House of Lords
House of Commons

Joint Committee on Statutory Instruments

Twenty-sixth Report of Session 2017–19

Drawing special attention to:

Fire and Rescue Authorities (National Framework) (England) Order 2018 **(S.I. 2018/560)**

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) (Amendment) (England) Regulations 2018 **(S.I. 2018/591)**

Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018 **(S.I. 2018/599)**

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2018 **(Draft S.I.)**

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Joint Committee on Statutory Instruments

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Lord Lexden (*Conservative*)

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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.

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.

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, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

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Instruments reported

At its meeting on 20 June 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 four of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2018/560: Reported for failure to comply with proper legislative practice

Fire and Rescue Authorities (National Framework) (England) Order 2018

1.1 **The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice in one respect.**

1.2 This Order gives effect to the Fire and Rescue National Framework for England, which sets out the priorities and objectives for fire and rescue authorities in England. The Explanatory Note provides an electronic link to the document, but does not provide details of where hard copies may be obtained or inspected.

1.3 In a memorandum printed as an Appendix 1, the Home Office expresses its regret that an address where a hard copy of the Framework document is available was not provided, and thanks the Committee for drawing this oversight to its attention. It undertakes to take steps to remind its drafting lawyers of the importance the Committee attaches to the accessibility of relevant documents and particularly the availability of hard copies for those without access to the internet. (The Committee addressed this issue in the Special Report published on 12 June.) **The Committee accordingly reports this Order for failing to comply with proper legislative practice, acknowledged by the Department.**

2 S.I. 2018/591: Reported for defective drafting

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) (Amendment) (England) Regulations 2018

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

2.2 These Regulations extend the deadline for farmers and land managers to submit certain payment claims under the Rural Development Programme for England by amending regulation 5 of the Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014.

2.3 Regulation 1(2) states that they extend to England and Wales only but is silent on application. Regulation 1 of the 2014 Regulations makes provision about extent and application. The Common Agricultural Policy (Amendment) Regulations 2015 (S.I. 2015/1325) which also amends the 2014 Regulations are silent on both extent and

application. The Committee asked the Department for Environment, Food and Rural Affairs to explain the mismatch between these Regulations and the 2014 and 2015 Regulations in respect of application and extent.

2.4 In a memorandum printed at Appendix 2, the Department says—

> "The Department considered it necessary to include an extent provision because the enabling power (section 2(2) of the European Communities Act 1972) extends to the whole of the United Kingdom. In this instance the Department only wished to change the law of England and Wales, and accordingly (in line with paragraph 3.13.2 of Statutory Instrument Practice) considered it necessary to include provision confining the extent of the instrument to England and Wales.
>
> "As the regulation being amended only applies in England, the Department did not think it necessary to include an application provision in the 2018 Regulations, the territorial application of the amendment being governed by the 2014 Regulations (in line with paragraph 3.13.6 of Statutory Instrument Practice)."

2.5 The Committee does not accept that explanation, for three reasons:

- The explanation about extent would have applied equally to regulation 2(5) of the 2015 Regulations, which also amends regulation 5 of the 2014 Regulations (which appear to extend only to England and Wales – the Committee finds regulation 1 of the 2014 Regulations somewhat inscrutable, but on the basis that regulation 5 is omitted from the list of UK extending provisions in regulation 1(4) and that the other regulations are expressed by regulation 1(2) to apply in England only, the most likely intended result is that regulation 5 extends to England and Wales).
- The 2015 Regulations appear to rely on the presumption that amendments have the same extent and application as the provision amended, and that presumption would have applied equally to these Regulations.
- If the Department felt it necessary to make provision about extent, it would have been equally necessary to make provision about application. It would have been logical and acceptable to follow the 2015 Regulations in making provision about neither extent nor application, or to follow the 2014 Regulations in making provision about both; but it is not logical to make provision only about extent.

2.6 The Committee believes that the courts would be driven to conclude that both the 2015 and 2018 Regulations follow the 2014 Regulations both as to extent and as to application, so the inconsistency should not produce the wrong result as a matter of law; but it is confusing and unhelpful for readers, who are entitled to expect a consistent approach in a series of amending instruments. **Accordingly, the Committee reports regulation 1 for defective drafting.**

3 S.I. 2018/599: Reported for doubt as to whether they are *intra vires* and for defective drafting

Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018

3.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that there is a doubt as to whether they are *intra vires* in one respect and that they are defectively drafted in another respect.**

3.2 These Regulations provide for the making of loans to eligible students in connection with postgraduate doctoral degree courses beginning on or after 1 August 2018. Regulations 3(3)(d) and 5(5) provide that a person is not (or ceases to be) eligible for a postgraduate doctoral loan if, in the opinion of the Secretary of State, the person's conduct has shown them to be unfit to receive the loan. That appears to confer a discretion on the Secretary of State which amounts to a sub-delegation of a kind that requires express enabling power; the Committee therefore asked the Department for Education to identify the *vires* for these provisions.

3.3 In a memorandum printed at Appendix 3, the Department acknowledges that "including an 'unfitness' criterion necessarily requires a judgement to be made as to whether an applicant is unfit or not". The Department argues that this is "preferable to, for example, an exhaustive list in the Regulations of acts or omissions that preclude eligibility" because a list "might fail to anticipate cases in which it would be entirely appropriate to refuse access to student finance." The Department also asserts that because the enabling power allows the regulations to make provision "for determining" eligibility that allows the Secretary of State sub-delegating a discretionary function to the Secretary of State. The Committee is not convinced: the presumption against sub-delegation is a strong one, for obvious rule of law reasons, and does not appear to be rebutted clearly in this case merely by a reference to provision "for determining" eligibility. The Committee accepts that an exhaustive list of objective criteria would be difficult to produce (although it could of course be amended by regulation from time to time as necessary); but there is sufficient room to argue that the enabling power is expected to refer to objective criteria rather than what amounts to an open discretion for the Committee to wish to bring the doubt to the attention of the two Houses. (The Committee notes the Department's suggestions that the discretion is constrained by legal principle and by guidance, but if there is no power to confer the discretion in the first place, then attempting to narrow it again by issuing guidance, or by reference to principles of administrative law, does not make it lawful.) **Accordingly, the Committee reports regulations 3(3)(d) and 5(5) for doubt as to whether they are *intra vires*.**

3.4 Paragraph 2(c) of Schedule 2 requires applicants and eligible students to inform the Secretary of State if they are absent from the course. Absence can lead to payments being suspended (regulation 15). The Committee asked the Department to identify the intended minimum length of absence that triggers the requirement in paragraph 2(c) and to explain how effect is given to that intention.

3.5 In its memorandum, the Department—

- "acknowledges that a literal interpretation of this provision is capable of triggering the notification requirement in the event of any absence";
- argues that "from the overall context of the statutory scheme, the Department considers that it is clear that not every short absence would trigger the consequences set out in the Regulations";
- explains that it "has taken this approach to retain operational consistency with related aspects of other student finance secondary legislation made using the same powers and already in force";
- refers to departmental guidance and sectoral advice on what constitutes absence; and
- undertakes to "consider whether further drafting clarity can be achieved in relation to the expression of absence policy across higher education student finance statutory instruments".

3.6 The Committee believes that it would have been possible to include provision about the length and nature of absence that triggers suspension. As a matter of principle, legislation should not use expressions that go beyond the intended policy, and then attempt to narrow them through guidance or advice (in the absence of express enabling power to operate in that way). In this case, as a matter of law any significant absence will trigger suspension, which is clearly not the Department's intended policy: **The Committee accordingly reports paragraph 2(c) of Schedule 2 for defective drafting.**

4 Draft. S.I.: Reported for unusual use of the enabling powers

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2018

4.1 **The Committee draws the special attention of both Houses to this draft Order on the ground that it appears to make an unusual use of the enabling powers.**

4.2 Under the Financial Services and Markets Act 2000, a person is prohibited from carrying on a regulated activity unless they are authorised to do so or are exempt from that prohibition. A person who contravenes the prohibition is guilty of a criminal offence.

4.3 Authorisation to carry on a regulated activity is given by either the Prudential Regulation Authority or the Financial Conduct Authority, depending on the type of activity concerned.

4.4 A "regulated activity" means an activity carried on by way of business which relates to investments specified in an order made by the Treasury, namely the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544 – "the 2001 Order").

4.5 This draft Order amends the criteria by which alternative investment finance bonds ("AFIBs") qualify as a specified investment for the purposes of the 2001 Order.

4.6 Article 1 would bring the draft Order into force on the day after the day on which it is made. The Committee asked the Treasury to justify this provision in light of the Committee's First Report of Session 2014–15.[1]

4.7 In that report, the Committee expressed the view that, where an affirmative procedure instrument imposes new duties which are significantly more onerous than before, and requires those affected to adopt different patterns of behaviour, there should be a period between the making of the instrument and its commencement which gives those affected a reasonable chance to adapt to the changes required. The Committee considered that, as a starting assumption, the period should be at least 21 days, and that the Government should provide strong policy reasons to justify any shorter period.

4.8 In a memorandum printed at Appendix 4, the Treasury explains that the change made by the Order is needed to:

- give certainty to issuers of sukuk (Islamic finance bonds) on UK markets and to make UK markets more attractive to list sukuk;
- achieve consistency with the tax treatment afforded by section 34 of the Finance Act 2018 (which came into force on 1 April 2018) to sukuk offered for trading on multilateral trading facilities, as well as consistency with the treatment of conventional bonds;
- reassure issuers of and traders in sukuk that the instruments will be legally recognised and treated as such on UK markets.

4.9 The London Stock Exchange has warned the Treasury that the continued failure to amend the permitted arrangements for AFIBs in the 2001 Order is causing issuers of sukuk to look elsewhere, that it is damaging the competitiveness of UK markets, and that further delay is increasing the harm.

4.10 The Treasury does not deem it necessary to allow businesses additional time to process the changes as the regulatory framework is already in place for the most part. The Treasury also estimates that bringing the proposed amendments into force immediately would have little or no impact on firms. The Financial Conduct Authority say that there have been only 66 issues of sukuk on the London Stock Exchange so far and there is currently only one firm in the United Kingdom which has the relevant permissions to operate instruments within the current scope of the 2001 Order. Accordingly, the Treasury believes that the impact of immediate application of the proposed amendments will be minimal as there is only one firm which may be affected, and it is not certain to what extent that firm has actually undertaken this activity.

4.11 In summary, the Treasury considers a longer waiting period to be both unnecessary and potentially harmful to the markets, and does not foresee that businesses and regulators would need the additional time to prepare, as businesses have not generally yet taken up the activity.

1 In relation to the draft Openness of Local Government Bodies Regulations 2014. (HL Paper 4; HC 332-i)

4.12 The Committee is unpersuaded that the changes to the law made by the proposed Order are so urgent that they must have effect on the day after the day on which it is made. If the need for the amendments is really so pressing, the draft Order should have been laid before Parliament much sooner, with a commencement date of 1 April 2018 to coincide with the tax changes referred to in the Treasury's memorandum. The Committee is, moreover, sceptical that a delay of 21 days between the date of making the Order and its coming to force would harm the markets.

4.13 The effect of this instrument is to prohibit business activities in relation to specified types of AFIBs without authorisation. While it may be the case that only a few people will be immediately affected by the amended legislation, they will still need a reasonable time to familiarise themselves with it and to take steps to ensure compliance so as to avoid potential criminal liability.

4.14 In its First Report of Session 2014–15, the Committee observed that it is fundamentally objectionable, in the absence of compelling reasons, to bring laws of this nature into force immediately. The Committee regards the reasons advanced by the Treasury in this case to be insufficiently compelling to justify immediate commencement of the Order.

4.15 **The Committee therefore reports article 1 of the draft Order on the ground that it appears to make an unusual use of the powers conferred by the relevant provisions of the Financial Services and Markets Act 2000.**

Instruments not reported

At its meeting on 20 June 2018 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

Draft instruments requiring affirmative approval

Draft S.I.	Cambridgeshire and Peterborough Combined Authority (Business Rate Supplements Functions) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Association Agreement) (Central America) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Comprehensive and Enhanced Partnership Agreement) (Armenia) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Framework Agreement) (Australia) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Partnership Agreement on Relations and Cooperation) (New Zealand) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Political Dialogue and Cooperation Agreement) (Cuba) Order 2018
Draft S.I.	European Union (Definition of Treaties) (Strategic Partnership Agreement) (Canada) Order 2018
Draft S.I.	Liverpool City Region Combined Authority (Business Rate Supplements Functions) Order 2018
Draft S.I.	New Towns Act 1981 (Local Authority Oversight) Regulations 2018
Draft S.I.	Renewables Obligation (Amendment) Order 2018
Draft S.I.	Social Workers Regulations 2018
Draft S.I.	West of England Combined Authority (Business Rate Supplements Functions) Order 2018
Draft S.I.	Contracts for Difference (Miscellaneous Amendments) Regulations 2018
Draft S.I.	West Midlands Combined Authority (Business Rate Supplements Functions and Amendment) Order 2018
Draft S.I.	Companies (Miscellaneous Reporting) Regulations 2018

Instruments subject to annulment

S.I. 2018/598	Passenger Name Record Data and Miscellaneous Amendments Regulations 2018
S.I. 2018/620	British Nationality (The Gambia) Order 2018

S.I. 2018/622	European Communities (Designation) Order 2018
S.I. 2018/623	Air Navigation (Amendment) Order 2018
S.I. 2018/629	Network and Information Systems (Amendment) Regulations 2018
S.I. 2018/643	Sea Fishing (Miscellaneous Amendments) Regulations 2018
S.I. 2018/653	Civil Enforcement of Parking Contraventions (England) General (Amendment) Regulations 2018
S.I. 2018/654	Education (Designated Institutions) (England) Order 2018
S.I. 2018/655	Professional Standards Authority for Health and Social Care (Fees) (Social Work England) Regulations 2018
S.I. 2018/657	Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2018
S.I. 2018/658	Tenements (Scotland) Act 2004 (Gas Services) Order 2018
S.I. 2018/664	Animal Health (Miscellaneous Fees) (England) Regulations 2018
S.I. 2018/666	Animal By-Products and Pet Passport Fees (England) Regulations 2018
S.I. 2018/676	State Pension Credit (Additional Amount for Child or Qualifying Young Person) (Amendment) Regulations 2018
S.I. 2018/682	Investigatory Powers (Consequential Amendments etc.) Regulations 2018

Draft Instruments subject to negative procedure

Draft S.I.	Cheshire West and Chester (Electoral Changes) Order 2018
Draft S.I.	Torbay (Electoral Changes) Order 2018

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/624	Digital Economy Act 2017 (Commencement No. 5) Regulations 2018
S.I. 2018/625	Data Protection Act 2018 (Commencement No. 1 and Transitional and Saving Provisions) Regulations 2018
S.I. 2018/652	Investigatory Powers Act 2016 (Commencement No. 5 and Transitional and Saving Provisions) Regulations 2018

Appendix 1

S.I. 2018/560

Fire and Rescue Authorities (National Framework) (England) Order 2018

1. By a letter dated 23 May 2018, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

> *Explain why an address where a hard copy of the Framework document is available is not given in this instrument.*

2. This Order gives effect to the Fire and Rescue National Framework for England, which sets out the priorities and objectives for fire and rescue authorities in England. The document was agreed following a public consultation. The Explanatory Note provides an electronic link to the document, but does not provide details of where hard copies may be obtained.

3. The Department was of the view that this approach was consistent with the most recent version of Statutory Instrument Practice ("SIP"), and that the provision of the www.gov link ensures the Framework is publicly accessible. The direct link provided in the Explanatory Note to the current framework also ensures there can be no confusion as to which version of the Framework is in operation.

4. It is, however, accepted that regrettably an address where a hard copy of the Framework document is available was not provided. The Department thanks the Committee for drawing this oversight to its attention. In terms of reassurance for the future, the Department will take steps to remind its drafting lawyers of the importance the Committee attaches to the accessibility of relevant documents and particularly the availability of hard copies for those without access to the internet.

Home Office

25 May 2018

Appendix 2

S.I. 2018/591

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) (Amendment) (England) Regulations 2018

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

> *Explain why regulation 1 matches neither regulation 1 of S.I. 2014/3263 nor regulation 1 of S.I. 2015/1325 in respect of extent and application.*

2. S.I. 2018/591 amends regulation 5 of S.I. 2014/3263, a regulation which only applies in England.

3. The Department considered it necessary to include an extent provision because the enabling power (section 2(2) of the European Communities Act 1972) extends to the whole of the United Kingdom. In this instance the Department only wished to change the law of England and Wales, and accordingly (in line with paragraph 3.13.2 of Statutory Instrument Practice) considered it necessary to include provision confining the extent of the instrument to England and Wales.

4. As the regulation being amended only applies in England, the Department did not think it necessary to include an application provision in the 2018 Regulations, the territorial application of the amendment being governed by the 2014 Regulations (in line with paragraph 3.13.6 of Statutory Instrument Practice).

5. Regulation 1(2) of S.I. 2014/3263 provides the general rule that the Regulations apply in England only. However, this is subject to paragraphs (3) and (4). Paragraph (4) lists certain provisions as having United Kingdom extent. One of those provisions is regulation 3.

6. S.I. 2015/1325 amends regulation 3 as well as regulation 5 of S.I. 2014/3263. An extent provision was not included in this instance because the instrument had the same UK-wide extent as the enabling power. An application provision was not included on the basis that it would not be necessary as territorial application of the amendments would be governed by the 2014 regulations.

Department for Environment, Food and Rural Affairs

7 June 2018

Appendix 3

S.I. 2018/599

Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018

1. In its letter to the Department for Education of 6 June 2018, the Joint Committee requested a memorandum on the following points:

> *(1) Identify the vires for regulations 3(3)(d) and 5(5).*
>
> *(2) What is the intended minimum length of absence that triggers the requirement in paragraph 2(c) of Schedule 2 and how is effect given to that intention?*

2. This memorandum has been prepared by the Department for Education. The Department is grateful to the Committee for the opportunity to provide an explanation on these points, recognises that some of this information could have been provided in the explanatory memorandum, and apologises for not taking the opportunity to do so.

The *vires* for regulations 3(3)(d) and 5(5)

3. Regulations 3(3)(d) and 5(5) of the Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018 (S.I. 2018/599) ("the Doctoral Regulations") provide, respectively, that a person is not – and ceases to be - an eligible student if, due to that person's conduct, the Secretary of State considers that person unfit to receive a postgraduate doctoral degree loan.

4. The *vires* for these Regulations is provided by section 22(1) and (2)(a) of the Teaching and Higher Education Act 1998 (THEA). Section 22(1) of THEA provides that regulations shall make provision authorising the Secretary of State to make loans to "eligible students". Under section 22(2)(a) of THEA regulations made under that section may - in particular - make provision "**for determining** whether a person is an eligible student in relation to any…loan…" (emphasis added).

5. The Department considers that these powers enable the regulations to provide for the criteria and the mechanisms by which eligibility is to be determined, including a provision whereby the Secretary of State is afforded a discretion to refuse financial support where a person's conduct would justify refusal of such support. It is also the Department's view that, as well as being permitted by the enabling power, it is fully consistent with the purpose of the statutory scheme – to impose appropriate controls regarding the provision of public money in the form of student finance - to include in the Regulations a criterion that enables those who might misuse public money to be barred from access to student loans.

6. The Department acknowledges that pursuing this aim by including an "unfitness" criterion necessarily requires a judgement to be made as to whether an applicant is unfit or not. Notwithstanding that the unfitness criterion is permitted by section 22 THEA, the Department's view is that a general "fitness" criterion is preferable to, for example, an exhaustive list in the Regulations of acts or omissions that preclude eligibility. Such a list might fail to anticipate cases in which it would be entirely appropriate to refuse access to student finance.

7. Given that the Secretary of State is statutorily responsible for the provision and administration of student finance, it is appropriate that the Secretary of State (and the Student Loans Company ("SLC") which acts on the Secretary of State's behalf) is made responsible for making the necessary judgement. However, by including this criterion, the Regulations do not create an unfettered discretion for the Secretary of State to determine eligibility. Crucially the determination in question is restricted to an assessment of the fitness of an applicant for student finance and is constrained by public law stipulations as to good decision-making when doing so.

8. Assessing Eligibility Guidance[2] for practitioners (published on SLC's website) provides guidance on when a student may, in practice, be considered unfit to receive financial support under the existing student support regime under the Education (Student Support) Regulations 2011 (S.I. 2011/1986) ("the Student Support Regulations") or the Education (Postgraduate Master's Degree Loans) Regulations 2016 (S.I. 2016/606) ("the Masters Regulations").[3] Such circumstances include fraudulent activity. The Department intends equivalent guidance to be issued by the SLC in respect of postgraduate doctoral degree loans before the start of the academic year commencing on 1 August 2018. Finally, an important further safeguard is provided whereby students can appeal against decisions pertaining to their eligibility to the SLC. Following such an appeal, they may appeal to the Independent Assessors who carry out impartial assessments in line with Terms of Reference agreed by the Department for Education. Ultimately, such a decision could be judicially reviewed.

The minimum length of absence

9. Paragraph 2(c) of Schedule 2 to the Doctoral Regulations provides that eligible applicants and students must inform the Secretary of State and provide particulars if they are absent from their course. A corresponding requirement is placed on higher education providers in regulation 13(6)(b). Where appropriate, absence can lead to payments being suspended (see regulation 15).

2 See sections 1.3 and 1.3.3 of the undergraduate guidance at https://www.practitioners.slc.co.uk/media/1511/sfe-17–18-assessing-eligibility-guidance-chapterpdf.pdf. Page 7 of the practitioner's guidance on Postgraduate Masters Loans provides that undergraduate guidance on when a student is unfit for a loan applies to masters loans also. The Postgraduate Master's Loan guidance is available at: https://www.practitioners.slc.co.uk/media/1593/2017–18-pgl-masters-guidance-17–18-v20-finalpdf.pdf

3 The Committee may wish to note that regulations 4(3)(f), 6(5), 137(3)(d), 140(7), 159(4)(d) and 162(7) of the Education (Student Support) Regulations 2011 (S.I. 2011/1986) prevent a student from being eligible for financial support where that student is deemed 'unfit'. Corresponding provisions are made in regulation 3(3)(d) and 5(5) of the Education (Postgraduate Master's Degree Loans) Regulations 2016 (S.I. 2016/606).

10. The Department acknowledges that a literal interpretation of this provision is capable of triggering the notification requirement in the event of any absence. However, from the overall context of the statutory scheme, the Department considers that it is clear that not every short absence would trigger the consequences set out in the Regulations. The Department has taken this approach to retain operational consistency with related aspects of other student finance secondary legislation made using the same powers and already in force.[4] Guidance on the process and what constitutes absence for the purposes of the Student Support Regulations and the Masters Regulations is provided to higher education providers through the SLC's Practitioners' Guidance website.[5] And higher education providers and the SLC both provide advice directly to students on this matter. In essence, where a student expects to be absent for a period of time, they should discuss this with their higher education provider which is expected to provide a range of support and advice including from course tutors and welfare and financial advisers. Students and providers should agree a likely period of absence, and a notification should be made to the SLC (usually through the provider). Where a student is absent due to illness, the notification requirement is triggered after 60 days. Relevant factors when determining whether payments should be suspended include the reason for and the length of the absence, how the higher education provider treats absence, the prospect of the student returning to the course and whether suspending payments would cause financial hardship. The above approach has operated successfully in practice to date. The Department intends for the SLC to issue equivalent practitioners guidance for doctoral degree loans before the start of the academic year commencing on the 1st of August 2018 which will reflect guidance already issued in respect of other comparable regulations. In light of the points raised by the Committee, the Department will actively consider whether further drafting clarity can be achieved in relation to the expression of absence policy across higher education student finance statutory instruments. If, having done so, the Department concludes that greater clarity can be achieved there is, subject to Parliamentary time, likely to be an opportunity to make any necessary revisions by next spring at the latest in time for the next academic year.

11. We hope that the Committee finds this memorandum helpful and are, of course, happy to provide any further assistance that the Committee requires.

Department for Education

12 June 2018

4 The Committee may wish to note that regulations 13(5), 15 and paragraph (2)(c) of Schedule 2 to the Education (Postgraduate Master's Loans) Regulations 2016 (S.I. 2016/606) make corresponding provision as to absence. Similar provisions are found in regulations 109(17), 113 , 116(12) and paragraph (2)(d) of Schedule 3 to the Education (Student Support) Regulations 2011 (2011/1986).

5 Undergraduate Guidance: https://www.practitioners.slc.co.uk/media/1522/change-of-circumstances-guidance-chapter.pdf (see, in particular, pages 14 – 17). Masters Guidance: https://www.practitioners.slc.co.uk/media/1593/2017–18-pgl-masters-guidance-17–18-v20-finalpdf.pdf (see, in particular, pages 31–32).

Appendix 4

Draft. S.I.

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2018

This memorandum responds to the Committee's request for a memorandum on the point set out below:

> *Explain, in light of paragraph 5 of the Committee's First Report of Session 2014–15, the justification for the provision that would bring the Order into force on the day after the day on which it is made.*

1. There are several reasons underlying the decision to give immediate effect which in the Treasury's view justify not following the approach of bringing this draft affirmative Order into force at least 21 days after it is made in conformity with the approach in paragraph 5 of the JCSI's First Report of the 2014–15 session. This approach is not of course the subject of a convention analogous to that applying to primary legislation and statutory instruments subject to the negative procedure.

Article 2 - Amendment is urgently required

2. HM Treasury is making this amendment to give certainty to issuers of sukuk (Islamic finance bonds) on UK markets and to make UK markets more attractive to list sukuk, and HM Treasury considers this change to be urgently required.

3. To the same end, provision has been made in section 34 of the Finance Act 2018 (c.3) to improve the tax treatment of sukuk offered for trading on multilateral trading facilities. However, without the corresponding amendments it is not clear that sukuk traded in this way will fall within the definition of alternative finance investment bonds ("AFIBs") under the Financial Services and Markets Act 2000 (c.8) ("FSMA"). The Finance Act 2018 provisions came into force on 1 April 2018 and the intent is to close the gap as quickly as possible in the interests of certainty, clarity and consistency.

4. Certainty is therefore a priority to ensure that sukuk are given equivalent treatment to conventional bonds (which is a policy aim) and to reassure issuers of and traders in sukuk that the instruments will be legally recognised and treated as such on UK markets.

5. The London Stock Exchange has warned HM Treasury that the continued failure to include these types of trading venues in the permitted arrangements for AFIBs in article 77A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) ("RAO") is causing issuers to look elsewhere and damaging the competitiveness of UK markets, and further delay is increasing the harm.

Article 2 - No additional time is required to prepare and little or no impact on business

6. Further, it was not deemed necessary to allow businesses additional time to process the changes as the regulatory framework is already in place for the most part, and there is estimated to be little or no impact on firms of bringing the proposed amendments into force immediately.

7. Articles 25D(2)(a) and 25DA(2)(a) of the RAO already contain a reference to AFIBs in the context of the activities of operating a multilateral trading facility ("MTF") and an organised trading facility ("OTF"). However, at the present time, the only instruments that could fall within articles 25D(2)(a) and 25DA(2)(a) are ones that have already been admitted to an official list or to trading on another type of venue. HM Treasury's amendment will result in consistent treatment which will be to the advantage of business without any detrimental implications.

8. HM Treasury has sought advice from the FCA as to which firms, if any, might be affected by the proposed amendments and the impact this would have. The FCA has confirmed that there have been 66 issues of sukuk on the London Stock Exchange so far, but there is currently only one firm in the United Kingdom which has Part 4A permission to operate a MTF or OTF with instruments in the current scope of article 77A of the RAO – so from this HM Treasury believes that the impact of immediate application of the proposed amendments will be minimal as there is only one firm which may be affected, and it is not certain to what extent it has actually undertaken this activity (prior to it becoming a regulated activity under this instrument).

9. In the circumstances, given that industry is eagerly welcoming the changes and the regulator foresees minimal impact (if any) of the proposed amendments entering into force immediately, a longer waiting period which would extend the period of differing treatment was felt to be both unnecessary and potentially harmful to the markets. It was not foreseen that businesses and regulators would need the additional time to prepare, as businesses have not generally taken up the activity yet, the corresponding regulatory provisions are already present in the RAO and Part 4A permission under FSMA for this activity is already available on application to the regulator. On that basis, HM Treasury considers that it has compelling reasons to take this approach and that it is fully appropriate to the situation.

Article 3 - No additional time is required to prepare and little or no impact on business

10. In this provision, the activity concerned (administering a benchmark as specified in article 63S of the Regulated Activities Order inserted by S.I. 2018/135) has been potentially subject to regulation under section 22(1A) FSMA since the relevant provision (regulation 51 of S.I. 2018/135) came into force on 27 February 2018. The effect of article 3 is that all persons who carry on the activity of administering a benchmark as provided in the RAO as amended are regarded as carrying on the activity by way of business. Hence they fall within section 22(1A) of FSMA as carrying on a regulated activity of a specified kind which is carried on by way of business and relates to administering a benchmark. Article 3 is therefore part of the regulatory framework introduced by S.I. 2018/135 rather than a standalone provision. No person is prejudiced by its inclusion and this enables the FCA to regulate new benchmark administrators comprehensively.

11. Again, it is considered that there are good reasons for not following the approach in paragraph 5 of the JCSI's First Report of the 2014–15 session.

HM Treasury

12 June 2018