate effectively at the point at which the UK leaves the EU.

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ("CRAR") was introduced in 2009 with the aim of regulating credit rating agencies (CRAs) established in the EU for the first time, to address failings in the run up to the financial crisis. Credit ratings are used for "regulatory purposes", which involves assessing the creditworthiness of an entity or financial instrument, and are used widely by financial market participants, including to determine capital requirements for credit institutions under the Capital Requirements Regulation (and associated legislation) and for insurance and reinsurance undertakings under the Solvency II Directive (and associated legislation). The CRAR provides that only credit ratings issued under the CRAR can be used for regulatory purposes. The European Securities and Markets Authority (ESMA) is currently responsible for supervising firms registered under CRAR, including in respect to matters such as disclosure, conflicts of interest and the quality of their ratings.

Why is it being changed?

2.3 After exit, CRAs established in the UK would not be covered by the EU regulatory regime under CRAR. If this instrument is not in place by exit day, CRAR – which will be transferred to the UK statute book by the European Union (Withdrawal) Act 2018 (EUWA) – will not operate effectively in the UK. Amending CRAR to establish a UK regime for regulation and supervision of CRAs is therefore necessary. Furthermore, if the instrument establishing this regime is not in place by exit day, there would be a significant cliff edge risk, as credit ratings would not be able to be used for regulatory purposes in the UK and there would be no regulatory oversight of CRAs. If credit ratings in the UK were invalid, the capital requirement for the entities or assets they previously rated would increase as a greater risk weighting would be attached to them. Laying this instrument will help to ensure that firms, which can

include any entity that seeks to borrow money, can continue to use credit ratings issued in the UK by CRAs as they do now.

What will it now do?

2.4 This instrument makes technical amendments to correct deficiencies in retained EU law and secondary legislation. It makes a series of modifications to primary legislation, namely the Financial Services and Markets Act 2000 (FSMA).

2.5 Key amendments include:

- Transferring functions and powers from the European Commission to the Treasury, and from ESMA to the Financial Conduct Authority (FCA);
- Providing additional powers, or "bolt-ons", to the FCA so it is able to fulfil its new supervisory role effectively, including modifications to existing FSMA provisions on FCA functions such as notice procedures, investigation powers, appeal rights, exemption from liability in damages and the ability to levy fees under the FCA's existing framework;
- Enabling credit ratings to be used in the UK for regulatory purposes from exit day should those ratings be issued by a CRA established in the UK and registered with the FCA;
- Introducing a transitional period to allow for ratings issued prior to exit in the EU by firms that register or apply for registration with the FCA for regulatory purposes for up to one year;
- Requiring firms wishing to apply for FCA registration to establish or maintain a legal entity in the UK; and
- Introducing three pre-exit registration regimes for CRAs to ensure that the transition from FCA to ESMA supervision occurs with minimal disruption (more detail is provided in section 7).

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 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the Act or by the instrument,

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

"In my view the provisions of the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument will amend CRAR to address deficiencies arising from the UK's exit from the EU. It will also make amendments to the Credit Rating Agencies Regulations 2010/906 and the Credit Rating Agencies (Civil Liability) Regulations 2013/1637 to address those deficiencies. The instrument also contains substantive provisions and modifications to FSMA to allow the FCA to operate effectively and consistently with its existing functions, in supervising CRAs for the first time. Additionally, Commission Delegated Regulations 272/2012 and 946/2012 are revoked by the instrument.

7. Policy background

What is being done and why?

7.1 The UK will leave the EU on 29 March 2019. The UK and the EU have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020. This will provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During the implementation period, common rules will continue to apply. The UK will continue to implement new EU law that comes into effect and the UK will continue to be treated as part of the EU's single market in financial services. This will mean that access to each other's markets will continue on current terms and businesses, including financial services firms, will be able to trade on the same terms as now until 31 December 2020. UK firms will need to comply with any new EU legislation that becomes applicable during the implementation period.

7.2 The government is seeking a deep and special future partnership with the EU, which should be greater in scope and ambition than any such agreement before and encompass financial services. Given the highly regulated nature of financial services, the volume of trade between UK and EU markets, and a shared desire to manage financial stability risks, the UK proposes a new economic and regulatory arrangement that will preserve mutually beneficial cross-border business models and economic integration for the benefit of businesses and consumers. Decisions on market access would be autonomous in our proposed model, but would be underpinned by stable institutional processes in a bilateral agreement and continued close regulatory and supervisory cooperation.

7.3 While the government has every confidence that there will be a deal and an implementation period in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. The government is clear that this scenario is in neither the UK's nor the EU's interest, and the government does not anticipate it arising. To prepare for this unlikely eventuality, HM Treasury intends to use powers in the European Union (Withdrawal) Act 2018 (EUWA) to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios.

7.4 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 – e.g. legislation implementing EU Directives. This body of law is referred to as "retained EU law".

The EUWA also gives ministers a power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through SIs. These contingency preparations for financial services legislation are sometimes referred to as 'onshoring'. These SIs are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose and is subject to further restrictions, such as the inability to use the power to impose or increase taxation, or establish a public authority. The power is also time-limited and falls away two years after exit day.

7.5 Wherever practicable, the proposed approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, if the UK does not enter an implementation period, some changes would be required to reflect the UK's new position outside the EU from 29 March 2019.

7.6 In the unlikely scenario that the UK leaves the EU without a deal, the UK would be outside the EU's framework for financial services. The UK's position in relation to the EU would be determined by the default Member State and EU rules that apply to third countries at the relevant time. The European Commission has confirmed that this would be the case.

7.7 In light of this, the approach in this scenario cannot and does not rely on any new, specific arrangements being in place between the UK and the EU. As a general principle, the UK would also need to default to treating EU Member States largely as it does other third countries, although there are cases where a different approach would be needed including to provide for a smooth transition to the new circumstances.

7.8 HM Treasury published a document on 27 June 2018, which sets out in more detail HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act. (https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act)

Transfer of powers

7.9 The FCA does not currently have any authorisation powers in respect of CRAs, as these entities are entirely authorised and supervised by ESMA. The instrument provides functions and powers to the FCA that are required to begin preparatory work prior to CRA registration before the UK leaves the EU. Regulation 71 in the instrument also enables the FCA to process registrations from new CRAs in the UK, under the usual process in CRAR. The FCA will gain full regulatory oversight powers from ESMA on the first day the UK leaves the EU, which will include complete authorisation and supervision responsibilities. These transfers of power are documented throughout the instrument, particularly in Part 2 which outlines the FCA's new rule making powers.

7.10 Additionally, under the UK process, the FCA will become responsible for assessing whether third country regulatory frameworks are as stringent as that of the UK for endorsement of third country ratings into the UK for regulatory use. The Treasury will be responsible for determining whether a third country jurisdiction is equivalent to enable a third country CRA to apply for Certification in the UK. These provisions are outlined in Regulations 55 and 56 of the instrument, and allow, under certain

circumstances, credit ratings issued from third countries to be used for regulatory purposes in the UK.

Status of credit ratings

7.11 Regulation 55 of this instrument will amend CRAR to enable ratings to be used for regulatory purposes in the UK if those ratings are issued by a CRA established in the UK and registered under the UK CRAR. The provisions for endorsement and certification will also apply, modified to work in a UK context, allowing ratings issued in third countries (and which meet certain conditions) to be used for regulatory purposes in the UK. To ensure continuity at the point of exit, the instrument will grandfather existing decisions made by ESMA on the suitability of third country regulatory frameworks for endorsement. In addition, the instrument will introduce a transitional period, which will enable credit ratings to be used for regulatory purposes for up to one year, if the ratings were issued before exit day in the EU by firms that register with the FCA or apply for FCA registration within the permitted time period.

Registration regimes

7.12 All CRAs that wish to register with the FCA will be required to establish legal entities in the UK following exit, consistent with existing CRAR rules regarding legal entities. This means that CRAs currently based in the UK as branches of non-UK legal entities will be required to set up a new legal entity and apply to the FCA for registration as a new UK CRA. A Temporary Registration Regime (TRR) will be introduced to deal with applications for authorisation as a new legal entity that are not determined before exit day. Chapters 1 to 4 of Part 8 in this instrument outline three types of pre-exit applications:

- The Conversion Regime will be an automatic registration regime for CRAs registered and established in the UK. These CRAs will be required to notify the FCA of their intention to convert their ESMA registration into registration with the FCA before exit day.
- The TRR is available to new legal entities, that are part of a group of ESMA-registered CRAs on exit day, that establish in the UK. If firms have submitted an advance application to the FCA, they will enter the TRR if that application has not yet been fully processed by exit day.
- The Automatic Certification Process will enable Certified CRAs established outside the EU to notify the FCA of their intention to extend certification to the UK. Like the Conversion Regime, these notifications must be made before exit day.

In all three instances, the FCA must acknowledge receipt of the CRA's notification within ten working days and confirm within 20 working days whether that notification is valid.

Appeal rights

7.13 CRAR contains several provisions enabling CRAs to appeal, to the Joint Board of Appeal of the European Supervisory Authorities and ultimately to the Court of Justice of the EU (ECJ), investigative and enforcement decisions of ESMA. Investigation and enforcement powers in relation to UK CRAs will be transferred to the FCA by this instrument. The Board of Appeal and ECJ will no longer have jurisdiction under UK CRAR, and therefore references to these EU institutions are being replaced with

appropriate UK institutions – in this case the Upper Tribunal, as set out in Part 4 of the instrument, which is consistent with other appeals of FCA decisions under FSMA. The following decisions will be subject to the FCA's Supervisory Notice Procedure (which builds in a right of appeal to the Tribunal):

- Decisions to refuse registration of a CRA (or groups of CRAs).
- Decisions to withdraw registration.
- Decisions to suspend the use of ratings issued by a CRA.

Warning and Decision Notice

7.14 Part 6 of this instrument also applies the FCA's Warning and Decision Notice procedures in respect of other decisions it takes under the UK regime (which are also subject to a right of appeal to the Tribunal). This is to enable its decision and appeals procedures to fit together effectively and to provide consistency with its current functions. Other decisions of the FCA under its functions in relation to CRAs will be subject to judicial review in the usual way.

Enforcement

7.15 The instrument, under Part 7, permits the FCA to publish public censures or impose financial penalties for contraventions of requirements imposed under the new UK CRA regime. It also applies the existing criminal offences in section 177 of FSMA (offences) and section 398 of FSMA (misleading the FCA) to requirements imposed under the new UK regime, including the application of section 400 of FSMA (offences by bodies corporate etc) in respect of those two offences. This constitutes an expansion in scope of the two existing criminal offences under section 177 and section 398 as they will now apply to CRAs, which is necessary to allow the FCA to enforce its new supervisory powers in relation to CRAs effectively.

Further amendments

7.16 The instrument applies and modifies FSMA with the effect that the FCA may charge fees, consistent with its current procedures, in relation to its functions in supervising CRAs under the new UK CRA regime. This is provided for throughout the instrument.

7.17 General amendments that are being made to section 1A (6) FSMA under the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), will have the effect of providing the FCA with exemption from liability for damages in relation to its new functions in relation to CRAs.

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 EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. 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 Treasury has not undertaken a consultation on the instrument, but has engaged with relevant stakeholders on its approach to Financial Services legislation under the European Union (Withdrawal) Act 2018, including on this instrument, in order to familiarise them with the legislation ahead of laying.

10.2 An explanatory policy note was published on 8 October, and the instrument was published in draft on 30 November to maximise transparency ahead of laying. (https://www.gov.uk/government/publications/draft-credit-rating-agencies-amendments-etc-eu-exit-regulations-2018).

10.3 The financial services regulators undertook a public consultation in October and November 2018 on any changes they propose to make to Binding Technical Standards and rules made under the powers conferred upon them by the Financial Services and Markets Act 2000. The October consultation can be found here: https://www.fca.org.uk/publication/consultation/cp18-28.pdf and the November consultation can be found here: https://www.fca.org.uk/publication/consultation/cp18-36.pdf.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 There will be an impact on the credit rating industry as the UK government is requiring CRAs to establish a legal entity in the UK and register with the FCA if its credit ratings are to be used for regulatory purposed in the UK after exit. There will also be costs for altering IT processes, for example, where firms will be required to report to the FCA rather than ESMA. However, other aspects of CRAR will not create significant strains for businesses as the instrument is largely replicating the current regulatory framework. Business processes and procedures are largely being continued from the existing EU legislation.

12.2 There is no impact on charities and voluntary bodies.

12.3 The impact on the public sector is that the instrument will impose additional requirements on the FCA given the transfer of powers from ESMA. The FCA will be responsible for registering and supervising UK CRAs from exit day, which include new investigation and enforcement responsibilities. The FCA, however, has accounted for these additional regulatory roles through its 2018/2019 business plan. Considerable FCA resources have been dedicated to work focussed on the UK's departure from the EU, including arrangements to implement any additional powers the FCA obtains. The FCA has significant technical expertise and experience in regulating the financial services sector to high standards. Therefore, the responsibilities of EU bodies can be transferred to the FCA efficiently and effectively, providing firms, funds and their customers with confidence after exit.

12.4 A full Impact Assessment is submitted and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As this instrument is made under the EUWA, no review clause is required.

15. Contact

15.1 Samuel Hill at HM Treasury (Telephone: 0207 270 5494 or email: Samuel.Hill@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

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

15.3 The Economic Secretary to the Treasury at HM 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 13, 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 16, 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. Appropriateness statement

1.1 The Economic Secretary to the 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 Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because this SI will amend the current legislation relating to credit rating agencies so that it operates effectively in a UK only context. It will ensure there is an effective transfer of powers from the relevant EU authorities to their UK equivalents, notably HM Treasury and the FCA, so that credit rating agencies are regulatory appropriately in a UK-only scenario. It goes no further than doing what is appropriate to mitigate any disruption to the UK financial services sector as a result of the UK leaving the EU.

2. Good reasons

2.1 The Economic Secretary to the 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".

2.2 These are: that the current legislation relating to credit rating agencies needs to be amended so that it operates effectively in a UK only context. Laying this instrument will allow UK firms to continue to use credit ratings issued by UK CRAs as they do now. Failing to lay the instrument would create a significant cliff edge risk, as credit ratings would not be able to be used for regulatory purposes in the UK. This would significantly increase the capital that UK firms would need to hold against EU assets if ratings are not available.

3. Equalities

3.1 The Economic Secretary to the Treasury, John Glen MP, has made the following statement(s)

"The 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."

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

"In relation to the instrument, I, the Economic Secretary to the Treasury John Glen, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

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

5. Criminal offences

5.1 The Economic Secretary to the Treasury 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 expansion in the scope of existing criminal offences (sections 177 and 398 of the Financial Services and Markets Act 2000) and for the penalties in respect of them in the Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019.

5.2 Those are to enable the FCA to properly enforce its new supervisory powers and functions in relation to credit rating agencies, similarly to other FCA regulated firms."

6. Legislative sub-delegation

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

"In my view it is appropriate to create the relevant sub-delegated powers in the Credit Rating Agency (Amendment, etc.) (EU Exit) Regulations 2019.

6.2 This instrument transfers regulatory oversight powers from ESMA to the FCA. This is considered appropriate as the FCA will have the necessary technical knowledge and resources to provide effective regulatory oversight of CRAs to ensure UK markets remain competitive once the UK leaves the EU. Additionally, the FCA will be required to begin preparatory work for registering CRAs ahead of exit day, and the sub-delegation of these powers is necessary to ensure a smooth transition for CRAs and users of credit ratings.