



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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**Sixteenth Report  
of Session 2017–19**

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**Drawing special attention to:**

*Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018  
(S.I. 2018/135)*

*Ordered by the House of Lords  
to be printed 14 March 2018*

*Ordered by the House of Commons  
to be printed 14 March 2018*

## Joint Committee on Statutory Instruments

### Current membership

#### House of Lords

[Baroness Bloomfield of Hinton Waldrist](#) (*Conservative*)

[Lord Lexden](#) (*Conservative*)

[Baroness Meacher](#) (*Crossbench*)

[Lord Morris of Handsworth](#) (*Labour*)

[Lord Rowe-Beedoe](#) (*Crossbench*)

[Lord Rowlands](#) (*Labour*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

#### House of Commons

[Derek Twigg MP](#) (*Labour, Halton*) (Chair)

[Dan Carden MP](#) (*Labour, Liverpool, Walton*)

[Vicky Foxcroft MP](#) (*Labour, Lewisham, Deptford*)

[Patrick Grady MP](#) (*Scottish National Party, Glasgow North*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Lee Rowley MP](#) (*Conservative, North East Derbyshire*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

### Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 73, available on the Internet via [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

### Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii that its parent legislation says that it cannot be challenged in the courts;
- iii that it appears to have retrospective effect without the express authority of the parent legislation;
- iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

- v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii that its form or meaning needs to be explained;
- viii that its drafting appears to be defective;
- ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

#### **Publications**

The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

#### **Committee staff**

The current staff of the Committee are Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

#### **Contacts**

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London, SW1A 0AA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: [jcsi@parliament.uk](mailto:jcsi@parliament.uk).



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# Instruments reported

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At its meeting on 14 March 2018 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to one of those considered. The Instrument and the ground for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

## 1 S.I. 2018/135: Reported for being made using the inappropriate parliamentary procedure

### *Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018*

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they have been made using the inappropriate parliamentary procedure.

1.2 These Regulations were made by the Treasury under section 2(2) of the European Communities Act 1972, and are subject to annulment by resolution of either House. An instrument under that power may be made using either that procedure or by means of a draft requiring approval by a resolution of each House. The Regulations contain a provision which could have been made under section 22(1A) of the Financial Services and Markets Act 2000, if amended in the same way as has been achieved by another provision of these Regulations; if the provision had been made using that power, it would have been subject to the affirmative resolution procedure.

1.3 In the Committee's opinion, where section 2(2) is used to do something which could have been done under another power, and that other power would have required affirmative resolution, as a general rule the section 2(2) instrument should also be made by affirmative resolution. It appears from the Explanatory Memorandum to these Regulations that the Treasury agrees with the Committee's view, but considered that the need to bring the Regulations into force without further delay outweighed the desirability of applying the affirmative resolution procedure. The Committee therefore asked the Treasury why the instrument had not been prepared sooner so as to allow sufficient time for the affirmative resolution procedure. In a memorandum printed as an Appendix, the Treasury states that, although drafting began in March 2017, it proved more complex and time-consuming than had been anticipated; and the issue of parliamentary procedure was not appreciated until January 2018.

1.4 The Committee understands how this situation has arisen on this occasion, but thinks it right to record that the result is a departure from an important principle of respecting the thresholds for affirmative resolution set by Parliament, and not appearing to use section 2(2) to avoid the need for affirmative scrutiny. **The Committee accordingly reports these Regulations for having been made using the inappropriate parliamentary procedure.**

## Instruments not reported

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At its meeting on 14 March 2017 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

## Annex

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### Draft instrument requiring affirmative approval

Draft S.I. Welsh Ministers (Transfer of Functions) (Railways) Order 2018

### Instruments subject to annulment

S.I. 2018/102	Waste Electrical and Electronic Equipment (Amendment) Regulations 2018
S.I. 2018/186	Public Service Pensions Act 2013 (Judicial Offices) (Amendment) Order 2018
S.I. 2018/194	Employment Rights (Increase of Limits) Order 2018
S.I. 2018/198	Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2018
S.I. 2018/199	Human Medicines (Amendment) Regulations 2018
S.I. 2018/201	National Health Service (Charges for Drugs and Appliances) (Amendment) Regulations 2018
S.I. 2018/204	Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018
S.I. 2018/205	Independent Educational Provision in England (Inspection Fees) and Independent School Standards (Amendment) Regulations 2018
S.I. 2018/209	Housing (Management Orders and Financial Penalties) (Amounts Recovered) (England) Regulations 2018
S.I. 2018/213	Non-Domestic Rating (Designated Areas) Regulations 2018
S.I. 2018/218	Teachers' Pensions Schemes (Amendment) Regulations 2018
S.I. 2018/220	Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018
S.I. 2018/231	Blood Safety and Quality Regulations and the Care and Support (Business Failure) Regulations (Consequential Amendments) Order 2018
S.I. 2018/232	Licensing Act 2003 (Premises licences and club premises certificates) (Amendment) Regulations 2018
S.I. 2018/248	Compulsory Purchase (Inquiries Procedure) (Miscellaneous Amendments and Electronic Communications) Rules 2018
S.I. 2018/253	Compulsory Purchase of Land (Written Representations Procedure) (Ministers) (Miscellaneous Amendments and Electronic Communications) Regulations 2018

## **Draft Instruments subject to negative procedure**

- Draft S.I.** Forest of Dean (Electoral Changes) Order 2018
- Draft S.I.** Hertsmere (Electoral Changes) Order 2018
- Draft S.I.** Preston (Electoral Changes) Order 2018
- Draft S.I.** South Gloucestershire (Electoral Changes) Order 2018
- Draft S.I.** West Berkshire (Electoral Changes) Order 2018

# Appendix

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## S.I. 2018/135

### ***Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018***

1. The Committee has asked the Treasury for a memorandum on the following point:

*Paragraph 3.5 of the Explanatory Memorandum states that the factors favouring the use of the affirmative procedure were outweighed by the importance of introducing the new regime without delay. Explain why, if the instrument is needed to be brought into force urgently it was not prepared earlier so that there would have been ample time for a draft to be approved by both Houses.*

2. Drafting of the instrument began in March 2017. This proved to be more complex and time-consuming than had been expected; some of the complexities are described in paragraph 3 of the Explanatory Memorandum. It was clear from the outset that the instrument would have to be made under section 2(2) of the European Communities 1972 (“the 1972 Act”). But consideration was not given at the outset to the requirement for the affirmative resolution procedure when making a statutory instrument under section 22(1A)(b) of the Financial Services and Markets Act 2000 (“the 2000 Act”) to create a new regulated activity in relation to the setting of a financial benchmark under the 2000 Act. Although this section could not in the event be relied on as conferring the necessary powers, its existence made it preferable to use the affirmative resolution procedure under section 2(2) of the 1972 Act when creating a new framework for regulating financial benchmarks under the 2000 Act.

3. It was not realised that the use of the affirmative resolution procedure was preferable until the beginning of January 2018 when the draft instrument was going through the final internal legal checks prior to being made. By that point the time needed to schedule debates in both Houses would have significantly increased the delay and uncertainty for those who became subject to regulation under the EU Benchmarks Regulation 2016 from 1 January 2018. The ability of the Financial Conduct Authority as the relevant UK regulator to make relevant rules would also have been further delayed. Even using the negative resolution procedure the instrument was unfortunately not ready for making until 1 February due to the number of issues requiring to be addressed.

4. The Treasury very much regrets that it was unable to provide Parliament with the opportunity to debate the draft instrument. To prevent this situation from recurring, the Treasury is taking steps to ensure that full consideration is always given to the appropriate Parliamentary procedure at the outset of drafting statutory instruments and the timetable is set accordingly.

**HM Treasury**

**6 March 2018**