EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (MARKET OVERSIGHT INFORMATION) REGULATIONS 2014

2014 No. 2822

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Care Act 2014 (the Care Act) introduces a new oversight regime of the financial sustainability of certain providers of social care who are registered with the Care Quality Commission (CQC) (care providers). This instrument makes provision for the CQC to obtain information from persons other than care providers to assist it in making the assessments of financial sustainability.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 55 of the Care Act requires the CQC to assess the financial sustainability of those care providers who are subject to the market oversight regime. Regulations made under section 53(1) of the Care Act (the draft *Care and Support (Market Oversight Criteria) Regulations 2014* which are subject to the affirmative resolution procedure) will set out the entry criteria for the regime and the CQC must determine, under section 54(1) of the Care Act, which care providers meet one or more of those criteria and so are within the market oversight regime. Regulations made under section 53(5) may specify particular care providers or care providers of a specified description to be made subject to the regime, irrespective of whether they would meet the entry criteria for the regime.

4.2 The CQC must obtain financial information in order to assess the financial sustainability of a care provider subject to the regime. Section 64 of the Health and Social Care Act 2008 (the 2008 Act) enables the CQC to require information from care providers which the CQC considers it necessary or expedient to have for the purposes of any of its regulatory functions. Section 57(1) of the Care Act provides that the duty to assess financial sustainability is to be treated as a "regulatory function" of the CQC for the purposes of Part 1 of the 2008 Act. Therefore, this power can be used by the CQC to obtain information from care providers for the purpose of it assessing their financial sustainability.

4.3 This instrument, made under section 55(5) of the Care Act, enables the CQC to obtain information from persons other than the care provider to assist it in making a financial sustainability assessment.

4.4 This market oversight regime is new, confers new powers and duties on the CQC, and does not replace any existing central regime.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 There is a diverse market for care and support services in England. Public, private and voluntary sector organisations can all provide these services. As in any market, some providers leave whilst new providers join it. Providers may leave the market for a number of reasons. Examples include a provider selling on its property for residential use or a provider's business being taken over by a competitor. Most exits from the market are handled responsibly by providers who ensure that those receiving care services continue to do so in line with contractual liabilities. This process is normally managed in an orderly way that does not cause interruption of services for the people receiving care.

7.2 Occasionally however, care providers do exit the market in a way that adversely impacts on their ability to manage the closure of the service in a planned way, and ensure that people receiving care and support services continue to do so in line with contracts.

7.3 Prior to the Care Act, when a care provider became unable to meet needs because of business failure, local authorities had functions which would generally extend to meeting the needs of those individuals whose needs the provider was meeting before failing. Local authorities have done this effectively for the financial failure of smaller scale providers operating at a local level. The Care Act therefore clarifies the position by setting out clear legal duties ("temporary duties") on local authorities in England in order to ensure that people are not left without the care they need if their care provider becomes unable to carry on providing care because of business failure.

7.4 Today, there are a number of medium and large providers of care, operating across large parts of England, on a significant scale. The impact of such a provider failing may affect many parts of the country and cause individual local authorities considerable difficulty in discharging functions under the Care Act without early warning that such a failure was likely to occur.

7.5 One such example was when, in 2011, Southern Cross, the largest provider of residential care services, got into financial difficulties. The local authorities affected had little or no consistent prior warning of the company's financial position and the growing possibility that care services could be interrupted as a result. This caused significant distress among the residents of Southern Cross's homes, worried in case their care service was interrupted. Although ultimately only a handful of people had to change their accommodation, the Government recognised that it was unacceptable for people's care to be interrupted, or for the threat that this might happen to cause unnecessary anxiety to them, their families and their carers.

7.6 The Government published the White Paper 'Caring for our future: *Reforming care and support'* which in large part prefigured the Care Act, where it set out a clear set of underpinning principles for the future of market oversight in adult social care. Building on these principles, Government carried out a separate public consultation ('Oversight in Adult Social Care') into a more detailed set of proposals for market oversight and provider failure. Proposals included a light touch framework for assessing the financial sustainability of those providers local authorities would find 'difficult to replace' should they financially fail. The vast majority of consultation responses were generally supportive of the broad shape of the proposals and wider principles set out in the *Caring for our Future* White Paper.

7.7 The Care Act therefore provides for the establishment of a market oversight regime, whereby the CQC will assess the financial sustainability of any registered care provider who is subject to the regime (either by means of meeting the entry criteria set out in regulations or otherwise by being specified as subject to the regime in regulations). The intention is that the most difficult to replace providers because of their size, geographic concentration, or other factors will be subject to the regime. The CQC will look at the finances of these providers, including issues like profitability and debt level, to assess their overall financial health.

7.8 For this purpose, the CQC may need information not just from the care provider itself but from other organisations in the care provider's group which could impact the financial health of the provider. For instance, the provider may be financially dependent on a holding company, or may be particularly exposed to the financial failure of a sister company. The care provider may be unable to provide the required information.

7.9 Therefore, these regulations enable the CQC to require a provider who is subject to the regime to obtain an information undertaking (which will be a legally enforceable undertaking to provide the CQC with information the CQC requests) from certain organisations in the provider's group, if it would assist the CQC to assess the financial sustainability of that provider. The organisations in question consist of "group undertakings" (as defined by section 1161(5) of the Companies Act 2006) of the provider. Such organisations, because they are within the provider's group, have the potential to impact on the financial health of the care provider.

7.10 Where the CQC has identified that there is a significant risk to the financial sustainability of a provider's business, it will take action to ensure a provider in its regime is taking steps to return to financial health. Where that is not possible and CQC is satisfied that a provider is likely to become unable to carry on providing the care for which it is registered with the CQC because of business failure, it must inform local authorities who may have to carry out temporary duties to meet people's needs, and the CQC may also request information from that provider which it believes will assist local authorities in ensuring continuity of care. The CQC must share with those local authorities carrying out the temporary duties any information that it believes will help the relevant local authorities to carry out those duties. The aim of this new regime is not to prop up failing providers, but to provide reassurance for people affected by the care business failing that their care services will not be interrupted.

7.11 The relevant sections in the Care Act were uncontentious with both stakeholders and Parliamentarians during the passage of the Care Bill through Parliament, echoing the broad agreement found in earlier consultation and engagement.

7.12 The instrument was drafted in consultation with the relevant policy leads at the Department of Business, Innovation and Skills and subject to scrutiny from a group of external stakeholders made up of representatives from the care provider sector, provider umbrella groups, representatives of care users and local authorities to ensure CQC are able to obtain financial information from organisations in a care provider's group in order to fully assess the financial sustainability of that provider.

8. Consultation outcome

8.1 The consultation on the package of regulations relating to Part One of the Care Act was published on 5 June 2014, and ran for ten weeks to 15 August. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face-to-face meetings and events with the full spectrum of stakeholders, including: people receiving care and support and their carers; social workers and other frontline practitioners; local authority finance managers, commissioners and elected members; voluntary and private social care providers; national representative groups and other charities and trusts; and NHS agencies, housing departments, DWP Job Centre Plus and other key partners involved in the reforms. In total, the consultation drew over 4,000 responses from many different sources. Responses were carefully analysed and, where appropriate, changes were made to regulations.

8.2 There were no consultation responses that commented upon, or otherwise addressed, the provision being made in these Regulations.

8.3 The Government response to the consultation was published on 23 October and can be found here:

https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance

9. Guidance

9.1 Statutory guidance to support implementation of Part One of the Care Act was subject to public consultation as part of the consultation on regulations under that part. The guidance was published at https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation on 23 October. This guidance is not itself the subject of parliamentary scrutiny.

9.2 The guidance will contain a chapter outlining local authorities' roles and responsibilities when managing business failure (in respect of both providers who will not be subject to the market oversight regime and those who will be) and other service interruptions.

10. Impact

10.1 A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at http://www.legislation.gov.uk/ukpga/2014/23/resources.

10.2 Although we are unable to calculate the precise number of care providers who will be included in the market oversight regime until late 2015 (by which time the market oversight regime will have been operating for a number of months, and it is intended that any regulations specifying particular care providers to be made subject to the regime, irrespective of whether they would meet the entry criteria for the regime, will have come into force), latest projections based on existing data suggest some 50 - 60 private providers and third sector organisations will be subject to the regime at a total annual net cost of approximately £0.365 million spread across those organisations. This figure includes all costs to organisations in the regime, including costs associated with providing information to CQC.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The instrument enables CQC to require financial information from organisations in a provider's group in order to gain a full picture of the financial health of those providers included in the market oversight scheme. This will enable CQC to provide local authorities with early warning should it be satisfied that a provider in the market oversight scheme business is about to fail. This will enable local authorities to effectively manage the exit of a failed provider from the market, ensuring continuity of care is preserved therefore reducing anxiety amongst service users that their care services will not be interrupted.

12.2 The Government has committed to keeping the impact of the package of regulations under review. We will monitor the impacts of implementation of the policies contained within the Act and regulations under it on an ongoing basis. This will include continuing to work closely with local government to understand the impact of implementation of the reforms.

13. Contact

Stephen Airey at the Department of Health Tel: 0207 210 5717 or email: Stephen.airey@dh.gsi.go.uk can answer any queries regarding the instrument.