FINANCIAL SERVICES BILL

Memorandum from Her Majesty's Treasury to the Delegated Powers and Regulatory Reform Committee

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Financial Services Bill ("the Bill"). The Bill was introduced in the House of Commons on 21st October 2020. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. A portmanteau bill under the banner of financial services, provisions included are those which arise as a result of the withdrawal of the United Kingdom from the European Union, those which otherwise have a connection with that withdrawal, and a smaller number of other provisions.
3. Of the former are those provided under the cross-heading access to financial services markets, dealing in particular with authorisation of Gibraltar firms post-exit and the recognition of non-UK funds.
4. Arising not out of withdrawal from the European Union but in connection with withdrawal are those under the cross-heading prudential regulation of credit institutions and investment firms, which take powers to implement measures in response to the Basel Accords in the absence of the conduit for application of European Union measures under the European Communities Act 1972 (c. 68).
5. Other matters of note are those dealing with benchmarks, which will allow for the orderly cessation of critical benchmarks including LIBOR, those dealing with insider dealing and money laundering, and those providing assistance to individuals (debt respite scheme and help to save.)
6. Provisions are described below in the order in which they appear in the Bill.

Delegated Powers

Prudential regulation of credit institutions and investment firms

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143B(2) of the Financial Services and Markets Act 2000 (power to make provision about the meaning of "on a consolidated basis", "group", "parent undertaking" and "subsidiary undertaking")

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative for provision which amends the Financial Services and Markets Act 2000, otherwise negative

Context and Purpose

7. Clause 2 introduces Schedule 2, which sets out a new prudential regime for FCA Investment firms to be regulated by the FCA.

8. The Financial Conduct Authority (FCA) has existing regulatory powers under Part 9A of the Financial Services and Markets Act 2000. At Schedule 2, the Treasury proposes inserting a new Part 9C into the Financial Services and Markets Act 2000 (sections 143A to 143Z) to extend these powers.

9. This is in the context that it is the Government's policy to introduce a new Investment Firms Prudential Regime (UK IFPR). The UK IFPR seeks to provide a simpler, proportionate, and less administratively burdensome regime for certain investment firms in the UK. The outcomes of the UK IFPR are intended to be similar to those of the EU Investment Firms Regulation (IFR) and Investment Firms Directive (IFD) which will apply for EU Member States from 26 June 2021.

10. Under the IFPR, the current prudential requirements applicable to investment firms, the CRR, will cease to apply in respect of investment firms which are authorised persons within the meaning of section 31(1)(a) of the Financial Services and Markets Act 2000, and are not a PRA -designated investment firm under article 3 of the Financial Services and Markets Act (PRA-regulated Activities) Order 2013 (the 'PRA RAO 2013') (FCA investment firms). However, the retained CRR (UK CRR) will continue to apply to credit institutions and PRA-designated investment firms. The role of the FCA will be to regulate and supervise FCA investment firms under the IFPR, and the role of the PRA will be to regulate and supervise credit institutions and PRA-designated investment firms under the CRR and the PRA RAO 2013.

11. Sections 143C(3)(a) and 143D(4)(a) set out that the FCA's ability to impose requirements can be on an individual basis or on a consolidated basis and sections 143D and 143E set out new powers of the FCA in relation to non-authorised parent undertakings and imposes new duties on the FCA in relation to parent undertakings. New section 143B(2) FSMA provides that the Treasury may make provision about the meaning of "on a consolidated basis", "group", "parent undertaking" and "subsidiary undertaking".

Justification for the power

12. The power to amend the definition of "on a consolidated basis" is necessary as the definition in the Financial Services and Markets Act 2000 of when firms are considered to be part of the same group is narrower compared to how consolidations are referred to in the Capital Requirements Regulation (Regulation (EU) No 575/2013) (CRR). Article 18 of the CRR allows for consolidation to mean different things in different cases described by reference to the application of provisions of the CRR.

13. The power to amend the definition of "parent undertakings" is needed to ensure that the Treasury can address any potential circumvention risks in a timely manner. It is not impossible that parent undertakings might restructure themselves in a way to fall out of scope of the Part 9C rules requirements. If such risk arises, the Treasury should act to further specify which persons count or do not count as "parent undertakings". This might also necessitate the need to amend the definitions of "group" and "subsidiary undertaking" as these are related to the definition of "parent undertaking".

Justification for the procedure

14. It is considered appropriate that any regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament when it amounts to amending the provisions of the Financial Services and Markets Act 2000 (see paragraph 20 of Schedule 2).

15. However, where any regulations are only modifying or repealing provisions for the purposes of Part 9C, a negative procedure is considered appropriate. The Treasury envisage that any such modification would be by way of inserting a freestanding provision under Part 9C, such as a provision which either adds to or deletes what amounts to a parent undertaking. Whilst the Treasury would like for these modifications to be made effective as soon as possible after Royal Assent, we have discounted the made affirmative procedure on the basis that these are not of sufficient urgency to merit the made affirmative procedure.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143C of the Financial Services and Markets Act 2000 (duty to make rules)

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9C of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

16. This relates to existing rule making powers of the Financial Conduct Authority (FCA) under Part 9A of the Financial Services and Markets Act 2000 (power to make general rules). At Schedule 2, the Treasury propose inserting a new Part 9C into the Financial Services and Markets Act 2000 (sections 143A to 143Z). Section 143C imposes a new duty on the FCA to make rules applying to FCA investment firms under Part 9C in exercise of their existing powers to make general rules.

17. The rules made by the FCA under section 143C must ensure that FCA investment firms have adequate measures in place to manage risks to consumers, risks to the integrity of

the UK financial system, risks inherent to FCA investment firms, and any other risks which are specified by the Treasury in regulations (see section 143C(2)(d)).

18. The rules must include requirements relating to the types and amounts of capital and liquid assets, requirements related to concentration risk, reporting requirements, public disclosure requirements, governance arrangements and remuneration policies and practices of FCA investment firms.

19. Under subsection (3), the rules made by the FCA may impose requirements to be satisfied on an individual or consolidated basis, in relation to the processes of consolidation, and make provisions in relation to transactions between an FCA investment firm and a member of its group. Subsection (3)(d) also allows the FCA to provide for exceptions from the requirements described at subsection (1).

20. Further, subsection (3)(e) enables the FCA to refer to the UK CRR, instruments made under the CRR and UK legislation implementing the Capital Requirements Directive. Subsection (4) also enables the FCA to include provision that modifies the UK CRR and instruments made under it (despite the prohibition in section 137A(6) of the Financial Services and Markets Act 2000) but may not amend or revoke provisions.

<u>Justification for taking the power</u>

21. The new duty on the FCA is also framed within an accountability framework. While the Government considers the most appropriate way to legislate for the IFPR is to allow the FCA to implement the firm requirements, the FCA is subjected to an enhanced accountability framework and consultation requirements set out in sections 143G to 143I. The Treasury consider that it is appropriate for the vast majority of the UK IFPR to be implemented in FCA rules as the expertise in these matters lies with the FCA rather than Treasury.

22. The accountability framework will enable greater scrutiny of the FCA's decision-making by enhancing transparency for Parliament, industry and the public. This is consistent with the points raised by the House of Lords EU Financial Affairs subcommittee on 27 March, which recommended that the Government should delegate more powers to the regulators to give the UK's regulatory regime more flexibility and increase its ability to respond to changes, and that these changes should be supported by strengthened Parliamentary scrutiny.

23. In addition to the FCA's strategic and operational objectives, the accountability framework will include requirements to ensure that the wider objectives of the Government and Parliament are taken into account. This will include the impact of regulatory requirements on UK competitiveness, international developments in prudential regulation (including international standards, where applicable), and our relationships with other jurisdictions, through financial services equivalence.

24. As noted above, subsection (3)(e) allows the FCA to amend its rules to reflect changes to the UK CRR. Subsection (4) further enables the FCA to include provision that modifies the UK CRR but may not amend or revoke provisions, This is considered necessary due to the manner in which the CRR is being implemented, further details of which are set out in respect of clause 3.

<u>Justification for the procedure</u>

25. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the FCA as the FCA is exercising its rule making powers on the basis of the framework set out in the Financial Services and Markets Act 2000.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143C(2)(d) of the Financial Services and Markets Act 2000 (power to specify additional risks in relation to FCA investment firms)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

<u>Context and Purpose</u>

26. As set out above, the rules made by the FCA under 143C(1) must include certain requirements in order to manage risks, including risks that are specified by the Treasury by regulations.

<u>Justification for taking the power</u>

27. Any risks that are known to be likely to arise have been listed under section 143C(2)(a) to (c). However, if market developments evolve which give rise to new, unexpected risks, then the Treasury will need to act quickly to respond.

28. It is not known what the new risks may be or in what circumstances they may arise. It is considered necessary to have a power without limitations to address the risks related to the requirements at section 143C(1).

<u>Justification for the procedure</u>

29. It is considered appropriate that any regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament, especially as the circumstances in which it may be used cannot yet be predicted.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143D of the Financial Services and Markets Act 2000 (duty to make rules applying to parent undertakings)

- new Section 143E(1) of that Act (power to make rules applying to parent undertakings)

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9C of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

<u>Context and Purpose</u>

30. The context of the delegated power is the same as described in the note on new section 143C.

31. The UK IFPR intends to reflect the intent of the EU IFR as regards to investment firm group regulation. Under the EU IFR the responsibility for ensuring compliance with relevant capital, concentration risk, disclosure, reporting and liquidity requirements at group level falls directly upon a parent undertaking of an FCA investment firm, which may be unauthorised. There is also a joint responsibility upon the parent undertaking and its subsidiaries to set up a proper organisational structure and appropriate internal controls to ensure the exchange of any necessary data.

32. The FCA have existing rule-making powers in the Financial Services and Markets Act 2000 in relation to authorised parent undertakings. Similar to section 143C(1), section 143D(1) imposes a duty upon the FCA to make general rules to ensure that authorised parent undertakings have adequate measures in place to manage risks to consumers, risks to the integrity of the UK financial system, risks to FCA investment firms as a result of their relationship with their parent undertakings; as well as any other risks which are specified by the Treasury in regulations (see section 143D(2)(d)).

33. Subsection (3), also requires the FCA to make prudential rules for non-authorised parent undertakings of FCA investment firms.

34. Section 143E(1), sets out the circumstances in which the FCA are not required to make rules under subsections (1) and (3), but where they may make rules in those circumstances. Section 143E(3) also gives the FCA a power to make rules in relation to both authorised and non-authorised parent undertakings which impose information disclosure requirements. It is not thought appropriate to impose a duty to make rules in these circumstances and for these purposes, as they may not be always necessary.

Justification for taking the power

35. As set out in the section of this memorandum dealing with section 143C, the Government considers the most appropriate way to legislate for the IFPR is to delegate responsibility for the implementation of firm requirements to the FCA, subject to an enhanced accountability framework, given the FCA's expertise.

36. The new power in relation to non-authorised parent undertakings is considered necessary to be able to regulate investment firm groups appropriately, where parent undertakings may not always be authorised.

Justification for the procedure

37. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the FCA. It is intended that the FCA's rule-making power is exercised in accordance with new rule-making provisions in Part 9C of the Financial Services and Markets Act 2000.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143D(2)(d) of the Financial Services and Markets Act 2000 (power to specify additional risks in relation to parent undertakings)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

38. As set out above, the rules made by the FCA under section 143D (1) in relation to parent undertakings must include certain requirements to address certain risks, including risks that are specified by the Treasury in regulations. New section 143D(2)(d) provides a power for the Treasury to specify additional risks to those set out in the legislation at 143D(2)(a) to (c).

Justification for taking the power

39. The justification for this power is similar to the one under section 143C(2)(d), except that this power specifically relates to parent undertakings. Any risks that are known to be likely to arise have been listed under section 143D(2)(a) to (c). However, if market developments evolve which give rise to new, unexpected risks, then the Treasury will need to act quickly to respond to the same.

40. It is not known what risks may be or in what circumstances they may arise. It is considered necessary to have a power without limitations to address the risks related to the requirements at section 143D(1). The risk is heightened somewhat in relation to non-authorised parent undertakings as the FCA will not have their usual powers in relation to those entities beyond what is set out in new Part 9C of the Financial Services and Markets Act 2000.

Justification for the procedure

41. It is considered appropriate that any regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament, especially as the circumstances in which it may be used cannot yet be predicted.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143G(1)(c) of the Financial Services and Markets Act 2000 (power to add to statutory list of matters)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

42. Section 143F sets out that "Part 9C rules" are rules made by the FCA in the performance of its duties under sections 143C and 143D, and in exercise of its powers in section 143E. Section 143G sets out that in making Part 9C rules, the FCA must have regards to international standards and the effect of the rules on the relative standing of the United Kingdom as a place for internationally active investment firms to be based or to carry on activities. Under subsection (1)(c), the FCA must also have regards to any other matters specified by the Treasury in regulations.

Justification for taking the power

43. The Treasury's power under section 143G(1)(c) to add to the statutory list of matters is a wide power without any limitations. Similar to the justification for the powers set out in 143C(2)(d) and 143D(2)(d), it is necessary to have a wide power as it is not possible to predict all of the circumstances in which the power may be exercised. Given the wide delegation of power to the FCA in this framework, it is necessary to ensure that they remain properly accountable to Parliament and Government.

44. If Government and Parliament priorities were to change in the future, for example in relation to social policies, this provision will allow for the Treasury to make regulations that the FCA will have regard to when it makes Part 9C rules.

Justification for the procedure

45. It is considered appropriate that any regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament, especially as the circumstances in which it may be used cannot yet be predicted.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143J of the Financial Services and Markets Act 2000 (power to require the establishment of parent undertaking with its head office in the United Kingdom)

Power conferred on: the Financial Conduct Authority

Power exercised by: notice

Parliamentary Procedure: none

Context and Purpose

46. The context for the use of this power is the same as that set out for s.143D.

47. Sections 143C and 143D require the FCA to make rules in relation to FCA investment firms and authorised and non-authorised parent undertakings of such firms. Where two or more FCA investment firms are part of a group whose parent undertaking is not in the United Kingdom, and where the FCA consider that the country or territory in which the parent undertaking is located does not impose requirements equivalent to the requirements set out in Part 9C rules, section 143J allows the FCA to impose, using its existing powers in section 55L of the Financial Services and Markets Act 2000, a requirement that the FCA investment firm secure the establishment of a parent undertaking with its head office in the United Kingdom.

Justification for taking the power

48. Requiring the establishment of a parent undertaking in the United Kingdom will bring that parent undertaking within the scope of Part 9C rules directed at parent undertakings, allowing the FCA to appropriately manage the risks posed by the parent undertaking in relation to the FCA investment firm.

Justification for the procedure

49. This extends the scope of the FCA's existing power under section 55L of the Financial Services and Markets Act 2000, which allows the FCA to impose requirements on authorised persons where it is desirable to do so in order to advance one or more of its operational objectives. No Parliamentary procedure is provided for in relation to the exercise of the existing power by the FCA.

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new sections 143K to 143Q of the Financial Services and Markets Act 2000 (imposition of requirements on non-authorised parent undertakings)

Power conferred on: the Financial Conduct Authority

Power exercised by: notice

Parliamentary Procedure: none

Context and Purpose

50. The context for the use of this power is the same as that set out for section 143D.

51. Sections 143C and 143D require the FCA to make rules in relation to FCA investment firms and authorised and non-authorised parent undertakings of such firms. In relation to an authorised parent undertaking, the FCA already has a power in section 55L of the Financial Services and Markets Act 2000 to impose additional firm-specific requirements on the undertaking where it is considered desirable in order to advance one or more of its operational objectives.

Justification for taking the power

52. The provisions in sections 143K to 143Q replicate the existing power of the FCA in section 55L of the Financial Services and Markets Act 2000 (and subsequent provision which clarifies the applicable procedures and the scope of the power) but for non-authorised parent undertakings, which are not within the scope of the power in section 55L. It therefore provides the FCA with the same power to impose firm-specific requirements on non-authorised parent undertakings, as it already has for authorised parent undertakings. This is necessary in order to implement appropriate provision to manage the risks posed by parent undertakings which can only be imposed on a firm-specific basis, rather than through Part 9C rules which will apply across the board to all parent undertakings.

Justification for the procedure

53. This replicates the FCA's existing power under section 55L of the Financial Services and Markets Act 2000, in relation to authorised parent undertakings, for non-authorised parent undertakings. No Parliamentary procedure is provided for in relation to the exercise of the existing power in section 55L by the FCA and so no procedure is provided for this power.

Clause 3; clause 5 and Schedule 3, Part 1: paragraph 1: prudential regulation of credit institutions etc.

- new section 144A of the Financial Services and Markets Act 2000 (CRR Rules)

- new section 144C of that Act (matters to consider when making CRR Rules)

- new section 144D of that Act (explanation to accompany consultation on CRR Rules)

- new section 144E of that Act (exceptions from sections 144C and 144D etc.)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

54. The current prudential requirements applicable to credit institutions and investment firms in the UK are largely contained in the CRR and legislation implementing the fourth capital requirements directive (CRD IV). The CRR and CRDIV formed part of a major EU legislative package that intended to address issues arising from the financial crisis of 2007/8. In particular, CRD IV has applied a significant proportion of the 'Basel 3' standards in the EU, which built on existing Basel Committee on Banking Standards (BCBS or Basel 3) to impose stricter capital requirements and new risk requirements and standards. The UK played an active role in negotiating and agreeing Basel 3, (as finalised by Basel 3.1) and remains committed to its full, timely, and consistent implementation alongside other major jurisdictions. In addition to the Basel 3 reforms, CRD IV also introduced EU-specific requirements, including relating to remuneration and restrictions on bonuses.

55. Most Basel standards in effect in the UK at the time of introduction of this Bill were implemented through the CRR and CRDIV. Some of the Basel 3 standards finalised between 2010 and 2017 are implemented in the EU through the Second Capital Requirements Regulation (CRRII) and the Fifth Capital Requirements Directive (CRDV). CRDV is being transposed through Treasury statutory instruments (SIs) and regulator rules, and therefore will apply in the UK. Some parts of EU CRRII apply before the end of the Transition Period and therefore form part of retained EU law. Some remaining EU CRRII provisions will apply in the EU from 28 June 2021. As this is after the end of the Transition Period, these parts of EU CRR II will not apply directly in the UK or form part of retained EU law at the end of the EU Exit Transition Period. In addition, most of the Basel 3.1 revisions agreed between 2017 and 2019 are not included in EU CRRII or EU CRDV, nor have they been the subject of an EU legislative proposal at the time of introduction of this Bill. Therefore, they are yet to be incorporated into the UK prudential framework. Therefore, until now, prudential regulation has been the responsibility of the EU, which has made Regulations, Directives, and tertiary legislation that has applied in and to the UK. The UK now inherits this EU law.

56. Under clause 3, the delegated power will operate by the Treasury making regulations revoking provisions of the UK CRR that need updating to reflect the latest prudential and Basel standards. The Treasury will only be able to revoke aspects of the UK CRR that relate to the matters listed in clause 3(2), which are effectively those within the scope of CRRII and the Basel reforms. It is implicit in the power of revocation that the Treasury may also revoke related implementing and delegated acts.

57. The "gap" left by these revocations will then be filled through rules made by the Prudential Regulation Authority (PRA) – indeed the Treasury cannot make such

revocations until they are satisfied the PRA rules will appropriate fill this gap or the gap does not need to be filled (clause 3(4)). The rules will primarily involve technical changes to the UK prudential framework as it relates to credit risk, market risk, operational risks as well as other risks specified in the CRR and the Basel standards. The Treasury's aim in exercising these powers would be to give effect in the UK to international standards set by the BCBS. A secondary aim would be to give effect to forthcoming provisions in EU law that are either yet to apply (in the case of directly applicable EU Regulations) or have yet to be transposed by Member States (in the case of EU Directives).

58. The Treasury will also have a power to revoke sections of the UK CRR where it is considered necessary or desirable to do so to maintain or improve the coherence of the prudential regime (clause 3(3)(b)); and to make consequential or supplementary changes where such revocation has taken place (clause 3(5)).

Justification for taking the power

59. This power effectively facilitates the transfer of aspects of the CRR and the Basel standards into PRA rules. This is intended to give the UK's regulatory regime the necessary flexibility in the international context and increase its ability to respond to changes. CRDV and CRRII transfer the responsibility for prudential requirements from subsidiaries to the relevant holding companies. Holding companies are not PRA-authorised persons therefore additional rule-making powers are required for the PRA which are explained below. The rules made by the PRA under the new framework are referred to as CRR Rules.

60. To enable greater scrutiny and transparency of PRA decision-making for the implementation of the updated prudential regime, the PRA will be required to have regard to a list of factors when exercising its rule-making power to update and maintain parts of the prudential regime related to the implementation of these outstanding Basel standards. This list of factors includes (a) relevant standards recommended by the Basel Committee on Banking Supervision from time to time, (b) the impact of regulatory requirements on the relative standing of the UK as a place for internationally active investment firms to be based or to carry on activities, (c) the likely effect of the rules on the ability of CRR firms to continue to provide finance to businesses and consumers in the United Kingdom on a sustainable basis in the medium and long term, and (d) any other matter specified by the Treasury by regulations (section 144C(1)(d)).

61. Further, the PRA will have to consider, and consult with the Treasury about, the likely effect of the rules on relevant equivalence decisions. For the purpose of this requirement, an equivalence decision is "relevant" if the Treasury have, by notice in writing, informed the PRA that it is relevant for that purpose. The PRA will also need to ensure that these enhanced accountability measures are designed to provide transparency for Parliament, industry and the public.

62. The PRA will also have additional requirements for its reporting and consultation processes to explain how it has considered the new factors. In accordance with section 138J of the Financial Services and Markets Act 2000, the PRA will be required to consult on its proposed rules. With respect to the new factors – letters (a) to (d), above – at consultation the PRA will also be required to publish an explanation of how having regard to these factors has affected the proposed rules. When the PRA makes the final rules, it will need to publish a document on the above as well as a summary of the effect of the rules.

63. Under subsection (3), the Treasury also has an express power to revoke provisions in the retained CRR where this is considered necessary or desirable to maintain the coherence of the retained CRR or the PRA rules. The power in subsection (1) allows the Treasury to revoke provisions in the retained CRR that directly reflect the Basel standards. However, without further amendment, this would mean that the retained CRR is no longer a coherent piece of legislation. The relevant capital requirements would be split between the retained CRR and the PRA rules, making it difficult to understand and potentially creating problems of interpretation. Taking into account these practical issues, the power in subsection (3) will allow the Treasury to revoke further provisions in the retained CRR that are related to the provisions revoked under subsection (1). This will provide for the delegation to the PRA of coherent, defined areas of responsibility within the UK's capital requirements regime.

64. The revocation under subsection (1) and (3) will only be done if the provision has been or will be adequately replaced by CRR Rules or it is appropriate for the provision not to be replaced.

65. Under subsection (5), the Treasury will also have a power to make consequential, supplementary, incidental, transitional, transitory and savings provision when exercising the revocation powers in subsections (1) and (3). Amendments are likely to need to be made to the UK CRR, with some amendments necessary to primary or secondary legislation insofar as they relate to the capital requirements regime. Some examples of amendments that are likely to arise include the following. This is not an exhaustive list and there are likely to be other amendments necessary as the PRA rules develop:

(a) consequential amendments to the UK CRR as a result of the repeal of the provisions in the UK CRR;

(b) consequential amendments to the Capital Requirements Regulation 2013 (SI 2013/3115);

(c) consequential amendments to other UK secondary legislation (for example, regulation 11 of the Solvency 2 Regulations 2015, SI 2015/575, and regulation 6(3)(c)(iii) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, SI 2017/701);

(d) consequential amendment necessary to primary legislation. An example of this is that when Article 308 of the CRR is revoked, consequential amendments will be needed to the relevant provisions of the UK European Market Infrastructure Regulation (EMIR) that relates to it. Further consequential amendments are also expected in relation to section 3(1) of the Banking Act 2009 (interpretation).

66. Over the longer term, the government is reviewing the overall framework for financial services regulation in the UK, to determine how the framework needs to adapt to the UK's new position outside of the EU, and to ensure the framework is fit for the future. The review will explore how the UK's expert, independent regulators can take the lead in designing and implementing the specific requirements that apply to firms, while ensuring there is appropriate democratic policy input. The delegated powers in the Bill will ensure that the Government goes into that review with an appropriate degree of flexibility as it seeks to adapt its framework for financial services in its future outside the EU

Justification for the procedure

67. It is considered appropriate that any regulations made by the Treasury using these powers are subject to the draft affirmative procedure in both Houses of Parliament. The Treasury may make secondary legislation relating to the revocations of sections of the retained CRR only if it considers that the PRA has or will adequately replace the provisions in rules, or it is appropriate for the provision not to be replaced. As a result, it is appropriate that Parliament should scrutinise the detail of the deletions made to other legislation and to seek assurances from Treasury Ministers during the debates that there are no "gaps" in the legal framework created by amendments to legislation.

68. The PRA will make its rules based on the framework set out in Part 9D of the Financial Services and Markets Act 2000, and therefore it is not subject to a further Parliamentary procedure.

Clause 5 and Schedule 3, Part 1, paragraph 1: prudential regulation of credit institutions, etc.

- new section 144C(1)(d) of the Financial Services and Markets Act 2000 (power to add to the list of statutory matters when making CRR Rules)

Power conferred on: the Treasury

Power exercised by: regulations, by way of statutory instrument

Parliamentary Procedure: draft affirmative

Context and purpose

69. The context of this is as set out for clause 3 and Schedule 3, Part 2.

70. Under clause 3, the Treasury will repeal sections of the retained CRR that need updating to reflect CRRII and the latest Basel standards via secondary legislation. Subsequently, the majority of these updates will be implemented through rules set by the PRA (CRR rules) and will primarily involve technical changes to the UK framework as it relates to credit risk, market risk, operational risks as well as other risks specified in the Basel standards. The PRA will also be subject to an enhanced accountability framework. This is intended to give the UK's regulatory regime more flexibility and increase its ability to respond to changes.

71. Schedule 3 inserts a new Part 9D into FSMA. Under new section 144C, the PRA must have regards to a list of factors when making its rules(which are set out in subsections (1) to (3) and which cover CRRII and the Basel standards), the effect of the rules on the standing of the UK as a place to carry on financial service businesses, and the effect on finance to business and consumers. Under subsection (1)(d), the Treasury have the power to make regulations to add to the list of matters that the PRA must have regard to. The PRA must also consider, and consult the Treasury about, the likely effect of the rules on relevant equivalence decisions.

Justification for taking the power

72. The Treasury's power to add to the statutory list of matters is a wide power without any stated limitations. It is necessary to have a wide power as it is not possible to predict all of the circumstances in which the power may be exercised. Given the wide remit of the PRA's rule-making power in this framework, it is necessary to ensure that they remain properly accountable to Parliament and Government.

73. If Government priorities were to change in the future, for example, in relation to social policy, this provision will allow for the Treasury to make regulations that the PRA will

have regard to when it makes CRR rules. This is similar to the power taken in relation to the FCA above under new section 143C(2)(d) FSMA inserted by Schedule 2.

Justification for the procedure

74. It is considered appropriate that any regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament, especially as it is not possible to predict all the circumstances in which this power may be used.

Clause 5 and Schedule 3, Part 1: paragraph 1: prudential regulation of credit institutions, etc.

- new section 144F of the Financial Services and Markets Act 2000 (consequential amendment of the Capital Requirements Regulation)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

75. As set out above, the Government considers the most effective way to update the UK's prudential regime is to allow for the implementation of firm requirements by the PRA, subject to an enhanced accountability framework. The revised regime will implement the Basel Standards and the UK's version of EU prudential rules. This is intended to give the UK's regulatory regime more flexibility and increase its ability to respond to changes. The PRA will be granted changes to its rule-making powers to ensure that it has the vires to make the necessary rule changes.

76. In subsection (5) of clause 3, the Treasury are provided with a power to make consequential, supplementary, incidental, transitional, transitory and savings provision when revoking provisions in the CRR. Separately, consequential amendments will be necessary as a result of the new CRR rules. It is not possible to specify all the consequential amendments as they will only become known once the PRA has consulted on its rules which will replace the EU law provisions that are being revoked.

77. Furthermore, there are likely to be ongoing amendments necessary after the revoked EU provisions have been dealt with. This is because the PRA is going to have ongoing policy responsibility for maintenance of the regime. Consequential amendments are likely to be necessary to ensure that the new regime is agile and flexible.

Justification for taking the power

78. The power under this section allows the Treasury to make provision amending primary and secondary legislation that is consequential on the rules made by the PRA for the purposes of replacing the revoked EU law provisions and enhancing the UK's prudential regime. As a power made under the Financial Services and Markets Act 2000, this power will include the power to make incidental, supplemental, consequential and transitional provision, as specified in section 428(3) of that Act.

79. It is considered appropriate to take this consequential power on the following grounds.

(a) This Bill contains a power to revoke provisions in the retained CRR under clause 3, which will be exercised by the Treasury once it considers the PRA has made or will make rules that adequately replace the revoked provisions (or it is appropriate for the provision not to be replaced) . It will be necessary for a separate power for the Treasury to make consequential amendments to legislation to reflect those rules.

Although the intent is for the PRA to be able to replicate the revoked EU requirements in the PRA rules where appropriate, the new rules will also introduce Basel standards that are not currently in the EU requirements, and therefore it will be necessary to make consequential amendments to legislation to reflect this.

(b) In addition, this power will be required to deal with ongoing requirements as the regime evolves and there is therefore a need for a power to make further amendments where necessary.

80. The PRA will be subject to an accountability framework when making its rules, requiring it to have regard to specific regulatory principles and explain how it has met those principles. This will help ensure that the exercise of the Treasury power is consequential on rules that have been subjected to proper accountability and transparency.

Justification for the procedure

81. It is considered appropriate that any regulations made using this power are subject to the draft affirmative procedure in both Houses of Parliament, especially given that the power envisages changes to primary legislation. As a result, it is appropriate that Parliament should scrutinise the detail of the deletions made to the legislation and to seek assurances from Treasury Ministers during the debates that there are no "gaps" in the legal framework created by amendments to legislation.

Clause 5 and Schedule 3, Part 1: paragraph 1: prudential regulation of credit institutions, etc.

- new section 144G of the Financial Services and Markets Act 2000 (power to grant permissions under the Capital Requirements Regulation)

Power conferred on: the Prudential Regulatory Authority

Power exercised by: rules made in accordance of Part 9D of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and purpose

82. The context of this is as set out for clause 3 above, whereby sections of the CRR will be revoked and replaced by way of CRR Rules made by the PRA.

83. The CRR allows firms to apply to the PRA for permission to change their capital requirements in certain areas. The procedural requirements for this are set out in Part 8 of the Capital Requirements Regulations 2013.

84. Under clause 3, some of the provisions that the Treasury intend to repeal include capital requirements permissions granted by the PRA. The PRA has power to exercise various discretions on firms' capital requirements under the CRR for which firms must make an application to the PRA for permission. The PRA assesses each application before deciding whether to exercise its discretion and grant the firm permission. The PRA however does not have the power in the Financial Services and Markets Act 2000 to grant new permissions in its rules.

Justification for the power

85. Section 138A of the Financial Services and Markets Act 2000 allows the PRA to modify rules subject to an application or with consent of the persons to whom the rule applies. However, section 138A does not allow the PRA to replicate the permissions regime in

the CRR. In particular, it does not allow for the power to vary or modify rules on an ongoing basis without the application or consent of the firm or to do so more generally. Therefore, if the regulator determined it was necessary to modify the permission (e.g. in the case of issues being identified with a regulatory capital permission) it would have to ask the firm to apply for a revised rule modification or indicate that otherwise the entire modification would be revoked. In some cases, this would mean that it would not be credible for the firm to continue to operate if, for example, a model permission was revoked in its entirety.

86. Section 144G(2) allows the PRA to not apply a CRR Rule, or to apply it with modifications, on the application of or with the consent of the persons subject to the CRR Rules.

87. Section 144G(3) allows the PRA to grant permissions, subject to conditions, to persons that are subject to the CRR Rules. Further, the PRA will also have the power to revoke and vary permissions, either on their own initiative, or on the application or with consent of the person it applies to.

88. The enhanced accountability framework applies to any rules made under this provision.

Justification for the procedure

89. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the PRA. It is intended that the PRA's power is exercised in accordance with new rule-making provisions in Part 9D of the Financial Services and Markets Act 2000 and under Part 8 of the Capital Requirements Regulations 2013.

Clause 5 and Schedule 3, Part 1: paragraph 1: prudential regulation of credit institutions, etc.

- new section 144H of the Financial Services and Markets Act 2000 (power to amend rules with reference to Capital Requirements Regulation and to modify that Regulation)

Power conferred on: the Prudential Regulatory Authority

Power exercised by: rules made in accordance of Part 9D of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and purpose

90. The context of this is as set out above.

91. Section 144H(1) gives a delegated power to the PRA which enables it to amend its rules to reflect ambulatory references to the UK CRR, given that the UK CRR will be updated to reflect the implementation of CRR II and Basel 3. The delegated power at subsection (2) also enables the PRA to include provision that modifies the UK CRR but may not amend or revoke provisions. This is similar to the power being granted to the FCA under section 143C(3)(e) and 3(f).

Justification for taking the power

92. As set out above, section 144H(1) allows the PRA to amend its rules to reflect changes to the UK CRR, given that the UK CRR will be updated to reflect the implementation of latest prudential and Basel standards. Subsection (2) further enables the PRA to include provision that modifies the UK CRR but may not amend or revoke provisions of the CRR itself, as that power is reserved to the Treasury.

93. This is considered necessary due to the manner in which the CRR is being implemented, further details of which are set out in respect of clause 3. Further, the enhanced accountability framework applies to any exercise of power under this provision.

Justification for the procedure

94. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the PRA. It is intended that the PRA's rule-making power is exercised in accordance with new rule-making provisions in Part 9D of the Financial Services and Markets Act 2000.

Clause 5(1)(b) and Schedule 3, Part 2: PRA'S power to make rules in relation to certain holding companies

- new section 192XA of the Financial Services and Markets Act 2000 (Rules applying to holding companies)

- new section 192XB of that Act (Procedural provision)

- new section 192XC of that Act (Disapplication or modification of rules in individual cases)

Power conferred on: the Prudential Regulatory Authority

Power exercised by: rules

Parliamentary Procedure: none

Context and Purpose

95. The draft Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 provide for a new Part 12B of the Financial Services and Markets Act 2000. These draft regulations have been laid before Parliament by the Treasury to implement Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (known as CRDV). Section 192P of FSMA provides that certain UK holding companies of groups of companies that contain a credit institution or a PRA-designated investment firm are required to apply for approval, or confirmation that they are exempt, from the PRA. Approval will only be granted where the PRA is satisfied as to the organisation and structure of the group and the suitability of its directors (section 192R). The PRA will monitor the holding company's continued compliance with these conditions once approved. The PRA may also take measures, issue directions and impose sanctions where there is non-compliance (under sections 192T, 192Y and 192U). Where the PRA is not satisfied that the holding company satisfies these requirements, either when it applies for or after it has received approval, the PRA can designate another company within the group to be responsible for complying with the prudential requirements on behalf of the group (section 192T(2)(c)).

96. Section 192V provides the PRA with a rule-making power in relation to holding companies for the purpose of securing the application of the prudential requirements to the relevant holding companies. This rule-making power was included in the draft regulations for the purpose of transposition of CRDV. In the Financial Services Bill 2020, provision is made for that rule-making power to be revoked and replaced with an extended rule-making power in section 192XA to enable the PRA to make rules for the

same types of holding companies but the new rule-making power also allows for rules which will cover the implementation of CRR2 and Basel as well.

97. As the power relates to holding companies which are not themselves carrying on regulated activities this power is subject to limitations which are designed to ensure that it is exercised in a proportionate manner. First, subsection (1) sets the scope of the PRA's power to only those holding companies which are approved or designated under section 192R or 192T FSMA respectively. Subsection (2) restricts the use of the power to several subject areas, the first of which is to secure the application of prudential requirements on a consolidated or sub-consolidated basis, as defined in the CRR to mean requirements which apply at a certain level of a firm's group structure as if the entirety of that element of the group were one firm. Subsection (2)(b) to (f) sets out the other subject areas including the mitigation of group risk, reporting and public disclosure requirements as well as remuneration.

98. The power can only be exercised where it appears to the PRA to be necessary or expedient to make rules for the purpose of advancing any of its objectives (section 192XA(1)). Section 192XA(3) and (4) set parameters around the PRA's ability to modify retained direct EU legislation when making rules.

99. In order to ensure accountability, the exercise of the power will be subject to almost all the accountability framework that applies to the making of CRR rules (section 192XB). Finally, section 192XC allows the PRA to disapply requirements on a case-by-case basis. This mirrors the PRA's existing "permissions" regime under which firms can apply to the PRA to disapply aspects of the prudential requirements, such as a specific buffer rate.

<u>Justification for the power</u>

100. The new power is considered necessary to enable the PRA to set suitable rules in relation to holding companies. The PRA is unable to use its general rule-making power under section 137G FSMA for the purposes of the implementation of the powers in the Bill because that power only applies to PRA-authorised persons. Holding companies are only required to seek approval, not authorisation, therefore additional powers are needed. If the PRA had to rely on its general rule-making power, it could only apply prudential requirements to authorised subsidiaries rather than to holding companies.

101. The power in section 192V, which it is proposed should be inserted into FSMA for the purpose of the transposition of CRDV, is insufficient to allow the PRA to make the full suite of rules necessary to implement CRRII and the Basel reforms.

<u>Justification for the procedure</u>

102. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the PRA given the constraints placed upon the exercise of the power, the accountability measures and the fact that the PRA is independent of government therefore generally operates without further oversight.

Clause 6: power to amend the Credit Ratings Agency Regulation

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

103. As set out for clause 3, the Government considers the most effective way to implement the Basel standards and EU law is to delegate responsibility to the regulators, subject to an enhanced accountability framework.

104. A requirement of Basel 3.1 involves some minor changes to previous Basel standards including:

(a) adding two eligibility criteria which credit ratings agencies (CRAs) must satisfy to an existing list of six criteria;

(b) adding some additional rules on disclosures;

(c) adding an additional principle.

Justification for taking the power

105. The process for recognising credit ratings is linked to recognition under the Credit Ratings Agencies Regulation (No 1060/2000) (CRAR) (see Article 135 CRR). The supervision of the CRAs is not within the PRA's remit. The FCA is taking on the function of regulating UK CRAs from the European Securities and Markets Authority (ESMA) at the end of the transition period.

106. A detailed review of the CRAR has not yet been carried out to identify all relevant changes, but it is not expected to be revoked in full and any amendments will be minor. Given the minor changes, it is not considered appropriate to split the CRAR into retained law and Regulator rules. Therefore, the Treasury need a specific narrow power to amend the CRAR to implement changes related to the use and issuance of credit ratings in line with the Basel framework, where it is "necessary or desirable" to do so. The proposed is limited as it is tied to standards in the Basel framework (see paras 98-99 on pp. 28-30 of *Finalising Post-Crisis Reforms*).

Justification for the procedure

107. It is considered appropriate that any Regulations made using these powers are subject to the draft affirmative procedure in both Houses of Parliament, as it is amendment of retained EU law. As a result, it is appropriate that Parliament should scrutinise the detail of the deletions and amendments made to the legislation and to seek assurances from Treasury Ministers during the debates that there are no "gaps" in the legal framework created by amendments to legislation.

Benchmarks

Clause 8, subsection (5): review of which benchmarks are critical benchmarks

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

108. This is an amendment to an existing power of the Treasury in Article A20 of Regulation (EU) 2016/1011 (the Benchmarks Regulation or 'BMR') to specify in regulations that a financial services benchmark is a critical benchmark for the purposes of the BMR. Specific provisions of the BMR deal with critical benchmarks, including FCA powers to act in relation to a critical benchmark to manage the increased risks posed by them.

109. The amendments to the Treasury power are consequential on the changes to be made in Article 20 of the BMR (clause 8 subsection (6)(c)) to the conditions to be satisfied for a benchmark to be designated as critical. The changes to the conditions are needed to reflect the fact that even where there are appropriate market-led substitutes to a benchmark, it may not be practical or possible for users of the benchmark to transition to alternatives, but the benchmark would still meet the other conditions to be a critical benchmark, that is, where the cessation of the benchmark or a change in its representativeness would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the United Kingdom. Designation of such a benchmark allows the FCA to use its powers in relation to that benchmark to manage the risks posed.

Justification for taking the power

110. The Treasury already have a power to designate critical benchmarks for the purposes of the BMR, and this is by negative resolution. This change reflects changes to the conditions to be satisfied before the Treasury can make such a designation for the reasons given above.

Justification for the procedure

111. The change in conditions does not necessitate any changes to the nature of the Treasury power or its parliamentary process.

Clause 9: mandatory administration of a critical benchmark

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

112. Clause 9 amends an existing FCA power under the BMR to compel an administrator of a critical benchmark to continue to produce that benchmark. The period of compulsion can be for up to 12 months at a time, with a current maximum period of 5 years.

113. The purpose of the existing power is to enable the orderly cessation of a critical benchmark where sudden cessation would result in significant and adverse impacts on

market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the United Kingdom.

114. This provision changes the maximum period of compulsion from 5 years to 10 years. The process for using this power remains the same, whereby the FCA can only direct the benchmark administrator to produce the benchmark for a period up to 12 months at a time, after which the power must be reviewed, and if the criteria for compulsion are still met, a further direction is issued.

115. The maximum period of compulsion is being increased from 5 to 10 years because there is an expectation that there will be a significant number of outstanding contracts referencing LIBOR after a 5-year period from the anticipated beginning of the use of this power by the FCA in late 2021. This power can be used in conjunction with the new powers in clauses 14 and 15, whereby the FCA can prohibit or restrict the use of the benchmark and direct that the way in which the benchmark is determined should be changed, following the designation of the benchmark in accordance with new Article 23A (under their new powers in clause 13), and where it is necessary to do so to enable the orderly cessation of the benchmark and where it advances the FCA's consumer protection and integrity objectives under section 1C and 1D of the Financial Services and Markets Act 2000.

Justification for taking the power

116. This is not a new power. The existing maximum period of 5 years is no longer considered adequate to allow the FCA to manage the orderly cessation of critical benchmarks that are referenced in a range of contracts whose term extends beyond 5 years.

Justification for the procedure

117. There is no Parliamentary procedure, as is usual for the exercise of FCA statutory powers in the form of a direction, instruction or prohibition, the FCA are given these powers to exercise as part of their day to day obligations as the regulator of the provision of financial services benchmarks. Parliamentary procedure would be inappropriate and would prevent the FCA from making decisions regarding individual entities in a timely manner.

Clause 10: prohibition on new use where administrator to cease providing critical benchmark

Power conferred on: the Financial Conduct Authority

Power exercised by: notice

Parliamentary Procedure: none

Context and Purpose

118. This is a new FCA power to prohibit the new use of a benchmark following the giving of notice by an administrator under Article 21 that it wishes to cease production of a critical benchmark. Once the administrator and the FCA have carried out the required assessments as to how and whether the benchmark should be either transitioned to a new administrator or ceased to be provided, the FCA will now have the power to prohibit some or all new use of the benchmark, where the FCA consider that it is desirable to do so in order to advance its consumer protection and integrity objectives under sections 1C and 1D of the Financial Services and Markets Act 2000.

119. This allows the FCA to limit the new use of a benchmark that it knows will cease to exist at a point in the future, in order to manage the risks posed by the cessation of that benchmark.

Justification for taking the power

120. As per clause 11.

Justification for the procedure

121. Please see clause 9.

Clause 11: power for FCA to require administrator to assess representativeness of critical benchmarks

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

122. Clause 11 provides the FCA with a set of powers to allow them to require an administrator of a critical benchmark to assess the representativeness of a critical benchmark which is based on submissions by specified contributors, where the FCA consider that the benchmark does not represent the underlying market or economic reality, or the representativeness of the benchmark is or may be at risk. The administrator's assessment will then inform the FCA's own such assessment of the benchmark.

123. Paragraph 3 of new Article 22A allows the FCA to require that the administrator of a critical benchmark assess the capability of such a benchmark to measure the underlying market or economic reality. This complements the requirement in paragraph 2 of new Article 22A that an administrator of a critical benchmark must assess the capability of such a benchmark to measure the underlying market or economic reality every two years (which re-states, with amendments, the existing requirement in Article 23). The new FCA power allows the FCA, where they have concerns, to step in and ask for an additional assessment in between each biennial assessment, rather than wait until the next assessment is due.

124. New Article 22B then requires the FCA to consider the benchmark administrator's assessment and to issue a written notice stating that it considers that either a) the benchmark is not representative of the market or economic reality that it is intended to measure or that the representativeness of the benchmark is at risk, or (b) the representativeness of the benchmark is not at risk .

125. Where the FCA consider that the benchmark does not represent the underlying market or economic reality, or the representativeness of the benchmark is or may be at risk, the FCA can then access their new power to designate the benchmark in accordance with new Article 23A (clause 13) which then allows them to access new powers in new Articles 23B to 23D to manage the risks posed by that situation. These new powers can be used in conjunction with existing BMR powers which are also amended by these provisions (specifically Article 21with changes made by clause 9).

Justification for taking the power

126. After the end of the Implementation Period (see section 1A(6) of the European Union (Withdrawal) Act 2018), the FCA will continue to be the regulator of UK Benchmark administrators. The FCA has a number of existing powers under the BMR which are aimed at appropriately managing the risks posed by critical benchmarks, given that their sudden cessation would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the United Kingdom.

127. These new powers to manage risks are considered necessary to deal with gaps in the BMR regime. The new powers allow FCA to identify in a more timely way where critical benchmarks may no longer represent the underlying market or economic reality and to take early action to manage the risks posed where the representativeness of the benchmark cannot be restored or there are good reasons for it not to be.

Justification for the procedure

128. There is no Parliamentary procedure, as is usual for the exercise of FCA statutory powers in the form of a direction, instruction or prohibition, the FCA are given these powers to exercise as part of their day to day obligations as the regulator of the production of financial services benchmarks. Parliamentary procedure would be inappropriate and would prevent the FCA from making decisions regarding individual entities in a timely manner.

Clause 12: mandatory contribution to critical benchmarks

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

129. Clause 12 amends the FCA's existing power in Article 23 BMR regarding mandatory contributions to a critical benchmark. Clauses 11 and 12 (this clause) change the way in which the FCA can manage the departure of contributors to critical benchmarks.

130. Clause 12 amends the existing power of the FCA under Article 23(6) BMR which allows the FCA to require contributors to continue, or new contributors, to contribute to that benchmark for a period of up to 12 months at a time, with a maximum period of 5 years. The amendment in new Art 23(6A) now clarifies that the FCA can only use its compulsion power so far as it considers it appropriate to do so for the purpose of maintaining, restoring or improving the representativeness of the benchmark.

131. Where the conditions in new Art 23(6A) are not met, the FCA now has the option to consider designation under new Art 23A, which then allows it to use new powers contained in Art 23B to D.

Justification for taking the power

132. Please see the explanation for clause 11, for overall justification for the set of new FCA powers.

Justification for the procedure

133. Please see clause 9.

Clause 13: designation of critical benchmarks that are no longer representative

Power conferred on: the Financial Conduct Authority

Power exercised by: decision

Parliamentary Procedure: none

Context and Purpose

134. Clause 13 provides the FCA with a new power to designate a benchmark under this provision, where it has already given notice that it considers that the benchmark is not representative of the market or economic reality that it is intended to measure or that the representativeness of the benchmark is at risk (following on from an assessment in accordance with new Article 22B or Article 21 new paragraph 3A). Designation is only possible where the FCA consider that the representativeness of the benchmark cannot reasonably be restored and maintained by the administrator using its powers under Art 23(6) or where there are not good reasons to restore its representativeness.

135. The FCA must give notice to the benchmark administrator that it intends to designate a benchmark under this Article. The administrator is then able to make representations to the FCA before the FCA's decision is finalised. The administrator may appeal to the Upper Tribunal any decision by the FCA to make such a designation.

136. The purpose of the designation is to then allow the FCA to take further steps to deal with the orderly cessation of the benchmark, in accordance with its new powers in clauses 14 and 15 (to prohibit new or legacy use of the benchmark and to require the administrator to change the way in which the benchmark is determined to manage the orderly cessation of the benchmark).

Justification for taking the power

137. Please see the explanation for clause 11, for overall justification for the set of new FCA powers.

Justification for the procedure

138. Please see clause 9.

Clauses 14 to 16: prohibition on use of and orderly cessation of benchmarks designated under Article 23A of Regulation (EU) 2016/1011

Power conferred on: the Financial Conduct Authority

Power exercised by: notice and direction

Parliamentary Procedure: none

Context and Purpose

139. Clause 14 insert new Articles 23B and 23C to provide for a prohibition on the use of a benchmark that has been designated under Article 23A, with the ability for the FCA to defer the date the prohibition takes effect and then allows the FCA to exempt from that general prohibition on use, certain use or users of that benchmark. These provisions and powers will allow the use of an Article 23A designated benchmark to be appropriately restricted whilst still allowing use in existing contracts that genuinely have no or inappropriate alternatives and no realistic ability to be renegotiated or amended.

140. Clause 15: New Article 23D gives the FCA a power to direct the benchmark administrator of an Article 23A benchmark (as designated under new Art 23A) to

change the way in which the benchmark is determined, including the input data, to change the rules of the benchmark, and to amend the code of conduct (where the benchmark is based on submissions by contributors). The power may only be used where it is appropriate to do so in order to manage the orderly cessation of the benchmark and where it is desirable to do so in order to advance the FCA's consumer protection and integrity objectives under sections 1C and 1D of the Financial Services and Markets Act 2000. Article 23E requires the FCA to review any use of powers under Article 23D 2 years after its first use, and every 2 years after that, and to publish a report following each review.

Justification for taking the power

141. Please see the explanation for clause 11, for overall justification for the set of new FCA powers.

Justification for the procedure

142. Please see clause 9.

Clause 15, subsection (2): insertion of new Annex 4: power for FCA to apply BMR to Article 23A designated benchmark with modifications

Power conferred on: the Financial Conduct Authority

Power exercised by: notice

Parliamentary Procedure: none

Context and Purpose

143. Clause 13 allows the FCA to designate a benchmark under new Art 23A of the BMR, where FCA consider that the representativeness of the benchmark cannot reasonably be restored and maintained by the administrator using its powers under Art 23(6) or where there are not good reasons to restore its representativeness.

144. Designation under clause 13 means that it may no longer be appropriate to apply certain provisions of the BMR to that benchmark. Clause 15 subsection (2) inserts new Annex 4 into the BMR. Paragraph 2 of new Annex 4 modifies certain provisions of the BMR where appropriate in the case of all Article 23A designated benchmarks.

145. Paragraph 3 of new Annex 4 BMR provides the FCA with a new power to provide that the BMR applies to an Article 23A designated benchmark with modifications where the FCA considers it appropriate to do so having regard to the effects of the designation under Article 23A and the FCA's exercise of its powers under Article 23D.

146. The FCA must give the administrator of an Art 23A benchmark written notice that it intends to apply the BMR with modifications, explain the proposed modifications and the reasons for them, and allow the administrator 14 days to make representations. The FCA will then issue a notice setting out the modifications.

Justification for taking the power

147. Please see the explanation for clause 11, for overall justification for the set of new FCA powers.

148. Although there are some provisions of the BMR that it will be appropriate to modify in relation to all Article 23A designated benchmarks (and these are specified in paragraph 2 of new Annex 4), in specific cases, including where the FCA exercises its powers under Article 23D, what modifications of the BMR will be appropriate will depend on how the

FCA exercises its Article 23D powers to change the way the benchmark is determined. In particular, the FCA, in using its Article 23D powers, is able to confer a discretion on the administrator. This power is therefore necessary to enable the FCA to ensure further appropriate modifications are made to the application of the BMR to an Article 23A benchmark on a case by case basis.

Justification for the procedure

149. Please see clause 9.

Clause 18, subsection (1): power to make provision relating to the operation of the BMR in relation to different versions of a benchmark

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

150. New Article 23G of the BMR clarifies how the BMR will apply in relation to different 'versions' of an 'umbrella' benchmark. A 'version' of an umbrella benchmark is a benchmark as provided in a particular currency or maturity or tenor, or a combination of these. For example, LIBOR is calculated for 7 different maturities and in 5 different currencies, giving rise to 35 separate versions of the benchmark.

151. In managing the orderly cessation of a critical benchmark such as LIBOR, it will be appropriate to ensure the FCA has the ability to use its existing and new powers which are aimed at orderly wind down in relation to different versions of the benchmark. Therefore, Article 23G specifies that Articles 11(4), (4A) and (4B), 21, 21A, 22A, 22B, 23 and 23A to 23E and Annex 4 apply in relation to the benchmark as if each version of the benchmark were a separate critical benchmark, with the specified modifications. Those modifications recognise that for some actions however, it would still be appropriate to act at the level of the benchmark. Article 23G also allows the FCA to exercise its functions under Articles 21, 21A, 22A, 22B, 23 and 23A to 23D and 23E(4) and paragraph 3 of Annex 4 in different ways in relation to different versions of the benchmark.

152. Paragraph (8) of new Article 23G provides the Treasury with the power to make provision about the operation of the BMR in relation to umbrella benchmarks, including provision to amend or revoke provisions in Article 23G by regulations. This will allow for the application of other provisions in the BMR not currently listed in Article 23G to operate at the 'version' level of a critical benchmark, and to amend what is currently specified.

Justification for taking the power

153. It is considered important to provide for this flexibility to allow the Treasury to make changes to Article 23G in regulations. The aim is to ensure that provision can be made for the exercise of the FCA's powers in this way in circumstances which might arise during the wind down of a critical benchmark that cannot reasonably be anticipated at this time. This includes the way that provision which relates to the ongoing maintenance of an Article 23A benchmark is applied, as well as the powers which are specifically aimed at managing the orderly wind-down of the benchmark.

Justification for the procedure

154. As these Regulations allow the Treasury to amend a provision of the BMR, and to make provision of a similar nature to Art 23G it is considered appropriate to use the draft affirmative procedure (see clause 18 subsection (2) which amends Article 49 BMR to that effect) to allow for considered Parliamentary scrutiny of the proposals.

Clause 19: power for FCA to extend the period of its review of an administrator's procedures for changes to or cessation of a critical benchmark

Power conferred on: the Financial Conduct Authority

Power exercised by: notice

Parliamentary procedure: none.

Context and purpose

155. Amendments to Article 28 (changes to and cessation of a benchmark) made by clause 19 require that the FCA be sent details of the specific assessment required to be undertaken by the administrator of a critical benchmark when drawing up procedures for dealing with potential changes to or cessation of a benchmark. The FCA has a period of up to 60 days to consider the administrator's procedures and assessment, and can extend that period, by written notice, for a period of up to 6 months.

Justification for taking the power

156. Please see the explanation for clause 11, for overall justification for the set of new FCA powers.

Justification for the procedure

157. Please see clause 9.

Clause 21 and Schedule 5, paragraph 11: power to make regulations concerning service of documents under the BMR

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and purpose

158. There are a number of powers in the BMR that allow the FCA to direct a person to take action or refrain from taking action, for example, under Article 21(3) the FCA can direct an administrator of a critical benchmark to continue to produce that benchmark for a specified period of time, and under Article 23D the FCA can direct that the administrator of a critical benchmark make changes to the way the benchmark is determined. The BMR does not currently provide for a clear procedure to be followed in the exercise of such powers.

159. In order to remedy this situation, paragraph 11 of Schedule 5 inserts new Article 48A into the BMR to provide the Treasury with a power to make provision about the procedure to be followed or rules to be applied where the BMR provides that information or a document of any kind should be given, or where the BMR authorises the imposition of a requirement.

Justification for taking the power

160. This allow the Treasury to consider and specify the detailed operational procedures for service of documents and imposition of requirements which are not usually contained within primary legislation.

Justification for the procedure

161. Regulations made under Schedule 5 will be subject to the negative resolution procedure. This is considered appropriate as the scope of the power is narrow and deals only with minor operational issues.

__Access to financial services markets__

Clause 22, subsection (5), and Schedule 6, paragraph 2(2): definition of "the Gibraltar regulator"

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

<u>Context and Purpose</u>

162. Paragraph 2(1) defines "the Gibraltar regulator" as the Gibraltar Financial Services Commission ("GFSC"). Paragraph 2(2) enables the Treasury to amend the definition of "the Gibraltar regulator".

163. The GFSC is a statutory body which operates as Gibraltar's financial services regulator under Gibraltar's Financial Services Act 2019. The GFSC plays an important role under the new Gibraltar Authorisation Regime set out in Schedule 2A. For example:

    (a) a Gibraltar-based person has a Schedule 2A permission to carry on approved activities in the United Kingdom if and to the extent that the person has permission from the Gibraltar regulator to carry on the corresponding activity in Gibraltar; see paragraph 13(1)(c);

    (b) the Gibraltar regulator gives the appropriate UK regulators the notification necessary for a Gibraltar-based person to obtain a Schedule 2A permission; see paragraph 12(1);

    (c) the Gibraltar regulator can request the variation or cancellation of a Schedule 2A permission or the imposition of requirements on a Gibraltar-based person with a Schedule 2A permission; see paragraphs 22, 32 and 44.

164. The policy objective is to ensure that the Gibraltar Authorisation Regime operates effectively and to minimise legal risks and uncertainty. Therefore, the Gibraltar regulator must be identified with precision. Doubts over the identity of the Gibraltar regulator could cause uncertainty for Gibraltar-based persons with a Schedule 2A permission; for example, a failure to identify the Gibraltar regulator accurately could call into question whether a Gibraltar-based person has a Schedule 2A permission in the first place. This would have serious consequences for the person and a negative impact on its UK customers and the UK's relationship with Gibraltar.

<u>Justification for taking the power</u>

165. The official name of the Gibraltar Financial Services Commission is a matter of Gibraltar law. It is for the Gibraltar Government to decide how to designate the Gibraltar regulator. The Gibraltar Government would be free to change the name by amending Gibraltar's Financial Services Act 2019. The power under paragraph 2(2) is appropriate to ensure that the definition in paragraph 2(1) is up to date should the Gibraltar Government decide to change the Commission's name. Given the very specific nature of the amendment, it would be disproportionate to have recourse to primary legislation. Such an amendment would involve no policy choice.

166. Paragraph 2(2) places a limitation on the Treasury's power to amend the definition: the Treasury may do so only if "they consider appropriate … in consequence of a change in the law of Gibraltar".

Justification for the procedure

167. The Treasury consider it appropriate that regulations amending the definition of "Gibraltar regulator" be subject to the negative resolution procedure. The proposed power could be used only to amend the definition of "Gibraltar regulator": this is a very narrow amendment that involves no policy choice.

Clause 22, subsection (5), and Schedule 6, paragraph 3(3)(b): definition of "branch"

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

168. Under the existing regime, Gibraltar-based persons providing financial services can operate in the UK through branches or on a cross-border basis (that is, from Gibraltar). The policy is that, in principle, Gibraltar-based persons with a Schedule 2A permission should continue to have the choice whether to carry on regulated activities in the UK through a branch or from Gibraltar. The objective is that the Gibraltar Authorisation regime preserves the existing understanding of "branch" in order to provide for a smooth transition from the existing regime to the new one. As a result, the Treasury consider it necessary to provide for a definition.

169. Paragraph 3(3)(a) defines "branch" as "a place where a person carries on an activity for an indefinite period and which does not have legal personality". This definition preserves the status quo because it reflects the current understanding of 'branch', which derives from the passporting regimes under EU law. Those regimes provide various definitions of 'branch' for different types of financial institutions. However, broadly speaking, they have two common elements: a branch is a place of business which:

(a) has no separate legal personality (see e.g. art. 4(1)(17) of Regulation (EU) No 575/2013), and

(b) involves a permanent presence in the host member state (as opposed to a service provided on a cross-border basis, see e.g. C-221/89 Factortame [1991] ECR 1-3905, paragraph 20).

170. Paragraph 3(3)(b) provides that "branch" also means "any other description of place specified in regulations made by the Treasury". This provision reflects the fact that the existing definition of "branch" is not necessarily limited to the key elements captured in paragraph 3(3)(a). As explained below, EU law also provides that, for example, 'agencies' are treated as branches under some single market directives. More importantly, the UK will no longer be bound by EU law, so the Treasury consider it necessary to have the discretion to develop an autonomous concept of branch where appropriate to do so.

171. The proposed power would enable the Treasury: (i) to fully preserve the status quo by ensuring that a place that is currently treated as a branch would continue to be treated as such although it does not fall under paragraph 3(3)(a); (ii) to develop an autonomous concept of branch, for the purposes of this measure, which reflects future developments in line with the priorities of the United Kingdom outside the European Union.

Justification for taking the power

172. The Treasury consider the proposed power appropriate because it would enable the Treasury to provide for a comprehensive definition and adapt it to changing circumstances. While the definition in paragraph 3(3)(a) captures the key aspects of what a branch is, there are certain types of places of business currently regarded as branches that do not fall neatly within that definition. For example, an "agency" is treated as a branch under art. 13(11) of Directive 2009/138/EC and art. 2(1)(12) of Directive (EU) 2016/97. Neither Directive defines "agency". Questions may be asked whether an independent UK-based person acting on behalf of a person with a Schedule 2A permission could be regarded as a branch under paragraph 3(3)(a). Much may depend on the factual circumstances and this may result in uncertainty. The proposed power in paragraph 3(3)(b) would enable the Treasury to provide clarity.

173. Similarly, there may be doubts whether physical infrastructure in the UK temporarily used by a person providing services from Gibraltar is a branch. Technological developments may also raise questions whether automated facilities fall within the definition. For example, in 2000 the European Commission addressed the question whether electronic machines – such as ATMs – could be 'branches' of insurers. It took the view that they did not but observed that it could not "rule out the possibility that technological developments might, in the future, induce it to review its position", see Commission Interpretative Communication (2000/C 43/11, 16 November 2000)

174. Given the current pace of technological progress, this type of issues is likely to intensify in the next few years. The proposed power would enable the Treasury to respond quickly to developments and promote legal certainty. By contrast, without the proposed power, the definition of branch in paragraph 3(3)(a) may prove underinclusive. If so, it would have to be amended by primary legislation. This would limit the Treasury's ability to respond to developments in a timely manner, especially where those developments are driven by fast-paced technological change.

Justification for the procedure

175. The Treasury consider the negative resolution procedure appropriate because this is narrowly framed power which is intended to implement the statutory objective of allowing Gibraltar-based persons to carry on approved activities through UK branches. This policy is set out in Schedule 2A. The power would simply give operational content to that policy.

Clause 22, subsection (5), and Schedule 6, paragraph 5: approval of regulated activities for Schedule 2A purposes

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

176. Under section 19 of the Financial Services and Markets Act 2000, no person may carry on a regulated activity in the UK unless they are an authorised person or an exempt person. Section 31 lists the 'authorised persons' under the Financial Services and Markets Act 2000. Under new section 31(1)(aa), a Gibraltar-based person that has a Schedule 2A permission to carry one or more regulated activities is an authorised person. Section 22 defines what is meant by 'regulated activity'. The Financial Services

and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("RAO") lists the regulated activities for the purposes of section 22.

177. A Gibraltar-based person will be able to carry on a regulated activity under Schedule 2A only if the activity is approved by the Treasury for the purposes of that Schedule, see paragraph 13(1)(b). "Approved activity" means a regulated activity approved by regulations made under paragraph 5, see paragraph 3(1).

178. Paragraph 5(1) gives the Treasury the power to approve a regulated activity. The policy objective is that the Treasury should be able to grant access to the UK financial services markets under Schedule 2A provided certain conditions are satisfied. Ensuring that the UK markets remain open to Gibraltar-based persons reflects the commitment given by the Government in March 2018 when it announced that it would guarantee Gibraltar financial services firms' existing access to the UK and work to design a replacement framework.

179. Paragraph 5(2) provides a non-exhaustive list of what the power to approve a regulated activity would enable the Treasury to do. Under paragraph 5(2)(a), the Treasury could approve a regulated activity "only so far as it is carried on by a person of a description specified in the regulations". In principle, under paragraph 1(2), different types of persons can be Gibraltar-based persons for the purposes of Schedule 2A: individuals, bodies corporate, partnerships and unincorporated associations. Paragraph 5(2)(a) would enable the Treasury to specify the legal status that a person must have in order to have a Sch. 2A permission to carry on a particular approved activity. Through this power, for example, the Treasury would be able to specify that an approved activity can only be carried on by individuals, or companies, or partnerships. For instance, a UK-based person must be a body corporate or a partnership in order to have a Part 4A permission to carry on the regulated activity of accepting deposits, see paragraph 5B of Schedule 6 to the Financial Services and Markets Act 2000. The proposed power would enable the Treasury to approve the regulated activity of accepting deposits only so far as the Gibraltar-based person is a body corporate or a partnership.

180. Under paragraph 5(2)(b), the Treasury could approve a regulated activity "only so far as it is carried on through a branch in the United Kingdom."

181. Under paragraph 5(2)(c), the Treasury could approve a regulated activity "only so far as it is carried on in other circumstances specified in the regulations". This would enable the Treasury, for example, to approve a regulated activity only so far as carried on from Gibraltar.

182. Under paragraph 5(2)(d), the Treasury could approve a regulated activity "subject to other limitations". This would enable the Treasury to preserve – to the extent possible – the scope of market access under the existing regime by approving regulated activities subject to relevant limitations. For example, the Treasury would be able to set out the relevant exclusions in the RAO. As explained above, the RAO lists the regulated activities and the activities which are excluded from the scope of the regulated activities. By specifying the exclusions in the RAO, the regulations made under paragraph 5 would ensure that the framework for market access reflects the RAO in a clear way. The Treasury would also be able to preserve the scope of existing market access for Gibraltar-based persons even where the access is subject to other types of exclusions. For example, Gibraltar-based insurers that do not meet certain thresholds cannot currently passport into the UK. This is because they fall outside the scope of the Solvency 2 Directive which currently defines the scope of the passporting rights of insurers. By contrast, under the Gibraltar Authorisation regime, those insurers would

no longer be excluded if the Treasury approved the regulated activity of effecting and carrying out insurance contracts because they would be covered by the RAO. In order to preserve the existing scope of market access, the Treasury could approve that regulated activity subject to the relevant limitation.

Justification for taking the power

183. The Treasury consider it appropriate to set out the list of approved activities in regulations on the following grounds.

(a) The list is highly complex and involves a considerable amount of detail. It may have to specify not just the regulated activities, but also the description of persons who can carry on the activities; whether the activity is carried on through a branch or from Gibraltar only; or other relevant limitations.

(b) Should the Treasury decide to grant access for additional activities, the list would have to be updated. Under new section 32A, the Treasury must prepare a biannual report about the operation of Schedule 2A. The report could be the basis for the approval of a new regulated activity. If so, the list of activities may need to be adjusted more often than Parliament can be expected to legislate for by primary legislation. Given the average time to pass a Bill, it is unrealistic to expect that modifications to the list would be made by primary legislation within a two-year timeframe.

(c) It is not possible to anticipate fully in what areas UK market access might be granted in the future. This will partly depend on future discussions between the Treasury and the Government of Gibraltar. For example, should the Government of Gibraltar decide to strengthen its financial industry in new sectors, it could seek access to the UK market for the relevant activities. The proposed power to approve activities would be more responsive to developments in areas whose importance to the UK/Gibraltar relationship is difficult to predict.

(d) The law of Gibraltar can be amended relatively quickly. Therefore, should the Treasury and the Government of Gibraltar agree to change the list of approved activities, regulations made under the proposed power would be the best way to keep pace with changes in the law of Gibraltar.

(e) It is not possible to anticipate whether what is now an unregulated activity will become regulated in the future. Given the fast pace of technological developments in financial services, new regulated activities could be added to the RAO. Should the Treasury decide to approve new regulated activities, the proposed power would make it easier to keep the list of activities in tune with these changes.

(f) It is usual to list regulated activities in secondary legislation. For example, the RAO lists the regulated activities under section 22 of the Financial Services and Markets Act 2000. The Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013 (SI 2013/556) lists the PRA-regulated activities.

(g) The list of Gibraltar-based firms that currently have access to the UK financial services markets are set out in the Financial Services and Markets Act 2000 (Gibraltar) Order 2001. The Order was made by the Treasury exercising the delegated power under section 409 of the Financial Services and Markets Act 2000.

184. The proposed power is subject to the following limitations.

(a) The Treasury could approve only a regulated activity under section 22 of the Financial Services and Markets Act 2000, as set out in the RAO.

(b) The Treasury may approve a regulated activity only if it is satisfied that the approval is compatible with each of the objectives listed in paragraph 7.

(c) The Treasury may approve a regulated activity only if it is satisfied that the law and practice of the UK and Gibraltar (relevant to the activity that would be approved) are sufficiently aligned under paragraph 8.

(d) The Treasury may approve a regulated activity only if it is satisfied that there is adequate cooperation between the Treasury, the FCA, PRA and the scheme manager, on the one hand, and the Government of Gibraltar and the Gibraltar regulator, on the other, see paragraph 9.

(e) Before approving a regulated activity, the Treasury must consult the FCA, the PRA and the Gibraltar Government under paragraph 10.

Justification for the procedure

185. The Treasury consider the affirmative resolution appropriate because the approval of a regulated activity involves a significant policy choice. First, a decision to grant market access has consequences for who is authorised to operate in the UK, which has consumer protection and financial stability implications. Second, it has important consequences for the UK's relationship with Gibraltar because access to the UK market is key to Gibraltar's economy. Finally, the opening up of certain sectors to Gibraltar-based persons may have an impact on the UK's relationship with third countries to the extent that such matters are relevant to the conclusion of bilateral agreements with those countries.

Clause 22, subsection (5), and Schedule 6, paragraph 6: identification of Gibraltar activities corresponding to approved activities

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

186. Under paragraph 13(1)(c), a Schedule 2A permission is a permission to carry on an approved activity in the UK only if and to the extent that "the person has permission from the Gibraltar regulator to carry on the corresponding activity in Gibraltar." Paragraph 3(2)(a) also defines "corresponding activity" as "an activity corresponding to an approved activity".

187. Under paragraph 6(1), the Treasury must by regulations specify the "corresponding activities".

188. The policy objective underlying paragraph 6 is to ensure that a Gibraltar-based person may carry on an approved activity in the UK only if it is authorised under the law of Gibraltar to carry on the same activity. Permission from the Gibraltar regulator is a necessary precondition which is designed to promote consumer protection and financial stability. However, it is not enough for a Gibraltar-based person to have a permission from the Gibraltar regulator: it must have the permission to carry on a corresponding activity. In order for a Gibraltar-based person to obtain a Schedule 2A permission, the UK regulators will need to receive a notification which, among other things, must specify the corresponding activity and state that the person has permission from the Gibraltar regulator to carry on the corresponding activity in Gibraltar, see paragraph

15(1)(d) and (e). The UK regulators will be under a duty to reject a notification if satisfied that a person does not have a permission to carry on the corresponding activity, see paragraph 18(3).

189. Paragraph 6 is closely connected with paragraph 4 and must be seen together. In practice, the Treasury expect that regulations made under paragraph 5 and 6 will list the "approved activities" and the "corresponding activities". Paragraph 6(2) makes provision similar to paragraph 5(2).

Justification for taking the power

190. The Treasury consider it appropriate to set out the list of corresponding activities in regulations on the following grounds.

(a) The list is highly complex and involves a considerable amount of detail. It requires the Treasury to consider how the Gibraltar's Financial Services Act 2019 regulates activities.

(b) Should the Treasury decide to grant access for additional regulated activities, the list of corresponding activities would have to be updated. This can be done more quickly through secondary legislation.

(c) Should the law of Gibraltar be amended, regulations made by the Treasury would be able to respond quickly by keeping the scope of market access in line with developments. The identification of a corresponding activity is essential to the granting of market access. A delay in specifying a corresponding activity would have consequences for Gibraltar-based persons and the UK's relationship with Gibraltar.

191. The proposed power is subject to the following limitations.

(a) The duty in paragraph 6 arises only if the Treasury approve a regulated activity.

(b) The Treasury could specify a corresponding activity only if it is satisfied that the identification of the activity is compatible with each of the objectives listed in paragraph 7.

(c) The Treasury could specify a corresponding activity only if it is satisfied the law and practice of the UK and Gibraltar (relevant to the corresponding activity) are sufficiently aligned under paragraph 8.

(d) Before specifying a corresponding activity, the Treasury must consult the FCA, the PRA and the Gibraltar Government under paragraph 10.

Justification for the procedure

192. The Treasury consider the affirmative resolution appropriate because the identification of a corresponding activity under paragraph 6 is closely connected with the approval of a regulated activity under paragraph 5. Both involve a significant policy choice and will occur at the same time: they should be subject to the same procedure.

Clause 22, subsection (5), and Schedule 6, paragraph 15(3): amending content of notification under paragraph 14(1)

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

<u>Context and Purpose</u>

193. A Gibraltar-based person will be able to obtain a Schedule 2A permission if, among other things, the appropriate UK regulator receives a notification from the Gibraltar regulator (see paragraph 12(1)). Paragraph 15(1) specifies the content of the notification. Paragraph 15(1)(i) provides that the notification must "contain, or be accompanied by, any further information specified in a direction given by the appropriate UK regulator" under paragraph 57.

194. The notification requirement is necessary to ensure that the UK regulators have the information needed to discharge their functions under Schedule 2A and will contribute to the promotion of the regulators' statutory objectives. The information will also be used to update the public register held under section 347 of the Financial Services and Markets Act 2000. To that extent, the notification will serve the purposes of consumer protection and transparency.

195. Under paragraph 15(3), the Treasury may "change the information that a notification must contain". This power would enable the Treasury to amend the list of items in paragraph 15. The objective is to ensure that the list of information remains relevant to the activities approved by the Treasury under Schedule 2A.

<u>Justification for taking the power</u>

196. The Treasury consider this power appropriate because it would ensure that changes to the Gibraltar Authorisation regime are reflected in the information listed in primary legislation. This is a new regime; and, therefore, additional information may have to be included if that proves necessary, based on the actual operation of the regime. Regulations made under paragraph 15(3) would allow for swift action to enable such new information to be included.

197. The proposed power is subject to the following limitations.

198. First, paragraph 15(4) precludes the Treasury from amending or repealing paragraph 15(1)(i).

199. Second, the proposed power could not be used to change a direction given by a UK regulator under paragraph 57. This is because, if a direction were modified by the Treasury, it would no longer be a direction given by the UK regulator and the information specified in the direction would no longer meet paragraph 15(1)(i).

200. Third, before amending the list in paragraph 15(1), the Treasury must consult the FCA, the PRA and the Gibraltar Government under paragraph 15(5).

<u>Justification for the procedure</u>

201. The information under paragraph 15(1) is technical and does not involve policy choices. It is closely connected with the overall structure of the Gibraltar Authorisation regime. For example, it includes information about approved and corresponding activities. Changes to the list of information would simply give operational content to the new regime.

Clause 22, subsection (5), and Schedule 6, paragraph 55(5): definition of 'private person' for the purposes of the right of action under paragraph 55(1) to (3)

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

202. Under Part 6 of new Schedule 2A, a requirement can be imposed on a person with a Schedule 2A permission. The contravention of a requirement does not give rise to a right of action for breach of statutory duty unless, among other things, the action is brought by a "private person" who suffers loss as a result of the contravention (see paragraph 55(2)).

203. Paragraph 55(5) provides that "private person" has such meaning as may be prescribed." "Prescribed" means prescribed by regulations made by the Treasury (see section 417(1) of the Financial Services and Markets Act 2000).

204. This power would enable the Treasury to replicate under the Gibraltar Authorisation regime the existing arrangements applicable to Gibraltar-based firms. Currently, requirements can be imposed on those firms under Part 13 of the Financial Services and Markets Act 2000. Under section 202 of the Financial Services and Markets Act 2000, a contravention of a requirement imposed under Part 13 does not give rise to a right of action for breach of statutory duty. However, under section 202(2), in prescribed cases, an action can be brought by a person who suffers loss as a result of the contravention. The Treasury exercised the power to prescribe cases for the purposes of section 202 by making the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256). Among other things, reg. 7 provides that, for the purposes of section 202(2), the action would need to be brought at the suit of a "private person". Reg. 3 defines "private person". Part 13 of the Financial Services and Markets Act 2000 is saved for Gibraltar-based firms from IP completion day by new section 409(11)(e) inserted by reg. 2(5) of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 (SI 2019/589). However, this provision will be repealed once Schedule 2A comes into force. The policy objective is therefore to make similar provision under the new Gibraltar Authorisation regime.

Justification for taking the power

205. The Treasury consider this power appropriate on the following grounds:

(a) It may be necessary to adapt the definition of "private person" to changing circumstances. The Gibraltar Authorisation regime is a new regime and it is difficult to anticipate where it may appropriate to recognise a right of action to private persons. It is therefore not possible to make provision for all relevant contingencies in primary legislation.

(b) The proposed power merely replicates an existing power under section 202(2) of the Financial Services and Markets Act 2000. The use of secondary legislation is therefore supported by precedent. The definition of "private person" is currently set out in regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001.

Justification for the procedure

206. The proposed power is limited to the definition of "private person" for the purposes of paragraph 55. It is very narrow and technical. The current definition is set out in the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 made, among other things, under section 202(2), which is subject to the negative resolution procedure (see section 429(8)).

Clause 22, subsection (5), and Schedule 6, paragraph 56(1): UK regulators' power to direct that a change relating to a Gibraltar-based person with a Schedule 2A permission must be notified

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose

207. Paragraph 56 would enable the FCA or PRA to direct that a change relating to a person with a Schedule 2A permission subject to this paragraph must be notified by the person to the UK regulator giving the direction and the Gibraltar regulator (see paragraph 56(1) to (3)). The FCA and PRA would also be able to specify the time of the notification (see paragraph 56(4)). The policy objective is to ensure that the UK regulators have up-to-date information so that they are in the best position to discharge their responsibilities under Schedule 2A.

Justification for taking the power

208. The Treasury consider this power appropriate on the following grounds.

(a) The UK regulators are in the best position to specify the types of change to the relevant information that a Gibraltar-based person must notify so that they can discharge their responsibilities effectively;

(b) The appropriate UK regulators will have to work more closely with the Gibraltar regulator than the Treasury will do. The UK regulators will be in the best position to see how the new regime works in practice.

209. This power under this paragraph is subject to certain limitations.

(a) A direction under paragraph 56(1) may only be given in relation to a change relating to a matter relevant to a notification under paragraph 14 or 23 (see paragraph 56(2).

(b) A direction can only be general. It may not make provision in relation to a specific Gibraltar-based person (see paragraph 56(6).

Justification for the procedure

210. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000. The Treasury believe that this is appropriate for paragraph 56 as well.

211. However, paragraph 56(10) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (5), and Schedule 6, paragraph 57(1): UK regulators' power to direct that a notification for the purposes of paragraphs 12, 22, 32 or 44 must include specified information

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose

212. Paragraph 57 would enable the appropriate UK regulator to direct that a notification for the purposes of paragraph 12, 22,32 or 44 must include information specified in the direction. The policy objective is to ensure that the FCA and the PRA have the information necessary to discharge their functions under Schedule 2A. For example, the power to give directions under paragraph 57 would enable the regulators to specify information necessary for rejecting notifications under paragraphs 19, 20, 26(5), 36(5),(6), 48(4),(5).

213. Under paragraph 12(1), a Gibraltar-based person will be able to obtain a Schedule 2A permission if, among other things, the appropriate UK regulator receives a notification from the Gibraltar regulator. Paragraph 15(1) specifies the content of the notification. Paragraph 15(1)(i) provides that the notification must "*contain, or be accompanied by, any further information specified in a direction given by the appropriate UK regulator*" under paragraph 57.

214. Under paragraph 22(1), a Gibraltar-based person's Schedule 2A permission could be varied if, among other things, the appropriate UK regulator receives a notification from the Gibraltar regulator. Paragraph 24(1) specifies the content of the notification. Paragraph 24(1)(f) provides that the notification must "*contain, or be accompanied by, any further information specified in a direction given by the appropriate UK regulator*" under paragraph 57.

215. Under paragraph 32(1), a Gibraltar-based person's Schedule 2A permission could be cancelled if, among other things, the appropriate UK regulator receives a notification from the Gibraltar regulator. Paragraph 34 specifies the content of the notification. Paragraph 34(c) provides that the notification must "*contain, or be accompanied by, any further information specified in a direction given by the appropriate UK regulator under paragraph 57.*"

216. Under paragraph 44(1), a requirement can be imposed on a Gibraltar-based person with a Schedule 2A permission if, among other things, the appropriate UK regulator receives a notification from the Gibraltar regulator. Paragraph 46 specifies the content of the notification. Paragraph 46(d) provides that the notification must "*contain, or be accompanied by, any further information specified in a direction given by the appropriate UK regulator*" under paragraph 57.

217. The policy is that the UK regulators will be able to specify necessary information and use it to exercise their powers in relation to persons with a Schedule 2A permission.

Justification for taking the power

218. The Treasury consider this power appropriate on the following grounds:

(a) The UK regulators are in the best position to specify the type of information they need in order to discharge their responsibilities in respect of Gibraltar-based persons. The information would be technical information which will vary depending on the type of approved activity. It would not be possible to set out this information in primary legislation because such a list (i) may be too detailed, or (ii) may not be sufficiently comprehensive. The UK regulators will be able to specify the information when the Gibraltar Authorisation regime comes into force.

(b) The appropriate UK regulators will be working more closely with the Gibraltar regulator than the Treasury will do. The UK regulators will be in the best position to see how the new regime works in practice. If, based on experience, they take the view that certain information proves necessary, they will be able to respond to developments and add the necessary information in a timely fashion by using their power to give directions.

(c) Both financial services and non-financial services legislation provide precedents for a regulator's power to give directions as to the content of notices or applications (see e.g. reg. 14(2) of SI 2018/1149. For a non-financial services example, see sec. 250(3)(d) of the Gambling Act 2005).

(d) More generally, the FCA and PRA can give directions for certain purposes under the Financial Services and Markets Act 2000 (see e.g. section 138A of the Financial Services and Markets Act 2000).

219. The power under paragraph 57 is subject to the following limitations.

(a) Under paragraph 57(2), a UK regulator may only specify information which it reasonably considers necessary to discharge its functions in relation to persons with a Schedule 2A permission.

(b) Under paragraph 57(5) and (6), before giving a direction, the FCA and the PRA must consult the Treasury. The PRA must also consult the FCA.

Justification for the procedure

220. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000. The Treasury believe that this is appropriate for paragraph 57 as well.

221. However, paragraph 57(7) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (5), and Schedule 6, paragraph 58(3)(a): specifying period when a regulated activity ceases to be treated as approved for the purposes of the transitional arrangements under Part 9

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

222. Under paragraph 5, the Treasury may approve a regulated activity for the purposes of Schedule 2A. Paragraph 58 makes provision for a transitional regime when the Treasury withdraw the approval of a regulated activity. The policy objective is to provide for a smooth transition out of the Gibraltar Authorisation regime and minimise economic disruption and legal risks.

223. Under paragraph 58(2), the regulated activity is treated as approved subject, among other things, to certain time-limits specified in paragraph 58(3).

224. Paragraph 58(3)(a) provides that the regulated activity ceases to be treated as approved at the end of the period specified by the Treasury by regulations. This provision would enable the Treasury to specify the maximum length of the transitional regime. By setting a specific period, Gibraltar-based persons will be able to plan and make their own business decisions on what is in their best interests. For example, they could decide to apply for a Part 4A permission or wind down their own UK business. The proposed power will promote legal clarity and certainty.

Justification for taking the power

225. The Treasury consider the proposed power appropriate for the following reasons.

(a) It is not possible to set out the maximum length of the transitional arrangement in primary legislation in advance because this is matter that depends on the particular type of regulated activity for which the Treasury decide to withdraw the approval. Different types of regulated activities involve different types of contractual liabilities. For example, insurance contracts tend to be longer-term than other types of contracts. The proposed power would enable the Treasury to set the period at the time they withdraw market access and have the relevant information as to the type of activity.

(b) The maximum length of the transitional arrangement is better dealt with in secondary legislation. It would take too long to pass new primary legislation for this purpose.

(c) The transitional arrangement in paragraph 58 is closely connected with the withdrawal of approval: the former automatically comes into operation when the latter takes place. It is natural that, when the Treasury withdraw approval, it also specifies the length of the transitional regime under paragraph 58.

Justification for the procedure

226. The affirmative resolution procedure is appropriate because a decision as to the length of the transitional regime involves policy considerations of some significance. For example, it will determine for how long, after the withdrawal of approval, Gibraltar-based persons will be able to operate in the UK under paragraph 58. This has obvious implications for consumer protection, continuity of financial services and the stability of sectors of the financial system.

Clause 22, subsection (5), and Schedule 6, paragraph 59(3)(a): specifying a period when a Gibraltar activity ceases to be treated as corresponding to the approved activity for the purposes of the transitional arrangements under Part 9

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

227. Under paragraph 6, the Treasury must identify the activities under the law of Gibraltar which correspond to the activities approved under paragraph 5. Paragraph 59 makes provision for a transitional regime where the Treasury decide that an activity under the law of Gibraltar no longer corresponds to an approved activity. The transitional regime

in paragraph 59 mirrors the arrangements in paragraph 58: similarly, the policy objective is to provide for a smooth transition out of the Gibraltar Authorisation regime and minimise economic disruption and legal risks.

228. Under paragraph 59(2), the Gibraltar activity is treated as corresponding to the approved activity subject, among other things, to certain time-limits specified in paragraph 59(3).

229. Paragraph 59(3)(a) provides that the Gibraltar activity ceases to be treated as corresponding to the approved activity at the end of the period specified by the Treasury by regulations. This provision complements the power in paragraph 58(3)(a). In practice, it is expected that the transitional arrangements in paragraph 58 and 59 will operate together because the withdrawal of approval of a regulated activity and the revocation of a Gibraltar activity are key components of the Gibraltar Authorisation regime and will take place at the same time. However, as distinct elements, specific transitional arrangements must be made for each of them. As a result, a separate power to set a period of time under paragraph 59 is needed. The policy objective is the same as for the power in paragraph 58: promote legal clarity and certainty and enable Gibraltar-based persons to decide what is in their best interest while ensuring a smooth transition out of the Gibraltar Authorisation regime.

Justification for taking the power

230. The Treasury consider the proposed power appropriate for the following reasons.

(a) It is not possible to anticipate in primary legislation what the length of the period should be. This will depend on the particular type of Gibraltar activity.

(b) A decision as to the length of the transitional period is better taken in secondary legislation. Given the average time to pass primary legislation, that would not be an appropriate vehicle for this purpose.

(c) The transitional arrangement in paragraph 59 is closely connected with a decision that a Gibraltar activity no longer corresponds to an approved activity: the former automatically comes into operation when the latter occurs. It is natural that, when the Treasury revoke a corresponding activity, it also specifies the length of the transitional regime under paragraph 59.

Justification for the procedure

231. The affirmative resolution procedure is appropriate because a decision as to the length of the transitional regime involves policy considerations of some significance. For example, it will determine for how long, after the withdrawal of approval, Gibraltar-based persons will be able to operate in the UK under paragraph 59. This has obvious implications for consumer protection, continuity of financial services and the stability of sectors of the financial system.

Clause 22, subsection (5), and Schedule 6, paragraph 61(1): UK regulators' power to give directions as to protected contracts for the purposes of Part 9

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose

232. Under paragraph 60(2)(a), the FCA or PRA could decide that a person in the transitional arrangement under Part 9 could carry on an activity to the extent necessary, among other things, for the performance of a protected contract. Paragraph 60(9) defines "protected contract" as a "a contract specified in a direction by the appropriate UK regulator under paragraph 61".

233. Paragraph 61(1) gives the FCA and the PRA the power to direct that a contract specified or described in a direction is a protected contract for the purposes of Part 9. The policy objective is to ensure that, by providing the regulators with the ability to specify the relevant contracts, a Gibraltar-based person in the transitional regime is not able to frustrate the purpose of the restriction notice under paragraph 60. This power is intended to protect consumers and financial stability.

Justification for taking the power

234. The proposed power is appropriate because it is very difficult for primary legislation to provide a comprehensive definition of all the types of contracts that should be covered for the purposes of paragraph 60. The types of contract that may need to be covered will depend on the regulated activities approved for the purposes of Schedule 2A: different regulated activities involve different types of contracts. Finally, the proposed power would enable the FCA and PRA to address the future development of contractual arrangements in a timely manner.

Justification for the procedure

235. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000.

236. However, paragraph 61(4) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (5), and Schedule 6, paragraph 60(8): specifying a period within which a restriction notice given by the UK regulators under paragraph 60(2) may not take effect

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

237. Paragraph 60 confers a power on the FCA and the PRA to restrict the transitional permission that a Gibraltar-based person will have by virtue of the transitional regimes in paragraphs 58 or 59. Paragraph 60(8) would enable the Treasury to provide for a minimum period, within those transitional regimes, during which the FCA and the PRA could not restrict the transitional permission. The policy objective is two-fold:

(a) to ensure that there is a minimum period within which Gibraltar-based persons could, if they wish, write new business and apply for a Part 4A permission, and enabling those persons that obtain a Part 4A permission to remain "authorised persons" seamlessly.

(b) to ensure that all Gibraltar-based persons are treated alike, thus reducing legal risks.

238. Paragraph 58 makes provision for a transitional regime when the Treasury withdraw the approval of a regulated activity. Under paragraph 58(2)(c), the regulated activity is treated as approved subject, among other things, to any restriction under paragraph 60.

239. Similarly, paragraph 59 makes provision for a transitional regime when the Treasury decide that an activity under the law of Gibraltar no longer corresponds to an approved activity. Under paragraph 59(2)(c), the Gibraltar activity is treated as corresponding to an approved subject, among other things, to any restriction under paragraph 60.

240. Under paragraph 60(2), the appropriate UK regulator may decide that a person may only carry on the regulated activity or approved activity in the UK for certain purposes specified in that paragraph (e.g. the performance of protected contracts). In order for the UK regulator to restrict the transitional permission, they must give the Gibraltar-based person a restriction notice (see paragraph 60(6)(a)).

241. Under paragraph 60(7)(a), the restriction notice must specify the date on which it takes effect.

242. Under paragraph 60(8), the Treasury could "by regulations provide that a restriction notice may not specify a date falling before the end of a period specified or described in the regulations".

Justification for taking the power

243. The Treasury consider the proposed power appropriate for the following reasons.

(a) It is not possible to set out the period under paragraph 60(8) in primary legislation because a decision will need to take into account some factual circumstances that will be known only at the time the transitional regimes in paragraphs 58 and 59 come into operation (e.g. types of regulated or corresponding activities; types of contractual obligations involved; possibly number of Gibraltar-based persons involved).

(b) The transitional arrangement in paragraph 60(8) is closely connected with the transitional regimes in paragraphs 58 and 59. It is natural that, when the Treasury set the maximum length of those regimes, it also specifies the minimum period for the purposes of paragraph 60(8).

Justification for the procedure

244. The affirmative resolution procedure is appropriate because a decision as to the minimum period under paragraph 60(8) involves policy considerations of some significance. For example, it will determine for how long Gibraltar-based persons will be able to write new business in the UK with an unrestricted transitional permission once the transitional regimes in paragraphs 58 and 59 have come into effect. This has obvious implications for consumer protection, continuity of financial services and the stability of sectors of the financial system.

Clause 22, subsection (5), and Schedule 6, paragraph 63(1): extending the period under section 55V(1) and (2) for determining applications for Part 4A permissions

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

245. Section 55V of the Financial Services and Markets Act 2000 sets out statutory deadlines for the determination by the UK regulators of applications under Part 4A:

(a) under section 55V(1), the FCA and PRA must determine an application under Part 4A within 6 months of the date on which they received the completed application.

(b) under section 55V(2), the FCA and the PRA may determine an incomplete application if they consider it appropriate and must determine such an application within 12 months.

246. Paragraph 63(1) gives the Treasury the power to extend the statutory deadlines in section 55V(1) or (2) where a Gibraltar-based person applies for a Part 4A permission or a variation of a Part 4A permission and the application relates to an activity that the person is carrying on by virtue of a transitional arrangements under Part 9 of Schedule 2A. Once the transitional arrangements in Part 9 come into effect, Gibraltar-based persons could decide to apply for a Part 4A permission and, should they obtain such a permission, remain an 'authorised person' under the Financial Services and Markets Act 2000.

247. The policy objective is to facilitate the smooth transition from a Schedule 2A permission to a Part 4A permission, by ensuring that the FCA and the PRA will have enough time to process applications by Gibraltar-based persons.

248. The extension of the statutory deadlines in section 55V(1) or (2) could occur by way of textual or non-textual amendment (see paragraph 63(2)).

Justification for taking the power

249. The Treasury consider the proposed power appropriate because the statutory deadlines in section 55V(1) and (2) may prove inadequate when dealing with applications for Part 4A permission. For example, the FCA and the PRA may have to determine a significant number of applications. This will partly depend on a number of factors: e.g. the overall number of Gibraltar-based persons carrying on the relevant activity; how many of those persons seek a Part 4A permission. It is not possible to anticipate this level of detail in primary legislation with sufficient precision. The extension of the statutory deadlines involves consideration of factual circumstances that can be assessed only at the time the transitional regimes in paragraphs 58 and 59 come into effect.

Justification for the procedure

250. The Treasury consider the negative resolution procedure appropriate because this power is very narrowly framed. The power is subject to the following limitations.

(a) It can be used to amend only the statutory deadlines in section 55V(1) or (2).

(b) It can be used only in relation to a determination of an application for a Part 4A permission or a variation of a Part 4A permission where the application relates only to the carrying on of an activity which the applicant carries on in the UK by virtue of Part 9.

251. This means that the power under paragraph 63(1) could not be used to amend section 55(1) or (2) in relation to other applications under Part 4A.

Clause 22, subsection (5), and Schedule 6, paragraph 63(3): extending the period for considering applications for approval under section 59 of the Financial Services and Markets Act 2000

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

252. Under section 59 of the Financial Services and Markets Act 2000, authorised persons must ensure that individuals intending to perform certain functions are approved by the FCA and PRA. Under section 60, an application for approval must be made by the authorised person. Section 61 provides for the statutory periods within which the regulator must consider the application for approval. Section 63ZA provides for the statutory period within which the regulator must consider the application for a variation of approval.

253. Under new section 71J, a Gibraltar-based person with a Schedule 2A permission would need to obtain approval under section 59 if the person has a UK branch or if the person had both Schedule 2A and Part 4A permissions. In other cases, persons with a Schedule 2A permission would be subject to the approval regime under the law of Gibraltar.

254. Paragraph 63(3) and (4) give the Treasury the power to extend the statutory periods in sections 61 and 63ZA where a Gibraltar-based person applies for approval or a variation of approval under section 59 and the application relates to the performance of a function relating to an activity which is carried on by virtue of a transitional arrangements under Part 9 of Schedule 2A. Gibraltar-based persons seeking a Part 4A permission would need to ensure that they comply with the approval requirement in section 59.

255. The policy objective behind paragraph 63(3) and (4) is to provide for an effective transition from a Schedule 2A permission to a Part 4A permission and ensure that the FCA and the PRA will have enough time to consider applications by Gibraltar-based persons.

256. The extension of the statutory periods in section 61 and 63ZA could take place by way of textual or non-textual amendment (see paragraph 62(4)).

Justification for taking the power

257. The Treasury consider the proposed power appropriate because the statutory periods in sections 61 and 63ZA may not be sufficient to enable the regulators to process applications. The rationale is similar to the one set out for paragraph 63(1). The FCA and the PRA may have to consider a significant number of applications. This will depend on factors such as the number of Gibraltar-based persons applying for approval. It is not possible to anticipate precisely this level of detail in primary legislation. The extension of the statutory periods can only be decided only at the time the transitional regimes in Part 9 come into effect and together with the extension of the statutory deadlines under paragraph 63(1).

Justification for the procedure

258. The Treasury consider the negative resolution procedure appropriate because this power is very narrowly framed. The power is subject to the following limitations.

(a) It can be used to amend only the statutory periods in relation to applications for approval, or variation of approval, under section 59.

(b) It can be used only in relation to application to the performance of a function relating to the carrying on of an activity which the applicant carries on in the UK by virtue of Part 9.

259. This means that the power under paragraph 63(3) and (4) could not be used to amend the time for considering an approval application by a person with a Schedule 2A permission that carries on an approved activity through a UK branch. Such a person would have to comply with section 59 under section 71J.

Clause 22, subsection (5), and Schedule 6, paragraph 67(1): power to direct that a contract is a 'protected contract' for the purposes of Part 10

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose:

260. Part 10 of Schedule 2A makes provision for transitional arrangements where a UK regulator cancels a Schedule 2A permission, or varies such permission so as to remove permission to carry on an approved activity (paragraph 64) or the Gibraltar regulator cancels a Gibraltar permission, or varies such permission so as to remove permission to carry on an activity in Gibraltar (paragraph 65). When one of these events happen, the transitional arrangements in Part 10 automatically come into operation: the person concerned can carry on the relevant activity subject to certain restrictions. In particular, the person can carry on the activity only to the extent necessary for the purposes listed in paragraph 64(3) or 65(3). One of these purposes is the performance of a "protected contract".

261. Paragraph 65(5) defines 'protected contract' as (a) an existing contract, or (b) a contract specified in a direction issued by a UK regulator under paragraph 67. Paragraph 65(6) defines 'existing contract' and provides that the definition does not include a contract specified in a direction under paragraph 67. It also provides that a direction may make exceptions to paragraph 65(6)(b).

262. Under paragraph 67(1), a UK regulator may direct that a contract specified or described in a direction given under this paragraph is a protected contract for the purposes of Part 10. This power includes power to modify the definition of 'existing contract', see paragraph 67(2).

263. The policy objective is to ensure that, by providing the regulators with the ability to specify the relevant contracts, a Gibraltar-based person in the transitional regime under Part 10 is not able to frustrate the purpose of the restrictions under paragraphs 64(3)(a) and 65(3)(a). This power is intended to protect consumers and financial stability.

Justification for taking the power

264. The proposed power is appropriate because it is very difficult for primary legislation to provide a comprehensive definition of all the types of contracts that should be covered for the purposes of Part 10. Paragraphs 64(7) and 65(6) give a general definition of 'existing contract'. Such a definition is necessary because, under Part 10, a Gibraltar-based person may be required to perform protected contracts as a result of a decision independent of a UK regulator (for example, following the cancellation by the Gibraltar regulator of a cancellation). When that occurs, a person must know what is meant by 'protected contract': the definition of 'existing contract' provides a degree of legal certainty and clarity. However, given the great variety of possible contracts, there is a risk that a statutory definition alone could be too inflexible either by being over-inclusive or under-inclusive. As a result, it is appropriate to give the regulators the power to direct that a contract is a protected contract for the purposes of Part 10. It is also appropriate to ensure that the regulators have the ability to adjust the definition of 'existing contract'.

Justification for the procedure

265. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000.

266. However, paragraph 67(5) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (5), and Schedule 6, paragraph 68(1) and (3): specifying and varying the date on which a transitional arrangement under Part 10 comes to an end

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: notice

Parliamentary Procedure: none

Context and Purpose:

267. Part 10 of Schedule 2A makes provision for transitional arrangements where a UK regulator cancels a Schedule 2A permission, or varies such permission so as to remove permission to carry on an approved activity (paragraph 64) or the Gibraltar regulator cancels a Gibraltar permission, or varies such permission so as to remove permission to carry on an activity in Gibraltar (paragraph 65). When one of these events happens, the transitional arrangements in Part 10 automatically come into operation: the person concerned can carry on the relevant activity subject to certain restrictions. In particular, the person can carry on the activity subject to specific time limits set out in paragraph 68(1) and (2).

268. Under paragraph 68(1)(b), the UK regulator can specify a date on which a transitional arrangement under Part 10 comes to an end. Under paragraph 68(3), the UK regulator can vary that date although it can do so only to extend it.

269. The policy objective is to ensure that, by enabling the regulators to set a specific period of time, the person whose permission has been cancelled will be able to carry on its activity in the UK only for the period of time necessary to fulfil one or more of the purposes set out in paragraph 64(3) or 65(3). This is intended to reduce risks to consumers and/or financial stability.

Justification for taking the power

270. This power will be exercisable when the permission of an individual person is cancelled. It is not possible to make provision for this class of events in primary legislation because individual cases may vary considerably. What is an appropriate period of time for a person may not be appropriate for another: much will depend on the factual circumstances of the cancellation of a permission. The FCA and the PRA are best placed to decide on the duration of the transitional arrangements for each individual person. In their role under Schedule 2A, they will deal with specific Gibraltar-based persons and the Gibraltar regulator. For example, they will have relevant information (through their information-gathering powers in Part 11 of the Financial Services and Markets Act 2000 or through the cooperation arrangements with the Gibraltar regulator) and will be able to set the appropriate date.

Justification for the procedure

271. There is no Parliamentary procedure. The exercise by the FCA and the PRA of their operational powers do not have formal Parliamentary oversight. However, both the FCA and the PRA must make annual reports to the Treasury on the discharge of their functions and the Treasury must lay a copy of the reports before Parliament (see paragraph 11 of Schedule 1ZA and paragraph 19 of Schedule 1ZB to the Financial Services and Markets Act 2000). It is not considered appropriate to provide for formal Parliamentary oversight for this power.

Clause 22, subsection (5), and Schedule 6, paragraph 83(3): replacing the residence requirement under paragraph 83(1)(a) for Gibraltar-based individuals carrying on insurance distribution activities

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

272. Under paragraph 1(1) and (2)(a), an individual with a head office and, where appropriate, a registered office in Gibraltar is a "Gibraltar-based person" for the purposes of Schedule 2A. Paragraph 83 makes provision in relation to individuals carrying on insurance distribution activities. Under paragraph 83(1), an individual without a head office in Gibraltar is treated as having a head office there if the individual:

(a) is normally resident in Gibraltar, and

(b) has permission from the Gibraltar regulator to carry on an insurance distribution activity in Gibraltar.

273. The residence requirement in paragraph 83(1) mirrors a similar provision for UK-based individuals in paragraph 2B(4) of Schedule 6, which transposed articles 3(1) and 2(10)(a) of Directive (EU) 2016/97.

274. Under the Directive, individuals who are insurance intermediaries must be registered with the authority of the member state where they are resident.

275. The residence requirement in paragraph 83(1) ensures that individuals carrying on insurance distribution activities who do not have a head office must be resident in Gibraltar. The policy objective is to preserve the status quo and treat alike Gibraltar-

based and UK-based individuals seeking to carry on an insurance distribution activity. By limiting who can carry on insurance distribution activities, the residency requirement has consumer protection and financial stability functions.

276. Neither the Financial Services and Markets Act 2000 nor the single market directives define 'resident'. However, the term has been interpreted under EU law in the sense of 'habitual residence' (see e.g. art. 1(h) of Regulation No 1408/71) or 'normal residence' (see e.g. art. 7 of Directive 83/182/EEC). This is also the meaning that the Treasury consider the term 'resident' would continue to have under paragraph 2B(4) of Schedule 6 as a result of section 5 of the European Union Withdrawal Act 2018. The reference to "normally resident" in paragraph 83(1)(a) is consistent with this understanding.

277. Paragraph 83(3) would enable the Treasury to replace the residence requirement in paragraph 83(1)(a) with a different requirement relating to residence in Gibraltar. For example, the Treasury could decide to set a minimum period that an individual would have to satisfy in order to be normally resident in Gibraltar.

<u>Justification for taking the power</u>

278. The Treasury consider the power in paragraph 83(3) appropriate because, not being bound any more by EU law, the UK will be able to develop an autonomous concept in line with its own objectives and priorities. As explained above, the residence requirement in paragraph 83(1)(a) derives from EU law. In future, the UK could decide to change that requirement.

<u>Justification for the procedure</u>

279. The Treasury consider the negative resolution procedure appropriate on the following grounds.

280. Paragraph 83(3) confers a power limited to amending the residence requirement in paragraph 83(1)(a). This is a very narrow power which is subject to the following limitations.

    (a) It can only be used to replace the residence requirement. It cannot be used to repeal it.

    (b) It can only be used to provide for a different requirement relating to residence in Gibraltar. It cannot be used to provide for requirements relating to residence elsewhere.

    (c) It can only be used in relation to individuals carrying on insurance distribution activities. It cannot be used for other purposes.

Clause 22, subsection (5), and Schedule 8, paragraphs 5 and 6: limiting the regulators' general rule-making powers

– new sections 137AA(3) and 137GA(2) of the Financial Services and Markets Act 2000

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

<u>Context and Purpose</u>

281. Under sections 137A and 137G of the Financial Services and Markets Act 2000 the FCA and the PRA have general rule-making powers which they can exercise to make rules

in relation to authorised persons (the FCA) and PRA-authorised persons (the PRA). These powers can also be exercised in relation to Gibraltar-based firms with current access to the UK market because such firms are 'authorised persons'.

282. However, the FCA and PRA may not make rules about matters for which responsibility is, under the single market directives, reserved to the home state regulator (see sections 137A(5)(b) and 137G(5)(b)). For example, financial supervision is a matter reserved to the home member state under various single market directives (see e.g. art. 30 of Directive 2009/138/EC; art. 49 of Directive 2013/36/EU).

283. To the extent that the prohibitions under sections 137A(5)(b) and 137G(5)(b) currently apply to Gibraltar-based firms, they will fall away once the existing regime is replaced by the new Gibraltar Authorisation regime.

284. New sections 137AA(3) and 137GA(2) would enable the Treasury to impose limitations on the regulators' general rule-making power in relation to Gibraltar-based persons with a Schedule 2A permission. By limiting the regulators' ability to make general rules, the Treasury would be able to provide for the different responsibilities of the FCA and the PRA vis-a-vis the Gibraltar regulator. This would also ensure a smooth transition from the existing regime to the new Gibraltar Authorisation Regime. Where appropriate, the Treasury could also impose new limitations to reflect developments in the relationship with Gibraltar. Limiting the regulators' general rule-making power is consistent with the following policy objectives:

(a) preserving Gibraltar's regulatory autonomy and ensuring that Gibraltar-based persons with a Schedule 2A permission will be primarily regulated under the law of Gibraltar;

(b) ensuring that the FCA and the PRA have the ability to make general rules where appropriate and consistently with their statutory objectives;

(c) ensuring that it is possible to adapt the general rule-making powers in a flexible way which is responsive to changes in the allocation of responsibilities agreed with the Gibraltar Government.

Justification for taking the power

285. The Treasury consider the powers under new sections 137AA(3) and 137GA(2) appropriate for the following reasons.

286. The general approach under the Gibraltar Authorisation regime is that Gibraltar-based persons with Schedule 2A will be primarily supervised by the Gibraltar regulator and regulated under the law of Gibraltar (aligned with UK law). The FCA and the PRA have an important role and Schedule 2A confers on them some significant powers (see paragraphs 27, 37 and 49). However, these powers can be exercised in specific circumstances (see paragraph 28). It is equally necessary to limit the regulators' general rule-making powers in order to bring them into line with the general approach underpinning the new regime.

287. It is not possible to identify in primary legislation all the possible limitations that would be appropriate. The existing prohibitions under 137A(5)(b) and 137G(5)(b) provide a useful insight into the difficulties that any such attempt would raise. Those prohibitions do not set out all the limitations: they simply cross-refer to the single market directives: whether a matter is reserved to the home state regulator or not is ultimately a question of interpretation of those directives. Moreover, although a similar provision has been in

place since the Financial Services and Markets Act 2000 was enacted, there is no list of all the matters that, under the directives, fall within the remit of the home state regulator.

288. Similar problems would be encountered if the Bill tried to provide a comprehensive list of limitations in relation to Gibraltar-based persons.

(a) The division of responsibilities between home and host state regulators is a complex issue. Primary legislation would not be a suitable vehicle for the amount of detail needed to identify the current limitations. As mentioned, the existing split of responsibility is currently set out in different directives, which attests to the complexity and volume of all the possible matters that would have to be included on the face of the Bill.

(b) The Gibraltar Authorisation Regime is a new regime underpinned by a political agreement between the UK and Gibraltar. A decision to limit the FCA and PRA's general rule-making powers means reaching common understandings with all the relevant stakeholders (e.g. the UK and Gibraltar regulators) as to the split of their regulatory responsibilities. Should those understandings change, the Treasury may have to revisit the division of responsibilities. The powers in new sections 137AA(3) and 137GA(2) would enable the Treasury to respond in a timely manner to those changes by imposing or removing limitations. This would be achieved more quickly by secondary legislation than by primary legislation.

(c) There is a close link between the regulators' general rules and the approval by the Treasury of a regulated activity under Schedule 2A. On the one hand, the general rule-making powers enable the FCA and the PRA to make rules with respect to the carrying on of regulated activities. On the other, under the new regime, the Treasury will be able to approve a regulated activity only if it is satisfied that the law and practice of Gibraltar and the UK are sufficiently aligned (see paragraph 8). To extent that the law of Gibraltar provides an adequate regulatory framework, the approval of an activity makes it possible to rely on that framework instead of the regulators' rules. Therefore, new sections 137AA(3) and 137GA(2) would enable the Treasury to decide whether to impose limitations at the time a regulated activity is approved.

(d) The proposed powers are supported by precedents. Under the Financial Services and Markets Act 2000 the Treasury may limit the regulators' rules or impose other requirements in a number of cases; see for example sections 137R(7); 142Y(4)(c); 3G(2); 137FBB(8).

289. The proposed powers are subject to the following limitations.

(a) They would only limit the general rule-making power under 137A and 137G of the Financial Services and Markets Act 2000 the other rule-making powers of the regulators would not be affected.

(b) They would only impose limitations on persons with a Schedule 2A permission: rules relating to other types of authorised persons under the Financial Services and Markets Act 2000 would not be affected.

(c) The Treasury would be under a duty to consult the UK regulators before making the relevant regulations; see new sections 137AA(4) and 137GA(3).

(d) The Treasury would not be able to impose limitations on FCA's general rules made under sections 137C, 137D or 137FD of the Financial Services and Markets Act 2000.

Justification for the procedure

290. The Treasury consider the affirmative resolution procedure appropriate because limitations on the regulators' general rule-making powers involve policy decisions of some significance. Limiting the regulators' ability to make general rules means limiting their ability to intervene. This is a proper subject of parliamentary scrutiny as it may have implications for consumer protection and financial stability.

Clause 22, subsection (6), and Schedule 7: UK-based persons carrying on activities in Gibraltar

- new Schedule 2B, paragraph 9 (directing information in respect of a Gibraltar notice)

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose

291. In order for a UK-based person to seek access to the Gibraltar's financial services market, the person must meet certain conditions. One of these conditions is that the UK-based person has given the appropriate UK regulator a 'Gibraltar notice' that it wants to carry on an activity in Gibraltar (paragraph 7(2)). Paragraph 9(1) provides for the mandatory content of the Gibraltar notice. Paragraph 9(1)(e) and (f) provides that a Gibraltar notice must contain "such other information as the appropriate UK regulator may direct" and "be given in such form and manner as the appropriate UK regulator may direct". The policy objective is to ensure that the FCA and the PRA should have the information necessary to carry out their functions under Schedule 2B.

Justification for taking the power

292. The UK regulators are in the best position to specify the type of information they need in order to discharge their responsibilities in respect of UK-based persons seeking to carry on activities in Gibraltar. Such persons must have a Part 4A permission (see paragraph 8(1)), so they are already regulated by the PRA and the FCA.

293. The information under paragraph 9(1)(e) would be technical information which may vary depending on the type of activity that the person intends to carry on in Gibraltar. It would not be possible to set out this information in primary legislation because of the level of possible detail and the need to update it where appropriate. In particular, the UK regulators will be in the best position to see how the new regime works in practice. If, based on experience, they take the view that certain information proves necessary, they will be able to respond to developments and add the necessary information in a timely fashion by using their power under paragraph 9.

Justification for the procedure

294. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000.

295. However, paragraph 9(6) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (6), and Schedule 7: UK-based persons carrying on activities in Gibraltar

- new Schedule 2B, paragraph 14 (directing information in respect of a variation notice)

Powers conferred on: the Financial Conduct Authority and the Prudential Regulation Authority

Powers exercised by: direction

Parliamentary Procedure: none

Context and Purpose

296. In order for a UK-based person to vary a Schedule 2B permission, certain conditions must be met. One of these conditions is that the UK-based person has given the appropriate UK regulator a 'variation notice' that it wants to vary the permission (paragraph 13(2)). Paragraph 14(1) provides for the mandatory content of the variation notice. Paragraph 14(1)(e),(f) provides that a variation notice must contain "such other information as the appropriate UK regulator may direct" and "be given in such form and manner as the appropriate UK regulator may direct". The policy objective is to ensure that the FCA and the PRA should have the information necessary to carry out their functions under Schedule 2B.

Justification for taking the power

297. The UK regulators are in the best position to specify the type of information they need in order to discharge their responsibilities in respect of UK-based persons seeking to vary a Schedule 2B permission. Such persons are authorised persons under the Financial Services and Markets Act 2000. The UK regulators' power under paragraph 14 is consistent with the power under paragraph 9 and, more broadly, with the regulators' responsibilities under Schedule 2B.

298. The information under paragraph 14(1)(e) would be technical information which may vary depending on the activity. It would not be possible to set out this information in primary legislation because of the level of possible detail and the need to update it where appropriate. In particular, the UK regulators will be in the best position to see how the new regime works in practice. If, based on experience, they take the view that certain information proves necessary, they will be able to respond to developments and add the necessary information in a timely fashion by using their power under paragraph 14.

Justification for the procedure

299. The proposed power is not subject to Parliamentary procedure. There is no formal parliamentary oversight over the regulators' powers to give directions under the Financial Services and Markets Act 2000.

300. However, paragraph 14(5) requires a UK regulator to publish a direction and to give a copy to the Treasury and the other regulator without delay.

Clause 22, subsection (7), and Schedule 8, paragraph 7: power to prescribe Gibraltar-based persons that must participate in the Financial Services Compensation Scheme

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

301. The Financial Services Compensation Scheme is currently governed by Parts 15 and 15A of the Financial Services and Markets Act 2000, and relevant regulatory rules. Currently, the legislation setting the scope of the FSCS is section 213 of the Financial Services and Markets Act 2000. It broadly encompasses all authorised persons and EEA firms which offer financial services to the UK via passport arrangements. However, there is a carve out for EEA firms which have been prescribed by the Treasury. Such firms do not participate in the FSCS unless they elect to do so. The details of prescribed firms and activities and the mechanism for firms electing is found in the Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001. Hence certain EEA firms elect to participate in the FSCS, bringing themselves within its scope, as anticipated by section 213(10).

302. Passporting will fall away when the UK leaves the EU, making the provisions relating to EEA firms and election redundant. A successor to this mechanism is required, with a more limited application to Gibraltar firms which offer financial services to the UK.

Justification for taking the power

303. As mentioned above, the current legislation involves all authorised firms and EEA firms participating in the scheme, with the Treasury having the ability to prescribe those EEA firms which are not to be regarded as eligible for FSCS participation, and those which may elect to participate. Gibraltar firms are deemed to be EEA firms for these purposes.

304. In preparation for the commencement of the Gibraltar Authorisation Regime, the Treasury require the power to set down categories of Gibraltarian firms (and regulated activities carried out by such firms) which cannot participate in the scheme. This will provide certainty to UK consumers that Gibraltarian firms using the Gibraltar Authorisation Regime, which are not subject to Treasury regulations, attract the same level of protection as UK firms. The proposed regulations are not a new concept, as they are necessary successors to the existing regulations, which will be made redundant by the end of the passporting regime and will fall away.

305. Further, the complexity and amount of detail required in setting out categories of firm and activity is best suited for inclusion in secondary legislation.

306. Finally, the Treasury are conscious of the possibility that new types of firm may offer financial services to the UK market, and that new regulated activities may be created. The fact that both aspects will be contained in secondary legislation will enable more flexible and proportionate responses to these developments than using primary legislation on each occasion.

Justification for the procedure

307. The existing regulations were made under sections 213(10), 214(5), 224(4), 417(1) and 428(3) of the Financial Services and Markets Act 2000 (noting the definition of "prescribed" in section 417). The Treasury note that this entailed the negative procedure

(pursuant to section 429(8)). It seems appropriate to retain the same procedure for the successor regulations.

308. The power would be used to supply the technical detail necessary to give effect to amended Part 15 of the Financial Services and Markets Act 2000. The Treasury will prescribe categories of Gibraltarian firms that will be unable to participate in the FSCS, as anticipated by the amendments being made to section 213 etc. The relevant firms will be persons authorised under section 31 of the Financial Services and Markets Act 2000. This will be by virtue of having permission to carry on activities approved by the Treasury under paragraph 5 of new Schedule 2A to the Financial Services and Markets Act 2000. The instrument approving such activities will be subject to the affirmative resolution procedure. As a result, Parliament will have a say on the persons authorised for these purposes. The proposed power to prescribe categories of firms which cannot participate in the FSCS implements the statutory scheme in relation to firms using the Gibraltar Authorisation Regime.

Clause 22, subsection (8): power to amend certain Parts of the Financial Services and Markets Act 2000 and other enactments

Powers conferred on: Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative if exercised so as to amend, repeal or revoke primary legislation, otherwise negative

<u>Context and Purpose</u>

309. Currently, certain types of Gibraltar-based firms are "authorised persons" under the Financial Services and Markets Act 2000 as they are treated as if they were EEA firms with passporting rights under Schedule 3 of that Act. This is the effect of the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 (SI 2001/ 3084), made under section 409 of the Financial Services and Markets Act 2000. As a result, references to "authorised person" under the Financial Services and Markets Act 2000 cover Gibraltar-based firms under the Gibraltar Order. References to "EEA firms" and/or "EEA firms qualifying for authorisation under Schedule 3 to the Financial Services and Markets Act 2000" may also capture Gibraltar-based firms under the Gibraltar Order although this may give rise to complex questions of interpretation. For example, in Provident Insurance PLC and other companies v Financial Services Authority [2012] EWHC 1860 (Ch), it was held that a Gibraltar firm was not an EEA firm under Part 7 of the Financial Services and Markets Act 2000. Schedule 3 has been repealed for EEA firms from IP completion day and saved for Gibraltar. However, once the new Gibraltar Authorisation regime comes into force, the saving will be repealed together with section 409 and the Gibraltar Order.

310. Under clause 22(8), the Treasury would have the power to amend Parts 7 and 18A and to make further provision in other enactments as regards Gibraltar-based persons. The policy objective is to ensure that:

(a) Part 7 continues to operate effectively in relation to cases involving a Gibraltar-based person. Part 7 concerns control of business transfer, including insurance business transfer schemes. Insurance is key to Gibraltar's financial services industry; therefore, it is necessary to ensure that the relevant provisions are consistent with the new regime.

(b) any doubt needs to be removed as to whether Part 18A applies to Gibraltar-based persons. Part 18A deals with the suspension and removal of financial instruments from trading; the operation of this scheme for Gibraltar-based persons appears to have been affected by onshoring amendments;

(c) legislation more generally should continue to operate effectively in relation to Gibraltar-based persons under the new regime and should not be affected by the repeal or amendment of references to EEA firms to the extent that those references captured Gibraltar firms before IP completion day.

Justification for taking the power

311. The Treasury consider the proposed powers appropriate because the power to make consequential amendments in clause 39 may not be sufficient and the relevant amendments or repeals cannot be made in primary legislation given the complexities that the relevant legislation raises.

312. Part 7 deals with control of business transfers. While it is reasonably clear how certain provisions apply to Gibraltar-based persons, there is some considerable uncertainty as to other provisions. For example, it is clear that, under the new Gibraltar Authorisation regime, a Gibraltar-based person with a Schedule 2A permission to effect and carry out insurance contracts could be the transferor and the transferee of an insurance business transfer scheme under section 105 of the Financial Services and Markets Act 2000. There is no intention to change this. However, it is much less clear the extent to which the power under clause 39 could be used to amend other provisions of Part 7 which would be necessary for the continuing operation of that Part in relation to Gibraltar-based persons. For example, under section 111(2)(a) of the Financial Services and Markets Act 2000, in order to sanction an insurance business transfer scheme, a court must be satisfied that the appropriate certificates have been obtained. Schedule 12 to the Financial Services and Markets Act 2000 makes extensive provision for such certificates. It contains a large number of EEA references which are omitted as of IP completion day. Once the new regime comes into operation, Schedule 12 would require some amendment so as to ensure that Part 7 insurance transfer schemes continue to work properly.

313. Part 18A of the Financial Services and Markets Act 2000 deals with the suspension and removal of financial instruments from trading. Section 313A gives the FCA power to require "institutions" to suspend or remove financial instruments from trading. Section 313CB requires the FCA to require other trading venues to suspend or remove a financial instrument from trading where the FCA is notified by a UK trading venue that the venue has suspended a financial instrument from trading. At present Part 18A does not treat Schedule 3 EEA firms as "institutions". There is an explicit exclusion for them. Although it is not beyond doubt, it is considered that the better view is that Gibraltar firms are excluded too. However, it is possible that, after IP completion day, Gibraltar-based firms could be "institutions" as a "qualifying credit institution" under section 313D(1) as inserted by SI 2019/662. The new power would enable the Treasury to decide whether to exclude Gibraltar-based persons (as currently) or provide explicitly that Gibraltar-based persons are included (as arguably they are from IP completion day). This would remove any doubt.

314. More generally, the Financial Services and Markets Act 2000 and other enactments contain many references to "EEA firms", "EEA firms qualifying under Schedule 3 of the Financial Services and Markets Act 2000". As explained, it is not always clear whether they currently capture Gibraltar. To the extent that they do, they have been saved for

Gibraltar while they have been otherwise repealed for EEA firms. The lack of clarity may have implications for the new regime, so it is necessary to ensure that the relevant enactments are carefully reviewed, and a decision is made as to whether they should or not apply to Gibraltar-based firms. Given the level of detail, it is not possible to do this by way of primary legislation. While it might be possible to rely on the power to make consequential amendments in clause 39 in some cases, the power may not always be sufficiently broad to be available.

Justification for the procedure

315. The Treasury consider the affirmative resolution procedure is appropriate for amendments, etc, to primary legislation. In respect of other enactments, the negative resolution procedure is appropriate because these powers are narrowly framed. Under clause 22(8)(c), the power is limited to provide for equivalent provisions in enactment in force immediately before IP completion day relating to an EEA firm under Schedule 3.

Clause 23: power to make provision about Gibraltar

Powers conferred on: the Treasury

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

316. The Gibraltar Authorisation Regime delivers on the UK Government's commitment to 'design a replacement framework' to provide access for Gibraltar financial services firms to UK markets that is broadly equivalent to the one they currently enjoy under the Financial Services and Markets Act 2000 (Gibraltar) Order (SI 2001/3084) (Gibraltar Order).

317. The regulation-making powers under clause 23 are designed to enable the Treasury to manage Gibraltar-specific regimes conferring rights to Gibraltar-based persons in UK markets and UK-based persons in Gibraltar markets that are not captured by the Gibraltar Order. The scope of the powers is defined in subsections (2) to (4) and (13), which define what is meant by 'relevant Gibraltar provision.'

318. The powers conferred on the Treasury are as follows.

(a) Repeal and revoke 'relevant Gibraltar provisions' and make the changes under subsection (5) (subsection (1)(a)), i.e., that the Treasury consider appropriate to secure that, after the repeal or revocation of the relevant Gibraltar provision, the same provision is made in connection with Gibraltar as is made in connection with most or all other countries or territories outside the United Kingdom.

(b) Make provision with the same effect as relevant Gibraltar provision repealed or revoked under the powers above (subsection (1)(b)). Subsection 9 provides, in case of repeal or revocation of relevant Gibraltar provisions under subsection (1)(a), the power under subsection (1)(b) includes power to make provision with the same effect as the provision that was the subject of the saving or modification, read with the saving or modification.

(c) Amend relevant Gibraltar provisions limitedly to restoring any aspect of the effect the provision had before IP completion day (subsection (1)(c)).

(d) Subject these regimes, by replacing or supplementing the relevant Gibraltar provision, to principles and mechanisms similar to those included in the new section 32A of, or Schedule 2A or 2B to, the Financial Services and Markets Act 2000 (which are part of the Gibraltar Authorisation Regime) (subsection (1)(d)). This will ensure a coherent regulation of Gibraltar-related activities in the UK markets. This power is complemented by the further provision that the Treasury may apply the existing mechanisms and principles of the new section 32A of, or Schedule 2A or 2B to, the Financial Services and Markets Act 2000 to the relevant Gibraltar provisions, with or without modifications (subsection (10)).

(e) When exercising the powers under subsections 1(b) to (d), make such modifications as the Treasury consider appropriate having regard to changes in the law of any part of the United Kingdom since the relevant enactment listed in subsections (3) and (4) was made (subsection (8)(a)). The Treasury are also delegated a power to restate relevant Gibraltar provision in a clearer or more accessible way (subsection (8)(b)). A power similar to this latter one is found in paragraph 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018.

(f) Make different provision in relation to different cases; amend, revoke, repeal or otherwise modify an enactment; make consequential, incidental, supplementary, transitional, transitory, or saving provision; confer functions on a person, including functions involving the exercise of a discretion (subsection (11)).

319. The power of the Treasury to use the described powers is limited:

(a) in scope, by the definition of 'relevant Gibraltar provision' in relation to which Treasury may exercise their powers (subsections (2) to (4) and (13));

(b) by the pre-condition to the making of the regulations in the exercise of these powers that the regulations are compatible with the objectives set out in subsection (6);

(c) procedurally, as the regulations made by the Treasury in the exercise of the powers in clause 23 will be subject to the affirmative procedure (subsection (12));

(d) also procedurally, in relation to the powers to make regulations applying certain mechanisms of section 32A to, and Schedules 2A and 2B to, the Financial Services and Markets Act 2000 (subsection 1(d)), by the duty of the Treasury to consult the FCA, the PRA, and the Government of Gibraltar before exercising that power (subsection 7).

<u>Justification for taking the power</u>

320. First, it would seem disproportionate to use primary legislation to create Gibraltar-specific market access regimes for the regimes underlying the relevant Gibraltar provisions, as defined in subsections (2) to (4) and (13), considering that currently Gibraltar is exercising its passporting rights into the UK for a very limited number of activities within this set, in relation to which the volumes of activity are also low.

321. Second, the complexity and amount of detail to make the choice on the use of powers, as well as the level of detail of the changes that will follow, arguably render the use of primary legislation disproportionate. By way of illustration, the Gibraltar (Miscellaneous Amendments) (EU Exit) Regulations 2019 has saved for Gibraltar more than 25 EU Exit regulations.

322. Similar considerations are relevant in relation to the power to apply to the relevant Gibraltar provision mechanisms and principles analogous to those set out in the new section 32A of, and Schedules 2A and 2B to, the Financial Services and Markets Act 2000

(subsection 1(d)). That power will be a practical way to bring coherence across the Gibraltar-specific legislation. The power in subsection 1(d) naturally entails large technical analysis on whether and how those principles and mechanisms apply to each relevant regime that the Treasury will decide to retain. Providing those changes by way of primary legislation would be difficult considering the flexibility required for their implementation.

323. Further, the decision to revoke or repeal certain relevant Gibraltar provisions, or amend or otherwise modify them, through the powers in subsection (1) presupposes an understanding between the Treasury and the Gibraltar Government as to how the underlying persons might be impacted. It also raises questions of reciprocity in relation to the treatment of UK-based persons operating in Gibraltar markets. A delegated power is better suited to address changes in priorities in access rights than primary legislation. To the extent that the changes must take place swiftly, secondary legislation permits quick action.

Justification for the procedure

324. Since the exercise of these powers will involve policy choices (mainly to 'switch on' and 'off' the various Gibraltar-related regimes depending on the future development of their relationship with Gibraltar, and the application of the principles and mechanisms of the GAR) the Treasury consider the affirmative resolution procedure to be the appropriate procedure.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271A of the Financial Services and Markets Act 2000 (schemes authorised in approved countries)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

325. Paragraph 1 of Schedule 9 inserts a new section 271A into the Financial Services and Markets Act 2000 to provide a power to approve a country or territory outside of the UK such that certain collective investment schemes (as described in the regulations) established in the approved country or territory may apply to the FCA to become a recognised scheme for the purposes of the Act; once a collective investment scheme is a recognised scheme, it can be marketed to the public in the UK.

326. The regulation-making power under section 271A is only exercisable by the Treasury if the applicable conditions are met. The first condition is that the Treasury may not make regulations unless it is satisfied that the law and practice of the country or territory, in which the description of schemes to be approved are authorised and supervised, affords to participants or potential participants in the UK protection which is, taken as a whole, at least equivalent to the protection such an investor is afforded by domestic law and practice in respect of comparable authorised schemes in the UK (section 271B). The second condition is that the Treasury may not make regulations unless it is satisfied that adequate arrangements exist, or will exist, for cooperation between the FCA and the authorities of the country or territory in which the class of schemes to be approved is authorised (see section 271C). The ability of the Treasury to exercise the power under

section 271A is restricted by these conditions, which are intended to safeguard participants in the UK.

327. New section 271D gives power to the Treasury to direct the FCA to prepare a report in relation to the law and practice of a country or territory under which the schemes are authorised and supervised, or particular aspects of such law and practice and any existing or proposed arrangements for cooperation between the FCA and the overseas regulator. The power to request a report under section 271D is intended to ensure that the Treasury have all the information required to be satisfied of the conditions under new sections 271B and 271C before exercising its regulation making power and approving a country or territory under section 271A.

Justification for taking the power

328. The Treasury have not yet determined those countries or territories which are to be approved because, as set out above, this will require an assessment of the law and practice of that country or territory to ensure it can be satisfied that the condition under section 271B is met. It will also require the FCA and the overseas regulator to agree, or begin to agree, arrangements regarding cooperation, and for the Treasury to be satisfied that such arrangements are adequate under the new section 271C. In addition, if the Treasury ask for a report from the FCA under section 271D when considering whether to exercise its power under section 271A, it will take time for the FCA to complete its assessment. Lastly, by providing for the approval of countries or territories in secondary legislation, this provides important flexibility for the Treasury to approve countries or territories in the future as the law and practice of a country or territory will be subject to change over time.

Justification for the procedure

329. It is considered appropriate that regulations made under section 271A be subject to negative procedure, given the safeguards described above and contained in new sections 271B and 271C. In addition, the Treasury can consider its exercise of the power having received a detailed report submitted by the FCA and given the need to respond swiftly to changes in the law and practice of foreign jurisdictions.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271E of the Financial Services and Markets Act 2000 (power to impose requirements on schemes)

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

330. The new section 271E of the Financial Services and Markets Act 2000 gives the power to the Treasury to impose additional requirements on collective investment schemes which are described in the regulations made under new section 271A and authorised in an approved country or territory. The additional requirements will be set out in those regulations. Those requirements may be described by reference to FCA rules. The FCA is given the power to make, amend or revoke a rule if it considers it necessary or appropriate to do so for the purpose of a requirement imposed (or varied or withdrawn) by the regulations which is described by reference to rules made or to be made by the

FCA (section 271E(5)). This power is accompanied by a power for the Treasury to direct the FCA to make, amend or revoke a rule when it considers it necessary or appropriate for the purposes of a requirement imposed (or varied or withdrawn) by the regulations which is described by reference to rules made or to be made by the FCA(section 271E(6)).

Justification for taking the power

331. This power is intended to ensure that the Treasury can impose requirements on collective investment schemes which must be satisfied by schemes recognised under section 271A in the UK. When imposing such requirements, the Treasury must have regard to requirements imposed on comparable authorised schemes in the UK.

332. The power for the Treasury to set out requirements in the regulations and to direct the FCA to produce or amend rules under section 271E is justified because requirements are likely to be detailed and technical, and the FCA will be better placed than the Treasury to adapt its rules to ensure that they are operable in relation to an overseas description of scheme marketing into the UK. In addition, the kinds of requirements imposed on schemes under the regulations are likely to change over time as the law and practices in the UK or in the approved country or territory develop, therefore secondary legislation will provide the necessary flexibility to ensure the effectiveness of any requirements.

Justification for the procedure

333. As set out above, the kinds of requirements imposed on schemes from approved countries or territories under the regulations are likely to change over time as the laws and practices of the UK or of the approved country or territory change. It is therefore likely that requirements might be amended or imposed at short notice once a country is approved, therefore taking a power subject to the negative procedure is considered more appropriate.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271F of the Financial Services and Markets Act 2000 (application for recognition to the FCA)

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

334. Under new section 271F the FCA has the power to direct the manner in which applications are made for the recognition of a scheme and to require the information which must accompany the application, or follow any application, for the purpose of determining the application. The FCA has accompanying powers to make different directions or requirements for different schemes, and to direct the applicant to present the information provided in such a form or to verify it in such a way as it requires.

Justification for taking the power

335. It is the policy intention not to mandate the design of the registration form in primary legislation but rather, to grant the necessary powers to the FCA to ensure it can determine a scheme's eligibility using its internal processes. This will give discretion to the FCA when requesting information from countries or territories with varying requirements as appropriate and provide greater clarity for both the FCA itself and for

those applying for recognition. The FCA can only exercise its powers of direction or to impose requirements concerning information under section 271F seek any information in relation to an application for recognition by a scheme under section 271A.

Justification for the procedure

336. These directions are specific to particular schemes and so it is not considered appropriate that a parliamentary procedure be involved or that the processes and procedures that apply under Part 9A of the Financial Services and Markets Act 2000, such as consultation procedures, be applied to these directions.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271J of the Financial Services and Markets Act 2000 (provision of information to the FCA)

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

337. Under new section 271J the FCA has the power to direct what information must be provided by operators of section 271A recognised schemes, and when this information should be provided. The FCA also has the power to give different direction to different persons, and to require the operator to present or verify the information requested in such a way as it may direct.

Justification for taking the power

338. The FCA may request information from an operator of a scheme recognised under section 271A for the purpose of either determining that the conditions for the scheme's recognition under new section 271G(2)(a) to (c) are still met, or to determine whether any requirements imposed on recognised schemes or the operator of the scheme under the Financial Services and Markets Act 2000 are satisfied. The FCA can also only exercise its powers under section 271J to give different directions in relation to different schemes or types of schemes where the power described above is engaged.

339. The information gathering powers delegated to the FCA under section 271J are therefore limited for certain purposes.

Justification for the procedure

340. It is not considered appropriate that a parliamentary procedure be involved or that the processes and procedures that apply under Part 9A of the Financial Services and Markets Act 2000, such as consultation procedures, be applied to these directions.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271K of the Financial Services and Markets Act 2000 (rules as to scheme particulars)

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9A of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

341. Under new section 271K, the FCA may make rules imposing duties or liabilities on recognised schemes under section 271A and its operator, for the purposes of requiring that scheme particulars be submitted to the FCA or published. The rules made under this power will specify the information required and any other requirements which must be complied with in relation to scheme particulars.

Justification for taking the power

342. This power is intended to ensure that recognised schemes under section 271A and their operators provide adequate information about the scheme to potential participants. The FCA will not be able to make rules imposing duties or liabilities on section 271A recognised schemes for purposes other than those which would be permitted by the FCA under section 248 in relation to authorised unit trust schemes, which are a type of comparable authorised scheme in the UK (section 271B(3)).

Justification for the procedure

343. FCA rules are made in accordance with the procedures and safeguards set out in Part 9A of the Financial Services and Markets Act 2000.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271P of the Financial Services and Markets Act 2000 (obligations on operator where recognition is revoked or suspended)

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

344. Section 271P sets out the obligations on the scheme operator, where the scheme's recognition is revoked or suspended, under section 271N(3), 271O(2) or 271L(1). It includes a power for the FCA to direct to whom notification is to be given and must contain such information as the FCA directs be made in such form and manner as the FCA may direct. The mirror power is reflected in section 282A in relation to section 272 funds.

Justification for taking the power

345. This power is necessary to ensure that then notification is being sent to those that will be most affected by the revocation or suspension and that the information received by those notified is accurate and in the most accessible and practical format.

Justification for the procedure

346. In common with other powers for the FCA to make directions as to the form and manner of a notification to it under the Financial Services and Markets Act 2000, it is considered that parliamentary oversight is unnecessary and by reason of the flexibility required it is not appropriate to put such matters in FCA rules.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271Q of the Financial Services and Markets Act 2000 (effect of variation or revocation of Treasury regulations)

Power conferred on: the Treasury

Power exercised by: regulations

Parliamentary Procedure: negative

Context and Purpose

347. Section 271Q(3) sets out that the Treasury may by regulations make provision requiring an application made by a scheme which has ceased to be a section 271A scheme as a result of the Treasury varying or revoking regulations made under section 271A, to be made during a specific period set out in the regulations or in a direction given by the FCA. The Treasury can also modify or disapply the time limits for the FCA to determine applications under section 272 for schemes which have ceased to be section 271A schemes.

Justification for taking the power

348. Following the variation or revocation of regulations made by the Treasury under section 271A, there may be a significant number of scheme's that had previously been recognised under section 271A, which are not permitted to continue marketing in the United Kingdom. The only other route for schemes to gain recognition under the Financial Services and Markets Act 2000 is to apply under section 272. Consequently, the number of applications under section 272 may rise considerably following such variation or revocation. It is therefore considered important to provide for this flexibility to allow the Treasury to modify, where appropriate, the time limits for the FCA to determine such applications and to set out what the applicable time limit is. The aim is to ensure that the FCA is not required to determine applications within the normal time limit for section 272 applications when it is processing a temporarily high number of applications. This flexibility will therefore help to ensure the FCA can effectively process applications from schemes which have ceased to be section 271A schemes which are seeking recognition under section 272.

Justification for the procedure

349. Regulations made under new section 271Q(3) will be subject to the negative resolution procedure. This is considered appropriate as the scope of the power is narrow and deals with only operational issues.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271R of the Financial Services and Markets Act 2000 (public censure)

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

<u>Context and Purpose</u>

350. Section 271R sets out sets out that if the FCA considers that the operator of a scheme, under the OFR, has contravened an additional requirement under sections 271E, or rules made under section 271K, or the operator of a section 271A scheme has contravened section 271I, 271J or 271P, or the operator of a section 271A scheme has contravened a rule made, or a requirement imposed, under section 283. then the FCA may publish a statement to that effect. The mirror power is reflected in section 282B in relation to section 272 funds.

<u>Justification for taking the power</u>

351. This power is necessary to ensure that the notification is sent to those that will be most affected by the revocation or suspension and that the information received by those notified is accurate and comprehensive and in the most accessible and practical format. Current investors will be afforded greater protection if the FCA is able to ensure that firms provide information in a way that is appropriate for individual circumstances and cases.

<u>Justification for the procedure</u>

352. These directions are specific to particular funds and so it is not considered appropriate that a parliamentary procedure be involved or that the processes and procedures that apply under Part 9A of the Financial Services and Markets Act 2000, such as consultation procedures, be applied to these directions.

Clause 24 and Schedule 9, paragraph 1: collective investment schemes authorised in approved countries

- new section 271S of the Financial Services and Markets Act 2000 (recognition of parts of overseas schemes under section 271A)

Power conferred on: the Treasury

Power exercised by: regulations

Parliamentary Procedure: draft affirmative

<u>Context and Purpose</u>

353. New section 271S(4)(a) provides the Treasury with the power to make, by way of regulations, provision about what are, or are not, appropriate modifications to Part 17 of the Financial Services and Markets Act 2000, or provisions made under it, which have effect in relation to parts of schemes recognised, or seeking recognition, under section 271A. The mirror power is reflected in section 282C in relation to section 272 schemes.

354. Section 271S(4)(b) and (c) also provide the Treasury with the power to make, by way of regulations, provision so that a relevant enactment has effect with such modifications as the Treasury considers appropriate, or does not have effect, in relation to parts of

schemes that are recognised, or seeking recognition, under section 271A. A relevant enactment means an enactment which makes provision in relation to schemes that are recognised, or seeking recognition, under section 271A. In addition, the regulation making power under sections 271S(4)(b) and (c) will only be available for relevant enactments which are passed or made before the day on which section 271S(1) comes into force. Under section 271S(5) the Treasury can amend, repeal or revoke an enactment as required when making regulations under sections 271S(4)(b) and (c). The mirror power is reflected in section 282C in relation to section 272 schemes.

Justification for taking the power

355. It is considered important to provide for this flexibility to allow the Treasury to make provision as to what modifications are appropriate to Part 17 of the Financial Services and Markets Act 2000, and any matter made by or under it. The aim is to ensure that the provisions under Part 17 and those made by or under it, where applicable, have the desired effect when applied to a part of a collective investment scheme which is described in the regulations made under new section 271A and is seeking recognition, or has been recognised, under section 272. This will provide the Treasury with the ability to clarify the position for parts of schemes, should there be any uncertainty as to the effect of a provision under Part 17 for section 271A schemes (and for section 272 schemes under section 282C).

356. It is also considered important to allow the Treasury sufficient flexibility to make provision under sections 271S(4)(b) and (c) so the effect of any relevant enactment is clear for parts of schemes that are recognised, or seeking recognition, under section 271A. In addition, the power is limited to enactments passed or made before section 271S(1) (and, for the mirror power under section 282C, section 282C(1)) comes into force, and so only seeks to clarify the position for existing enactments where these are relevant.

Justification for the procedure

357. As these regulations allow the Treasury to provide what modifications are required in this context under Part 17 of the Financial Services and Markets Act 2000, or provisions made under it, and to make provision and, if appropriate, modifications regarding any enactments where these are relevant enactments and amendments to any enactments, it is considered appropriate to use the affirmative resolution procedure to allow for considered Parliamentary scrutiny of the proposals.

Clause 24 and Schedule 9, paragraphs 10 and 12: collective investment schemes authorised in approved countries

- the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019

Power conferred on: the Financial Conduct Authority

Power exercised by: directions

Parliamentary Procedure: none

Context and Purpose

358. Paragraph 10 amends the 'exit mechanism', the process by which EEA stand-alone schemes which have been granted temporary marketing permission leave the Temporary Market Permission Regime ('TMPR') under the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/ 325).

359. Currently the exit mechanism from the TMPR under regulation 62(3) is limited to recognition, refusal or withdrawal of section 272 stand-alone applications. An amendment is therefore necessary so that the 'relevant period' under 62(3), in addition to (a) to (c) also includes recognition or refusal of recognition under the OFR, or the stand-alone (or sub-fund) withdraws their application for recognition or fails to make an application. It is the policy intention that the exit mechanism for OFR funds should replicate the exit mechanism for section 272 applications.

360. In paragraph 12, new regulation 67A of the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/ 325) amends the TMPR in respect of a stand-alone scheme that is a recognised scheme by virtue of regulation 62, so that the section 271A schemes are included and under paragraph (2) the FCA may direct that the scheme's application for recognition must be made during a period specified in the FCA direction.

Justification for taking the power

361. The Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/ 325) is amended to include a power to the FCA to direct a period for applications made by section 271A schemes.

Justification for the procedure

362. These directions are specific to particular funds and so it is not considered appropriate that a parliamentary procedure be involved or that the processes and procedures that apply under Part 9A of the Financial Services and Markets Act 2000, such as consultation procedures, be applied to these directions.

Clause 25, subsection 4(d): individually recognised overseas collective investment schemes

- new section 277(6) of the Financial Services and Markets Act 2000 (requirement to notify the FCA of proposed alteration to recognised scheme

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9A of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

363. The new section 277(1) of the Financial Services and Markets Act 2000 is amended so that scheme operators no longer have to provide written notice for all changes to the scheme's operation or management, for FCA approval. Instead, they only have to provide notice for changes which are a material alteration. The new section 277(6) gives the FCA a power to make rules specifying those changes considered material or not for written notice by an operator of a scheme recognised by section 272 of that Act.

Justification for taking the power

364. The FCA are best placed to determine what is material in relation to the information recognised schemes under section 272 must provide following recognition. This provision provides the necessary flexibility for the FCA to determine by way of rules, what is material based on the matters they deem material over time.

Justification for the procedure

365. These rules are specific to particular funds and so it is not considered appropriate that a parliamentary procedure be involved. The processes and procedures under Part 9A of the Financial Services and Markets Act 2000will also apply to rules made under this power.

Clause 26, subsection (2): money market funds authorised in approved countries or territories

- new paragraph 1ZA and 1ZB of Article 4 of Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

366. This provision inserts new paragraph 1ZA and 1ZB into Article 4 of Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, as it forms part of retained EU law.

Justification for taking the power

367. Article 4 paragraph 1ZA sets out that an undertaking satisfies the condition for authorisation if the FCA has received written notification that the undertaking intends to be marketed in the United Kingdom as an MMF. Paragraph 1ZB gives the power to the FCA to direct the form and manner of that notification and to contain or be accompanied by such information as the FCA may direct. By these means, the FCA can ensure that it receives all necessary and relevant information and that firms provide information in a way that is appropriate for individual circumstances and cases.

Justification for the procedure

368. These directions are specific to particular funds and so it is not considered appropriate that a parliamentary procedure be involved or that the processes and procedures that apply under Part 9A of the Financial Services and Markets Act 2000, such as consultation procedures, be applied to these directions.

Clause 26, subsection (3): money market funds authorised in approved countries or territories

- new Article 4A of Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds

Power conferred on: the Treasury

Power exercised by: regulations

Parliamentary Procedure: negative

Context and Purpose

369. This part inserts new Article 4A into Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, as it forms part of retained EU law.

Justification for taking the power

370. Under the current legislative framework, overseas money market funds ('MMFs'), which are a type of collective investment scheme, are not permitted to market in the UK unless the fund falls within one of the exemptions set out in Article 4(1)(a) to(c) of the Money Market Funds (Amendment) (EU Exit) Regulations 2019 (S.I 394) ('MMFR'). This Bill amends the Money Market Funds (Amendment) (EU Exit) Regulations 2019 to provide an exemption under the new article 4(1)(aa) MMFR, to overseas MMFs from a country or territory that have been approved by the Treasury under the new article 4A MMFR.

371. Article 4A MMFR sets out the test for equivalence, whereby the Treasury by regulations under paragraph 1 determine that the law and practice of a country or territory imposes requirements on money market funds which have equivalent effect to the requirements imposed by the MMFR. Section (4) sets out that the Treasury may request the FCA to prepare a report on the law and practice of the country or territory in question, when it is considering whether to make, vary or revoke an approval of its MMFs. This request must be made in writing. If the Treasury ask for a report, the FCA must provide the report.

Justification for the procedure

372. It is considered appropriate that regulations made under Article 4A be subject to negative procedure, given the safeguards described Article 4A(2). In addition, the Treasury would ordinarily consider its exercise of the power having received a detailed report submitted by the FCA and given the need to respond swiftly to changes in the law and practice of foreign jurisdictions.

Clause 27 and Schedule 10, paragraph 5(5)(b): provision of services to third country firms following an equivalence determination

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

373. The proposed power will enable the FCA to make directions as to the form and manner of applications made by third country firms to register under Article 46 of the Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014) ("MiFIR") for the purposes of providing services under the Title VIII regime. This power will enable the FCA to set out which forms Title VIII firms will be required to complete, and the level of information required. The power is intentionally open-ended, to give the FCA the necessary flexibility to determine what form of application is likely to be most appropriate (and change the nature of the application forms if necessary).

Justification for taking the power

374. The proposed power is to enable the FCA to obtain the necessary level of information from third country firms seeking to register under Article 46 of MiFIR. It is not considered appropriate for the Treasury to retain this responsibility because the FCA will be responsible for registering third country firms. It is therefore necessary to provide the FCA with the authority to specify what level of information third country firms will be required to provide upon registration.

Justification for the procedure

375. In common with other direction-making powers conferred on the FCA in respect of procedural matters within the FCA's remit, it is not considered that subjecting the exercise of the power to a parliamentary procedure is appropriate; such would prevent the FCA from publishing registration forms in a timely manner, as would exercising the power by regulator rules subject to Part 9A of the Financial Services and Markets Act 2000.

Clause 27 and Schedule 10, paragraph 5(6): provision of services to third country firms following an equivalence determination

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

376. Article 46(5) MiFIR requires Title VIII firms to write to clients in the UK before providing investment services, to inform them that they are not allowed to provide services to clients other than eligible counterparties and professional clients. This provision amends the second paragraph of Article 46(5) of MiFIR, to make it clear that the FCA can make directions as to the form of notice that Title VIII firms are required to provide. This reflects the substantive position in the EU MiFIR (noting that, under EU rules, ESMA has the power to specify the format of information required here).

Justification for taking the power

377. It is considered that this power is necessary to provide the FCA with the authority to specify the form in which Title VIII firms are required to notify their clients, which will help to ensure that this is done in a clear and consistent way; the proposed power is consistent with the EU text which makes similar provision under Article 46(7) of MiFIR.

Justification for the procedure

378. In common with other direction-making powers conferred on the FCA in respect of procedural matters within the FCA's remit, it is not considered that subjecting the exercise of the power to a parliamentary procedure is appropriate; such would prevent the FCA from making decisions in a timely manner, as would exercising the power by regulator rules subject to Part 9A of the Financial Services and Markets Act 2000.

Clause 27 and Schedule 10, paragraph 5(8): provision of services to third country firms following an equivalence determination

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9C of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

379. This provision inserts a new paragraph 6B into Article 46 of MiFIR to create a power to enable the FCA to set out, in rules, the reporting requirements for firms registered with the FCA under Title VIII. The IFR amends the Title VIII regime at the EU level, by setting out in detail the specific information third country firms are required to report to ESMA

on an annual basis. It has been decided to provide the FCA with greater flexibility under the UK rules, such that the regulator has flexibility both to determine what information firms are required to provide, and the level of frequency. The purpose of the power is to ensure that the FCA has an adequate level of information regarding the activities of third country firms providing services under the Title VIII regime to enable them to properly monitor their activities.

Justification for taking the power

380. It is considered that the power can be justified on the basis that the FCA does not currently have authority under existing legislation to require third country firms to report information related to their activities. It is necessary for the FCA to have this power to ensure that it can properly oversee the activities of those firms, for the benefit of UK clients and the UK market more generally. As noted above, the EU's version of these provisions also provides ESMA with the power to specify reporting requirements for third country firms. It is therefore considered that there is a further justification for granting a similar power to the FCA here to enable it to have similar or comparable powers.

Justification for the procedure

381. Please see the corresponding entry in respect of paragraph 5(5)(b) of Schedule 10. The FCA will also be subject to certain constraints when making rules here, in particular, a range of procedural obligations deriving from Part 9A of the Financial Services and Markets Act 2000 (with certain modifications), including a requirement to undertake a consultation. This is effected by new Article 50D of MiFIR.

Clause 27 and Schedule 10, paragraph 6(2): equivalence determination

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

382. This provision inserts a new paragraph 1 into Article 47 of MiFIR to create a power to enable the Treasury to make equivalence determinations in respect of third country jurisdictions. One of the pre-conditions for enabling third country firms to provide investment services to professional clients and eligible counterparties under Article 46 of MiFIR is that there must be an equivalence determination in favour of the relevant third country. This power enables the Treasury to make the relevant determination. The power here is a substitution in respect of the existing version of Article 47 of MiFIR that previously operated at the EU level and also contains such a power – the relevant provision here has simply been amended to alter some of the requirements for assessing equivalence.

Justification for taking the power

383. It is considered that this power is necessary to provide the Treasury with the ability to assess third country regimes for equivalences in a manner that will enable the operation of the MiFIR Title VIII regime; the proposed power is consistent with the EU text which makes similar provision under Article 47 of MiFIR.

Justification for the procedure

384. In common with other powers in retained EU law to make equivalence determinations, the power is proposed to be subject to a negative parliamentary procedure.

Clause 27 and Schedule 10, paragraph 7: power to impose requirements on firms

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

385. This provision inserts a new Article 48A into MiFIR to enable the Treasury to impose specific requirements on firms that have registered under the MiFIR Title VIII regime. Although the Treasury may determine that a third country jurisdiction is equivalent under Article 47(1) of MiFIR, it may be necessary to impose requirements on firms that have registered under the Title VIII regime to, amongst other things, help enable the FCA to meet its statutory objectives. The power also contemplates the FCA potentially making rules in relation to the Treasury's exercise of the power.

Justification for taking the power

386. It is considered that this power is necessary to provide the Treasury with the ability to impose requirements on firms to ensure that the MiFIR Title VIII regime operates effectively.

Justification for the procedure

387. The power is proposed to be subject to a negative parliamentary procedure. Although it is difficult to foresee the specific requirements that may need to be imposed on firms, given the cross-border nature of the Title VIII regime, and the need to, amongst other things, assist the FCA in meeting its operational objectives, it is likely that the Treasury would need to impose such requirements in a timely and expedient manner.

388. With regards any FCA rules made in relation to this power, the FCA will be subject to the same procedural constraints in Article 50D of MiFIR (as referred to above).

Clause 27 and Schedule 10, paragraph 8(3): temporary prohibitions and withdrawal of registration

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

389. This power provides the FCA with the ability to restrict or prohibit third country firms from providing services under the Title VIII regime where it does not directly comply or cooperate with the FCA's powers over it. The purpose of this power is to provide the FCA with the necessary supervisory tools to enable it to take actions against third country firms that are failing to comply with the regulator's requests, binding rules and requirements, or binding prohibitions and restrictions. The Bill also introduces a new Article 49A of MiFIR, which sets out the procedure for the FCA to impose a temporary prohibition or restriction on a third country firm.

Justification for taking the power

390. The FCA already has certain powers of intervention with regards third country firms under regulation 12 of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017. However, the FCA is only permitted to use these powers where it considers that: (i) the firm has acted, or is acting, in a manner which is clearly prejudicial to the interests of investors, or (ii) the firms has seriously infringed local law provisions or the requirements of an equivalence determination. The proposed power does not contain such conditions. It is considered that this approach is necessary to enable the FCA to have sufficiently effective supervisory tools where a third country firm is failing to co-operate or refusing to comply with an FCA requirement (e.g. reporting requirements or specific restrictions or prohibitions).

Justification for the procedure

391. Please see corresponding entry in respect of paragraph 5(5)(b) of Schedule 10.

Clause 27 and Schedule 10, paragraph 8(4) and (5): temporary prohibitions and withdrawal of registration

Power conferred on: the Financial Conduct Authority

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

392. This proposed power enables the FCA to withdraw the registration of a third country firm. The power builds on the existing authority set out in Article 49 of MiFIR by specifying that the FCA is able to use this power where it has well-founded reasons based on documented evidence to believe that, in the provision of investment services or activities in the UK, the third country firm: (i) is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets; (ii) has seriously infringed local rules or the requirements of an equivalence determination; (iii) has seriously infringed a requirement imposed by the Treasury; or (iv) is not maintaining necessary arrangements and procedures to provide required information or comply with prescribed requirements. The Bill also introduces a new Article 49B of MiFIR, which sets out the procedure for the FCA to withdraw the registration of a third country firm.

Justification for taking the power

393. The proposed power builds on and amends the existing Article 49 (1) power as set out in MiFIR. The purpose of the proposed power is to enable the FCA to withdraw the registration of a third country if the regulator deems it strictly necessary to do so. Given the seriousness of this action, it is considered necessary to include certain conditions before this action can be taken, which are the same as those set out in regulation 12 of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (see above).

Justification for the procedure

394. Please see corresponding entry in respect of paragraph 5(5)(b) of Schedule 10.

Clause 27 and Schedule 10, paragraph 10: power regarding the service of notices

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

395. This proposed power relates to the FCA's ability to impose temporary prohibitions or restrictions on Title VIII firms, and to withdraw their registration in certain circumstances. When (i) proposing or (ii) deciding to take action against a Title VIII firm, the FCA is required to provide a notice to the relevant firm which, among other things, provides detail on the action being taken, and when it is due to take effect. The power grants the Treasury authority to make regulations as to the service of such notices including, among other things, how the notice must be sent.

Justification for taking the power

396. Given that many Title VIII firms will be based outside the UK, we consider it is necessary to grant the Treasury a specific power to set out the rules / procedures that will apply to the service of such notices. This will help to ensure there is sufficient clarity around the service of notices.

Justification for the procedure

397. Regulations made under the power will – in common with the parliamentary procedure in Schedule 5, paragraph 10 (power to make regulations concerning service of documents under the BMR) – be subject to the negative resolution procedure. This is considered appropriate and proportionate as the scope of the power is narrow and only relates to the process of serving notices on firms in finite circumstances.

Insider dealing and money laundering etc

Clause 31: application of money laundering regulations to overseas trustees

Power conferred on: the Treasury / Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

398. The clause amends the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA") to ensure that, after the repeal of section 2(2) of the European Communities Act 1972, the Government can continue to impose and enforce requirements on non-UK trustees of overseas trusts with links to the UK. The purpose for doing so is to give the UK sufficient legislative flexibility to combat money laundering risks at the same time as retaining a clear UK nexus for extra-territorial application of any legislation.

Justification for taking the power

399. This amendment is to one paragraph of Schedule 2, to ensure that the extraterritorial application of the power to make regulations in section 49 of that Act can include provision about overseas trusts with links to the UK. The provision will not extend to any overseas trust: there must be an asset, income or business connection with the UK.

400. The power in section 49 of SAMLA, and the further provision made about that power in Schedule 2 to that Act, were examined by the Delegated Powers and Regulatory Reform Committee during its passage as a Bill.

401. The Delegated Powers Memorandum from the Foreign and Commonwealth Office stated by way of justification that the power was needed: (i) to provide powers in lieu of section 2(2) of the European Communities Act 1972 in respect of anti-money laundering and counter-terrorist financing matters, and (ii) to do so in a manner by which the UK's legal measures can react quickly and remain up to date relative to changes in technology and the changing nature of threats to the integrity of the financial system, and to comply with international standards.

402. Amendments made to the scope of the power during the passage of that Bill included providing that the power to impose monetary penalties for breaches of anti-money laundering rules can only be exercised by the FCA and Her Majesty's Revenue and Customs; that criminal offences can only be created if there is a mental element and/or a defence; and that a report about criminal offences must be laid before Parliament when the draft regulations are laid: see paragraph 21 of Schedule 2.

Justification for the procedure

403. The clause amends an existing power to make regulations under section 49 of SAMLA, which is exercisable subject to the draft affirmative procedure and therefore provides a greater level of scrutiny than previously applicable to similar measures implemented under section 2(2) of the European Communities Act 1972, where the negative procedure has been used.

404. The legislation already provides for specific safeguards relating to the creation of new criminal offences, as mentioned above, and the regulations cannot provide for a prison term of more than two years.

405. Accordingly, it is considered that the affirmative procedure is appropriate to the provision as amended.

Debt respite scheme

Clause 32: debt respite scheme

Power conferred on: the Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

406. The 2017 Conservative manifesto committed the government to establish a statutory debt respite scheme consisting of two elements: (i) a "breathing space", whereby someone in serious problem debt may apply for temporary stop on enforcement action and a pause on certain interest/charges; and (ii) a statutory debt repayment plan ("SDRP") which, where appropriate, would extend those protections to debtors whilst they repay their debts to creditors in a manageable way. This is enacted by sections 6 and 7 of the Financial Guidance and Claims Act 2018 ("FGCA"), which provide the relevant powers, for which please see the third Supplementary Memorandum from the Department for Work and Pensions and the Treasury to the DPRRC, dated 21 November 2017 ("Supplementary Memorandum").

407. Clause 32 amends the regulation-making power in section 7 of the FGCA by inserting a new subsection (4A) and adding a paragraph (ba) to subsection (5), which will permit regulations to be made that will fully reflect the SDRP policy intent of: (i) compelling a creditor to accept an SDRP in certain limited circumstances without their consent, (ii) providing for a charging mechanism through which creditors will contribute to the cost of running the scheme and the repayment plans, and (iii) including debts owed to central government (all of which are set out in the Government's policy consultation response published on 19 June 2019).

Justification for taking the power

408. As set out in the Supplementary Memorandum, the development of the debt respite scheme is complicated and requires significant research, policy development and extensive consultation with the debt advice sector, creditors and the wider public (a call for evidence launched in 2017 and the Government carried out a consultation in October 2018, the latter of which attracted over 130 responses from stakeholders).

409. The details of what the future SDRP regulations will contain are still being worked through and considered; once this has been determined, due to the complexity and scope of the regulations it is likely that the Government will undertake a technical consultation, as has been undertaken for the regulations implementing the first part of the policy and implementing a breathing space for debtors.

410. In addition, it still remains likely that the specific design features of the statutory debt respite scheme will need to be adapted in future, both to reflect the changing requirements of indebted consumers and to improve any aspects of the scheme which it emerges could work better for participants. It is important that the legislation permits flexibility to adapt and improve the scheme as lessons are learnt from its implementation.

Justification for the procedure

411. Regulations under section 7 of the FGCA are subject to the affirmative procedure in both Houses of Parliament and, where applicable, in the Welsh Parliament and the Northern

Ireland Assembly. Taking into account the ongoing need for flexibility in respect of those regulations and that the level of detail of the scheme which will be left to subordinate legislation, the Government considers that the affirmative procedure continues to be appropriate for an exercise of the power, including as amended by the Bill; in particular given the Henry VIII power to make incidental, supplemental, consequential, transitional or saving provision in section 7(5)(c) and (6) of the FGCA, the affirmative procedure will provide the required level of Parliamentary scrutiny.

Help to save

Clause 33: successor accounts for Help-to-Save savers

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

412. The Help to Save scheme is designed to promote and encourage saving among working people on low incomes, as part of the Government's recognition of the important role savings can play in promoting aspiration and supporting households' standards of living. Help to Save accounts are provided by the Director of Savings (a statutory officer, who separately runs the business of the National Savings Bank) and are available to working individuals on low incomes and in receipt of certain benefits. Account holders may deposit up to £50 per calendar month over the account's four-year term and a Government bonus is paid after 24 months and when the account matures at 48 months.

413. The legislation underlying Help to Save is silent about the future of any funds remaining in the account at maturity. While the Director of Savings will seek instructions from the account holder prior to the account maturing, if no instructions are forthcoming the lacuna in the current legislation means that those funds must remain in the matured account.

414. This clause inserts a new paragraph 13A into Schedule 2 of the Savings (Government Contributions) Act 2017. The clause will confer on the Treasury the power to make regulations which provide for the balance in a matured Help to Save account to be transferred to an account provided by the Director of Savings where the account holder has not provided instructions.

415. Paragraph 13A(1) will define a 'matured account' as an account which has been, but ceased to be, a Help to Save account.

416. Paragraph 13A(2) will provide that Treasury regulations may make provision for the balance in a matured account to be transferred to an account provided by the Director of Savings ('a successor account'). Paragraph 13A(3) will require the successor account to be an account in the National Savings Bank.

417. Paragraph 13A(4) will provide that no such transfer can take place where the account holder has provided instructions for dealing with the balance and the Director of Savings considers it reasonably practical to implement it. This will limit the powers at paragraph 13A(2) and ensure that, where an account holder has provided instructions, they are acted upon. The interaction of sub-paragraphs (2) and (4) of paragraph 13 will be such that funds remaining in a matured account can only be transferred to a National Savings Bank account where no instructions have been received.

418. Paragraph 13A(5) will provide that regulations may make provision for accounts opened before the regulations are made. This is intended to cover existing accounts which are uninstructed at maturity. Without this power an uninstructed account could not be transferred to a successor account and must remain within the matured account.

419. Paragraph 13A(6) will require that regulations made under paragraph 13A(2) must provide that the successor account can be either a new or existing account offered by

National Savings Bank and that no transfer charges can be imposed on the individual for whom the matured Help to Save account was opened.

Justification for taking the power

420. The effect of the power will ensure that, where no instructions have been received from the account holder concerning the future, post maturity, of funds held in the account, those funds are transferred to a savings account provided by the National Savings Bank.

421. It is intended that appropriate regulations will be included within the Help to Save Regulations 2018, made under powers in Schedule 2 to the Savings (Government Contributions) Act 2017.

422. Delegated legislation is appropriate to allow for the required level of detail in provisions concerning the 'successor' account (as examples, in specifying a named account in the National Savings Bank, and ensuring that that the transferred funds are aligned with the legislation that governs the National Savings Bank). The relevant provision should be sufficiently flexible to accommodate developments within the Help to Save scheme and the needs of relevant account holders. Comparable provisions for Help to Save concerning account requirements and the payments of sums by way of a bonus are set out in regulations rather than primary legislation.

423. Delegated legislation will allow changes to be made in an appropriate and timely way. The Government intends to publish draft regulations in advance of the first accounts maturing in January 2022.

Justification for the procedure

424. Regulations made under paragraph 13A(2) will be subject to the negative procedure. It is considered that this is an appropriate level of scrutiny given that these regulations can only be to the benefit of low-income savers who have inadvertently neglected to inform the account provider of their intentions for the account at maturity. The regulations will allow the funds to be transferred to a savings account provided by the National Savings Bank pending renewed engagement with the account provider.

Miscellaneous

Clause 34, subsection (2): amendment of the PRIIPs Regulation etc - power to specify PRIIPs

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with a modified Part 9A of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

425. The purpose of the delegated power is to enable the FCA to make rules specifying which products should be in scope of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) ("the PRIIPs Regulation").

426. Beyond the exemptions listed in Article 2 and the definition in Article 4 of the PRIIPs Regulation, there is no further clarification on investments that should be considered PRIIPs, which has proved confusing. This has particularly been the case in bond markets, where specific contractual features may inappropriately appear to bring certain products within scope of the Regulation. This has led to market uncertainty and certain issuers deciding not to issue such products on this basis.

427. It is proposed that the FCA should be able to make rules which would clarify the Article 4 definition in the PRIIPs Regulation; existing FCA guidance in respect of the applicability of the PRIIPs Regulation (in particular, what is and is not likely to amount to a PRIIP), such as in the FCA's policy statement PS 17/6, is not binding. The policy intention is that the FCA should be able to clarify the definition in the PRIIPs Regulation by prescribing the products that definitively will and will not amount to a PRIIP in a way that will have legal certainty.

428. To ensure the FCA interprets the definition of "PRIIP" in a clear and consistent way, the delegated power will enable the FCA to prescribe in its rules whether or not a product, or category of product, falls within the definition of a PRIIP for the purposes of the Regulation.

Justification for taking the power

429. A delegated power for the FCA to make rules in this regard is considered the most appropriate and flexible mechanism to achieve the greater clarity on the application of PRIIPs. The FCA is designated as the appropriate regulator by regulation 3 of The Packaged Retail and Insurance-based Investment Products Regulations 2017 (SI 1127/2017). Further, the FCA has been given the power by The Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019, in accordance with Chapter 2A of Part 9A of the Financial Services and Markets Act 2000, to develop high-level requirements to PRIIPs, including to amend Commission Delegated Regulation (EU) 2017/653([2]) on regulatory technical standards regarding key information documents. It is considered that this power is analogous to the powers sought here and that these powers are an extension of powers that the FCA currently has rather than a new area of competence.

430. The FCA's power to make rules in this respect must be with reference to the definition of PRIIPs, which will therefore serve as an inherent limitation on its exercise. Such rules

could not contradict or conflict with the definition of a PRIIP in Article 4(3) of the PRIIPs Regulation; the power merely enables the FCA to clarify which products may or may not fall within the definition, as opposed to amending the definition itself. In exercising the power, the FCA shall have regard to the exemptions set out in Article 2 of the PRIIPs Regulation (i.e. it must not be possible for the FCA to state that a product is a PRIIP if it has been exempted).

431. Providing the FCA with a delegated power of this nature would also allow the regulator to exercise its powers quickly, as will be necessary given the continuous innovation of new financial products.

Justification for the procedure

432. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the FCA. It is intended that the FCA's rule-making power is exercised in accordance with existing rule-making provisions in Part 9A of the Financial Services and Markets Act 2000, which contains sufficient safeguards; in particular, sections 138C (evidential provisions), 138F (notification of rules) and 138I (consultation by the FCA).

Clause 34, subsections (5) and (6): amendment of the PRIIPs Regulation etc - power to amend date for PRIIPs exemption

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

433. The intention is that exercise of this power would provide UCITS funds with an adequate transition period to meet the requirements of the PRIIPs Regulation, as amended by subsection (1) of this clause. The latest date for extending the exemption also reflects the expected end date of the Temporary Marketing Permissions Regime for EEA UCITS and aligns with the expected date for existing EEA UCITS to move into the Overseas Funds Regime (provided by clause 24).

434. As the PRIIPs regime, as amended, could only be in force once the current Bill receives Royal Assent, it is not considered there would be sufficient time for UCITS to meet the existing December 2021 deadline.

Justification for taking the power

435. The power will enable the Treasury to ensure that UK and EU UCITS selling to UK retail investors are subject to the same disclosure requirements as well as providing UCITS with an adequate transition period to meet the requirement of the retained EU Regulation.

Justification for the procedure

436. Since the power is to substitute a date, and there is a statutory constraint on when that date might fall, and the power does not involve the policy consideration beyond a consideration of reasonable time for compliance, it is considered that the negative parliamentary procedure is appropriate.

Clause 35: over the counter derivatives - clearing and procedures for reporting

Powers conferred on: the Financial Conduct Authority

Powers exercised by: rules made in accordance with Part 9A of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

<u>Context and Purpose</u>

437. In 2009, the G20 made a commitment to reform over-the-counter (OTC) derivatives markets to improve their transparency, prevent market abuse, and reduce systemic risks. Regulation EU No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (known as the 'European Market Infrastructure Regulation' or 'EMIR') implemented this for the EU and sets out a framework for central counterparties (CCPs) and trade repositories (TRs).

438. "EMIR REFIT" (Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019) introduced, amongst other provisions, two technical updates to the EMIR framework, which the UK supported as a member of the EU but which will not become retained EU law as they do apply before IP completion day. These measures are broadly mirrored in the measures in clause 35. The aim of the first of these measures (subsection (2)) is to make 'clearing' services under the EMIR framework retained after IP completion day (UK EMIR) more accessible and affordable. The second measure (subsection (3)) requires trade repositories to establish procedures which are aimed at improving the data quality of OTC derivatives trades available to UK regulatory authorities.

439. The policy issue tackled with the first measure is one of accessibility to the clearing services: in order to comply with the clearing obligation in article 4 of EMIR, counterparties can either become a clearing member of a CCP, or establish indirect clearing arrangements with a clearing member or a client of a clearing member. Indirect clearing arrangements are generally used by smaller counterparties with a limited volume of activity. However, such arrangements are often complex and their terms can vary widely, meaning that there is little competition to improve prices and services. These are all barriers to access indirect clearing arrangements. The first measure in subsection (2) tackles this issue requiring firms offering such direct and indirect clearing services to do so in accordance with Fair, Reasonable, Non-Discriminatory, and Transparent (FRANDT) terms. This should make it easier for firms to fulfil their regulatory obligations by making clearing services more accessible and affordable.

440. The second measure (subsection (3)) sets out further requirements for trade repositories (TRs) registered under EMIR to enhance transparency in the reporting of derivative transactions. All derivative trades must be reported to a TR under the requirements of EMIR (article 9 EMIR). This data is vital to allow financial services regulators to monitor the market and ensure financial stability. Each party to the contract reports their half of the trade, and the data needs to be reconciled within and between TRs to ensure it is useful to regulators. This system of separate reporting creates a risk of errors and it is important to safeguard data quality so that the FCA and Bank of England are able to monitor risks effectively. The second measure in subsection (3) tackles this issue by imposing new duties on TRs to ensure the effective reconciliation of data among them, ensure the completeness and accuracy of reported data, and facilitate switching by transferring data to other TRs.

441. To that aim, these provisions provide for two new rule-making powers for the FCA to adopt implementing measures to establish the detail determining: (i) how firms should satisfy the obligation to implement the FRANDT terms; and (ii) how TRs should be applying procedures required to improve data quality (subsection (4)).

Justification for taking the power

442. Financial services legislation is normally implemented in its technical details by regulators and specialised agencies. At the European level, that happens through binding technical standards (BTS). BTS are standards drafted by the European Supervisory Authorities and then adopted by the European Commission as binding regulations or decisions. The reason for that delegation is the very technical nature of BTS and the limited discretion underlying their adoption: BTS are only meant to set out uniform conditions for the basic acts they implement.

443. During the onshoring, BTS mandates in EU law have been transferred to the relevant UK regulators by the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115). Specifically, BTS standard-making powers in relation to indirect clearing obligations have been transferred to the FCA, which has been given responsibility for authorising and supervising trade repositories. Therefore, the FCA is the appropriate UK Regulator to set out the detail of how firms can comply with the two new EMIR provisions.

444. Existing BTS powers transferred to the FCA are however not wide enough in scope to allow the FCA to specify further the detail of how firms can comply with the new EMIR provisions. It is therefore considered necessary to grant specific rule-making powers to the FCA in order to allow them to do this. A new rule-making power is more appropriate rather than providing for a BTS-making power. BTS-making powers are limited to those powers transferred from EU entities to UK authorities using section 8 of the European Union (Withdrawal) Act 2018 (see section 138P of the Financial Services and Markets Act 2000).

445. The following relevant provisions of Part 9A of the Financial Services and Markets Act 2000 (rules and guidance), with the modifications described in the new subsection (3) of the new Article 84b EMIR, are applied to the exercise of the new rule-making powers:

(a) section 137T (general supplementary powers);

(b) chapter 2 (modification, waiver, contravention and procedural provisions), with the exception of sections 138A and 138B (modification or waiver or rules) and 138D (actions for damages), sections 138J and 138K (Consultation by the PRA) (Consultation: mutual societies), and sections 138M (Consultation: exemptions for temporary product intervention rules), 138N (Temporary product intervention rules: statement of policy), and section 138O (Statement of policy under section 138N: procedure);

(c) section 141A (power to make consequential amendments of references to rules etc).

Justification for the procedure

446. There is no parliamentary procedure. The FCA's general rule-making powers in Part 9A of the Financial Services and Markets Act 2000 do not have formal Parliamentary oversight. These powers are specific rule-making powers, applying the procedures that apply to the FCA's general rule-making powers, and as such it is not considered appropriate to provide for formal parliamentary oversight.

Clause 36: regulations about financial collateral arrangements

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

447. Subsections (1) to (3) of clause 36 make provision to underpin the legal validity of the Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226) ("FCARs"), made under section 2(2) of the European Communities Act 1972, implementing the Financial Collateral Arrangements Directive (2002/47/EC).

448. The Treasury took a power at section 255 of the Banking Act 2009 to make further provision in connection with the implementation of that Directive, and to make provision to enable financial collateral arrangements to be commercially useful and effective, in response to the case of R (Cukurova Finance International Limited) v H.M. Treasury and Alfa Telecom Turkey Limited [2008] EWHC 2567 (Admin), which challenged whether the Financial Collateral Arrangements (No.2) Regulations 2003 were wholly within vires. The case failed by reason of having been brought out of time but the vires risk remained and, rather than address this in regulations under section 255, it is now intended to address the issue by the enactment of subsections (1) to (3) of this clause. This avoids the need to revoke and remake the regulations.

449. The power under section 255 was subject to the made affirmative procedure, in order to address any vires issue with the Regulations swiftly had the Cukurova challenge been successful. It is considered, given the effect of subsections (1) to (3) of this clause, that urgency is no longer warranted so the opportunity has been taken at subsection (4)(b) and (c) of the clause to amend the power such that its exercise will be subject to the draft affirmative procedure.

Justification for taking the power

450. The provision at subsection (4)(b) and (c) is not taking a new power or amending the scope of the power at section 255 of the Banking Act 2009, but merely providing a different parliamentary procedure relevant to the exercise of that power.

Justification for the procedure

451. Section 255 of the Banking Act 2009 currently attracts the made affirmative procedure (see section 256), which was appropriate should a swift response be required in response to an adverse legal judgement in respect of vires. Assuming subsections (1) to (3) of this clause are enacted without amendment, such a response would no longer be indicated, and the draft affirmative procedure would therefore be appropriate in future.

Clause 38: subordinate legislation made under retained direct EU legislation

Power conferred on: the Treasury

Power exercised by: order made by statutory instrument

Parliamentary Procedure: negative

Context and Purpose

452. This is an amendment to the definition of "qualifying provision" in section 425C of the Financial Services and Markets Act 2000. The amendment expands the definition to

include regulations made by the Treasury and rules made by the regulators under new powers contained in retained direct EU legislation. This extends the scope of a series of existing powers in the Financial Services and Markets Act 2000 for the Treasury to specify qualifying provisions by order for the purposes of particular sections, so that various regulatory powers and functions under that Act apply to those qualifying provisions. These order-making powers are subject to the negative resolution procedure.

Justification for taking the power

453. The Treasury already have the power to specify qualifying provisions by order for the purposes of the relevant sections of the Financial Services and Markets Act 2000. The definition of qualifying provision already covers similar instruments that are made by virtue of EU Exit legislation. The expansion to the definition of qualifying provision allows legislation made under these new powers to be treated in the same way. This is necessary to ensure that the regulators have the appropriate powers and functions in relation to provision made under the new powers.

Justification for the procedure

454. It is considered that the amendment to the definition of qualifying provision does not necessitate any changes to the nature of the Treasury's existing order-making powers or the parliamentary process to which they are subject.

General

Clause 39: power to make consequential provision

Power conferred on: the Treasury

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative if exercised so as to amend, repeal or revoke primary legislation, otherwise negative

Context and Purpose

455. The power in subsection (1) of this clause enables provision to be made which is consequential upon other provisions of the Bill.

456. Subsection (2) provides that such regulations may make different provision for different purposes and may include incidental, transitional, transitory or saving provision.

Justification for taking the power

457. Due to the nature of certain provisions under the Bill, it is anticipated that these would, if enacted, require consequential amendment of other enactments, including primary legislation. Also included would be secondary legislation where the power under which it is made is no longer available (such as section 2(2) of the European Communities act 1972 or section 8 of the European Union (Withdrawal) Act 2018). In respect of other secondary legislation, although not necessary to take a power because the powers under which that legislation is made would still be available, it is considered a better approach and more convenient to make all the consequential provision in one instrument, or series, under one power.

458. Consequential amendment is most likely the case in respect of the operation of powers proposed under the Bill, where the manner of their exercise and therefore the consequential effect on existing legislation is yet to be determined.

Justification for the procedure

459. In respect of primary legislation, it is proposed that the regulations are subject to the draft affirmative procedure, as is usual with amendments to primary effected by secondary.

460. Although secondary legislation which may be amended by exercise of the power under which it is made might be subject to an affirmative resolution procedure, it is considered that a negative procedure is appropriate given that the nature of any amendments will be consequential upon, and therefore only those which arise naturally from, provisions in the Bill.

Clause 42: extent

Power conferred on: Her Majesty in Council

Power exercised by: Order in Council made by way of statutory instrument

Parliamentary Procedure: none (subsection (4)) / negative (subsection (5))

Context and Purpose

461. Section 79(10) of the Criminal Justice Act 1993 provides that Her Majesty may by Order in Council direct that provisions of that Act shall extend to a British overseas territory.

Subsection (4) of this clause provides that the power in section 79(10) of that Act applies to the amendment of that Act made by clause 30 of the Bill.

462. Section 430(3) of the Financial Services and Markets Act 2000 provides that Her Majesty may by Order in Council provide for any provision of or made under that Act, relating to a matter which is the subject of other legislation which extends to any of the Channel Islands or the Isle of Man, may be extended to the Channel Islands or the Isle of Man. Subsection (5) of this clause provides that the power in section 430(3) of that Act applies to the amendments of that Act made by any of the other provisions of the Bill.

Justification for taking the power

463. Subsections (4) and (5) extend each power to ensure that, should the power be exercised, it is the provisions of the Act as amended by the Bill which may be extended rather than those as at Royal Assent (subject to similar subsequent provision being made).

Justification for the procedure

464. It is considered that these provisions do not alter the nature of the power upon which each has effect sufficiently to warrant a revision of the Parliamentary procedure originally determined upon, albeit different for each, neither of which are considered to deliver an inappropriate level of scrutiny.

Clause 43: commencement and transitional provision

Power conferred on: the Treasury or, in respect of clause 31 (application of money laundering regulations to overseas trustees), the Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: none

Context and Purpose

465. This clause provides a power for provision which is not brought into force on the face of the Bill to be brought into force by regulations made by the Treasury or, in respect of clause 31 (application of money laundering regulations to overseas trustees), the Secretary of State.

Justification for taking the power

466. The precise timing for commencement of provisions is delegated to a Minister in order to deal with the vicissitudes of implementation.

467. In order to give effect to a smooth adoption of the new legislation, the power to make transitional, transitory or saving provision in connection with the coming into force of a provision of the Bill has been included.

Justification for the procedure

468. As is common with commencement regulations bringing into force an enactment and making no substantive provision, it is considered that in respect of these regulations no Parliamentary procedure is indicated.

Her Majesty's Treasury

21st October 2020