**EXPLANATORY MEMORANDUM TO**

**THE BUILDING SOCIETIES (FLOATING CHARGES AND OTHER PROVISIONS) ORDER 2016**

**2016 No. [XXXX]**

## 1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

## 2. Purpose of the instrument

2.1 To apply companies insolvency legislation on receivership to building societies with all necessary modifications. Most of the amendments are made in consequence of enabling the appointment of a receiver, but not an administrative receiver, of a building society's property which is subject to a floating charge.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instrument***

3.1 None.

***Other matters of interest to the House of Commons***

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

## 4. Legislative Context

4.1 This draft affirmative Order amends the Building Societies Act 1986 ("BSA 1986") and the Building Societies (Financial Assistance) Order 2010 (S.I. 2010/1188) ("the Financial Assistance Order") in consequence of the repeal of section 9B of BSA 1986 by paragraph 4 of Schedule 9 to the Financial Services (Banking Reform) Act 2013 ("the 2013 Act"). Section 9B restricted the creation of floating charges.

4.2 Paragraph 4 of Schedule 9 to the 2013 Act was commenced by the Financial Services (Banking Reform) Act 2013 (Commencement (No. 8) and Consequential Provisions) Order 2015 (S.I. 2015/428 (C. 25)) ("the Commencement Order"), which also applied legislation governing floating charges in Scotland (with modifications) in consequence of the repeal of section 9B. The Commencement Order came into force on 26 March 2015, and is slightly amended in consequence of this Order.

4.3 Section 145 of the 2013 Act empowers the Treasury to amend enactments in consequence of provision made by or under that Act. Section 143(2)(c) specifies the draft affirmative procedure for an order under section 145 which makes consequential amendments of primary legislation. The amendments enable holders of building society floating charges to appoint a receiver, but not an administrative receiver, under statutory provision for receivership which is applicable to insolvent companies.

4.4 In England and Wales and Scotland companies insolvency legislation on receivership is in Part 3 of the Insolvency Act 1986. In Northern Ireland it is in Part 4 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

4.5 The Financial Assistance Order already applies legislation about receivers in connection with public financial assistance to building societies. For that purpose a society could already give a floating charge (before the Commencement Order was made) and the Treasury or the Bank of England could appoint an administrative receiver.

4.6 The amendments are made in consequence of the general application by this Order of insolvency legislation on receivership, but also, under section 251 of the Banking Act 2009 (an order under that section is subject to draft affirmative procedure), for separate reasons connected with recent legislation on depositor preference.

4.7 The Order amends paragraph 23(2A) and (4A) of Schedule 8 to the Scotland Act 1998 in consequence of the renaming of the Financial Services Authority by the Financial Services Act 2012. The power exercised is section 118 of that Act, and an order under that section is subject to draft affirmative procedure if it amends primary legislation (section 116(1) and (2)).

## 5. Extent and Territorial Application

5.1 The instrument extends to all of the United Kingdom

5.2 The instrument applies to all of the United Kingdom

## 6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of the Building Societies (Floating Charges and Other Provisions) Order 2016 are compatible with the Convention rights"

## 7. Policy background

***What is being done and why***

7.1 This Order makes further provision in connection with the creation of floating charges by building societies, following the repeal of the statutory restriction in section 9B of the Building Societies Act 1986 by Commencement Order.

7.2 In July 2012 HM Treasury launched a consultation on the future of building societies, seeking views on how to maintain the distinctiveness of building societies while creating a level playing field and removing unnecessary barriers to growth. One of the proposals that came out of this was that building societies should be able to create floating charges over their assets (as well as fixed charges, which they are already able to create). A floating charge is a security interest over the non-fixed assets of a company, which enables the company to continue to use and dispose and exchange those assets in the course of its business. In the case of a building society, those assets include its mortgage book, whatever mortgages happen to be held at any time.

7.3 Removing the statutory restriction on floating charges was in line with the Government's commitment to allow mutual bodies to compete on a level playing-field with banks. It removed the risk that fixed charges could be re-categorised as

floating charges, which had the potential to cause legal uncertainty around the status of a charge. The impact assessment for that measure indicated that it would save building societies approximately £2m per year (with no additional costs).

7.4 This Order amends BSA 1986 to apply companies insolvency legislation on receivership with modifications. Most of the amendments are made in consequence of enabling the appointment of a receiver, but not an administrative receiver, of a building society's property which is subject to a floating charge. A receiver is commonly appointed to enforce the terms of a floating charge. The Order will ensure that there is uniform provision about receivers for banks, building societies and other companies. In particular, it will prohibit the appointment of an administrative receiver (a receiver over the whole or substantially the whole of a company's property). That prohibition was introduced for companies in 2002; a floating charge holder can appoint an administrator to act in the interests of all creditors.

7.5 The Order amends the Financial Assistance Order in consequence of the amendments of BSA 1986, but also to ensure that provision on reports by an administrative receiver, who can be appointed for a floating charge created to secure public assistance, is applied compatibly with the treatment of certain depositors as preferential creditors and of others as ordinary creditors of a building society.

***Consolidation***

7.6 The Treasury does not intend to consolidate the secondary legislation which is amended by this Order.

## 8. Consultation outcome

8.1 In July 2012 HM Treasury launched a consultation on the future of building societies, seeking views on how to maintain the distinctiveness of building societies while creating a level playing field and removing unnecessary barriers to growth. This Order is the second made to implement this policy (following the Commencement Order).

## 9. Guidance

9.1 HM Treasury do not plan to issue guidance.

## 10. Impact

10.1 The impact assessment for the removal of the restriction on creating floating charges indicated that the building society sector would be likely to save around £2m per annum. The impact assessment was approved by the Financial Secretary to the Treasury 16 December 2013.

10.2 This Order is unlikely to have significant impact beyond allowing a floating charge holder to appoint a receiver in the unlikely event that it becomes necessary to enforce the security. This is in the interests of legal certainty and for ensuring the effectiveness of floating charges.

10.3 The Impact Assessment prepared for the Commencement Order is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

## 11. Regulating small business

11.1 This SI may apply to activities that are undertaken by small businesses.

11.2 This SI affects building societies, which are unlikely to meet the definition of a small or medium sized enterprise, and lenders to a society who take security by way of a floating charge. It is not a regulatory measure (see below).

## 12. Monitoring & review

12.1 This instrument does not provide for the review of the amendments it makes.

12.2 In the Treasury's view the Order does not make regulatory provision in relation to a qualifying activity (building society borrowing) or amend any regulatory provision relating to that activity. Its effect is to extend the application of legislation on receivers to a new circumstance, namely the appointment of a receiver by a holder of a floating charge created by a building society. Part 3 is regulatory provision relating to the activity carried on by receivers, but the Order does not amend that regulatory provision.

12.3 Subject to this view, the Economic Secretary to the Treasury has made the following statement:

"In my view, it is not appropriate for policy reasons to make provision requiring a review of the provisions of the Building Societies (Floating Charges and Other Provisions) Order 2016."

12.4 The Order applies legislation on receivers as part of a programme of legislative change to allow building societies to create floating charges. It would not be appropriate to review the application of that legislation in relation to building society floating charges except as part of a wider review of the impact of allowing societies to create such charges. The Treasury has stated that is has no formal plans to review this wider legislation, but is likely to review it if there is a compelling case for doing so. Such a review would include a review of the effect of the Order.

12.5 Also, if it were appropriate to review the effect of the Order, it would be unhelpful in this case to provide for review in the Order itself, as it is just an amending instrument, and inappropriate to provide for review in the Financial Assistance Order, as that Order has the wider purpose of regulating public financial assistance of building societies.

## 13. Contact

13.1 Adam Patrick at HM Treasury Tel: 0207 270 5064 or email: Adam.Patrick@hmtreasury.gsi.gov.uk can answer any queries regarding this instrument.