

"No deal" Brexit: UK Government publishes details on draft regulations amending FSMA

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On 22 November 2018, HM Treasury published [Explanatory Information](#) on the draft Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (the Draft FSMA Regulations).

The Draft FSMA Regulations will make amendments to the Financial Services and Markets Act 2000 (**FSMA**) and related legislation to ensure that the UK's financial services framework continues to operate effectively in a "no deal" scenario. The statutory instrument that will implement the regulations is still in development, but HM Treasury has confirmed that it intends to lay it before Parliament ahead of Brexit, although the changes would not take effect on 29 March 2019 (**exit day**) if there is an implementation period as part of the deal.

The key deficiencies that HM Treasury has identified, and its proposed approach to remedying these deficiencies, are summarised below.

Deficiencies identified and proposed approach

Regulated and prohibited activities

Many of the definitions for regulated activities and entities used in FSMA, the Regulated Activities Order (SI 2001/544) and the Financial Promotion Order (SI 2005/1529) are dependent on provisions in EU legislation or use definitions based on an activity being carried out within the EU single market for financial services. The Draft FSMA Regulations will fix these definitions to reflect the UK's position as a standalone regulatory regime outside of that single market, for example by limiting the territorial scope of definitions to the UK, by bringing a definition from EU law into UK law, or by referring to relevant UK legislation.

Some of these definitions will be subject to transitional provisions, in particular those relevant to passporting. The Draft FSMA Regulations will work in conjunction with the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations, which came into law on 6 November 2018 and will permit EEA firms to obtain temporary permission to continue their regulated activities in the UK (see our separate blog post [here](#)).

Performance of regulated activities

Sections 59(8) and 63E(7) of FSMA currently exempt EEA firms from elements of the Approved Persons Regime and the Senior Managers & Certification Regime, where the responsibility for those elements falls to the EEA home state regulator.

The Draft FSMA Regulations will remove these exemptions, with the result that EEA firms will become subject to the same framework as non-EEA firms.

Part VII business transfers

Part VII of FSMA provides for the court-sanctioned transfer of insurance or banking business from one firm to another. In the context of insurance business, Part VII gives effect to the EU framework for portfolio transfers, which is set out in the Solvency II Directive and requires, inter alia, co-operation between EU supervisory authorities.

HM Treasury indicate that, once the UK leaves the EU, this framework for insurance business transfers, based on the mutual recognition of transfers implemented in accordance with procedures of the home EEA state, will no longer operate effectively. HM Treasury state that the Draft FSMA Regulations will therefore:

- revoke those FSMA provisions "facilitating transfers of insurance business from the EEA to the UK or from the UK to another EEA state"; and
- provide for EEA branches authorised in the UK to be treated in the same way that third party branches are treated now.

This implies that Part VII transfer schemes will be limited to transfers of business carried on in the United Kingdom by UK firms or the authorised branches of non-UK firms (including EEA firms) to other UK firms or authorised non-UK branches.

To avoid disruption for firms in the process of carrying out Part VII schemes (including Brexit-related schemes), HM Treasury indicate that the Draft FSMA Regulations will also introduce a saving provision for ongoing schemes. This will allow parties who have already initiated a transfer up to two years from exit day to obtain court sanction, although HM Treasury recognise that the effectiveness of that transfer may (in the absence of an agreed Brexit transition arrangement) be dependent on EEA states formally recognising business transfers involving UK firms or policies.

HM Treasury indicate that, to qualify for this saving provision, a regulatory transaction fee must have been paid to the PRA and the independent expert required under section 109 FSMA must

have been "appointed" by exit day (which will presumably mean that their appointment must have been approved by the appropriate regulator for the purposes of section 109(2) by that date).

Control over authorised persons

Part 12 of FSMA sets out requirements in relation to acquisitions or changes of control over certain categories of firm, such as insurance undertakings, including the requirement for any person who decides to acquire a controlling interest in a firm to notify the PRA or FCA (as appropriate) before making an acquisition.

The Draft FSMA Regulations will not change the basic requirements under Part 12 of FSMA, including the control thresholds and bands. However, they will make amendments to the procedures to be followed that will reflect the UK's position outside the EU supervisory framework. This will include removing the current requirement (under section 188 of FSMA) for the appropriate UK regulator to consult "any appropriate home state regulator" before it issues a decision in respect of a change of control application (a section 178 notice).

Supervision and enforcement by the FCA and the PRA

The Draft FSMA Regulations will include provisions that will ensure that the domestic versions of EU financial services regulation that has been designated as directly applicable (using the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013 (SI 2013/419)) – or any replacement domestic legislation in the future – can be enforced under FSMA.

FSMA also currently includes binding requirements on the UK regulators to inform EU and member state authorities in certain situations, including when they are considering or undertaking enforcement action of a UK regulated firm located in another member state. The Draft FSMA Regulations will remove this binding obligation, although HM Treasury notes that the UK regulators will still have a statutory ability to co-operate with EU authorities on a discretionary basis, and that it expects such co-operation to continue.

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