EXPLANATORY MEMORANDUM TO

THE CHARGING ORDERS (ORDERS FOR SALE: FINANCIAL THRESHOLDS) REGULATIONS 2012

2012 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These regulations set a financial threshold for the enforcement of charging orders by way of an order for sale, in cases where the charging order was made to secure the payment of money owed under an agreement which is a regulated agreement under the Consumer Credit Act 1974. The threshold is set at £1,000 so that a charging order in such a case may not be enforced by way of an order for sale where the amount owing (including interest but not including any fees or charges of the application to enforce) is less than £1,000.

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

3.1 None.

4. Legislative Context

4.1 Section 3A of the Charging Order Act 1979 ("the 1979 Act") gives the Lord Chancellor (LC) powers by regulations to set financial thresholds for the making of charging orders and for the enforcement of such orders by an order for sale.

4.2 The powers are in section 3A(1) and (2) respectively of the 1979 Act, and these regulations are made in exercise of the power in section 3A(2), which enables the Lord Chancellor by regulations to provide that a charge imposed by a charging order may not be enforced by way of order for sale to recover money of an amount below that determined in accordance with the regulations, together with section 3A(3) which allows for the regulations to make different provision for different cases and to include transitional provision.

4.3 By virtue of section 3A(5), the first exercise of each of the regulation-making powers in section 3A must be by way of affirmative resolution procedure. These regulations are the first regulations to be made under the power in section 3A(2).

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales.

6. European Convention on Human Rights

6.1 Helen Grant MP has made the following statement regarding Human Rights:

"In my view the provisions of the Charging Orders (Orders for Sale: Financial Thresholds) Regulations 2012 are compatible with the Convention rights."

7. Policy background

- **What is being done and why**

7.1 In 2003, the Lord Chancellor's Department published the "Effective Enforcement White Paper", in which it set out its proposals for reform of enforcement law. The proposals included changes to the 1979 Act governing the enforcement of judgment debts by charging orders and orders for sale. One of the proposals was to allow creditors to obtain a charging order even though the debtor was repaying the debt by instalments. The other was to establish a provision for secondary legislation to introduce safeguards for debtors on both charging orders and orders for sale.

7.2 These proposals were carried forward into Part 4 of the Tribunals Courts and Enforcement Act 2007 (the 'TCEA 2007'). Specifically, section 93 of the TCEA 2007 amends the 1979 Act to enable charging orders to be made by the court even though the debtor is not in arrears of an order for payment of the debt by instalments. Subsection 3 prevents the court from making an order for sale of the property unless the debtor has defaulted in making any payment due under an instalment order.

7.3 As a further safeguard, section 94 of the TCEA 2007 inserted a new section 3A into the 1979 Act to provide a power for the Lord Chancellor to specify in regulations financial thresholds below which a court cannot make a charging order and/or an order for sale. This provision was deemed necessary in order to ensure that charging orders are not used to secure payment of disproportionately small judgment debts. At the time of passing of the TCEA 2007 the Department had yet to finalise at what levels these thresholds should be set at, and as a result the provisions were not commenced at that time.

7.4 In 2010 the Ministry of Justice issued its consultation *'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system'* which set out, and sought views on proposals to reform the civil justice system in the courts in England and Wales,

significantly contributing to the Governments plans to tackle the perceived compensation culture, restore proportionality in costs for court users, and promote quicker, cheaper alternative dispute resolution where appropriate.

7.5 The consultation also sought views on the introduction of a threshold on orders for sale applications in relation to Consumer Credit Act 1974 (CCA) debts only, and the level at which such a threshold should be set. This was in line with the Coalition commitment to introduce 'more protection against aggressive bailiffs and unreasonable charging orders, to ensure that courts have the power to insist that repossession is always the last resort, and to ban orders for sale on unsecured debts of less than £25,000'. A range of options between £0-25,000 for a threshold were consulted upon. The intended effect was to introduce a minimum threshold on applications for orders for sale in relation to CCA debts, so limiting creditors using this as a method of securing payment of unsecured commercial debt which fall below the threshold amount. The consultation was aimed at the public, at business, creditors, and all those with an interest in the civil justice system in England and Wales and took place between 29 March and 30 June 2011.

- **Consolidation**

7.6 None: these are the first regulations to be made under the new power.

8. Consultation outcome

8.1 The consultation was aimed at the public, at business, creditors, and all those with an interest in the civil justice system in England and Wales and took place between 29 March and 30 June 2011. Copies of both the consultation paper and the Government responses are on the MoJ website at https://consult.justice.gov.uk/digital-communications/county_court_disputes Detail of the consultation responses is set out in the main consultation response report.

8.2 In summary the consultation responses slightly favoured the introduction of a threshold. Taken together, abstentions and support for a threshold of £1,000 exceeded those favouring a higher threshold. There were some strong arguments advanced as to why, if a threshold were to be introduced it should be a low one, such as the interaction with bankruptcy, the risk of increasing use of debt purchasing companies, risks around the cost and availability of unsecured lending, and the rights of creditors and small businesses to recover smaller business debts. In light of the responses the Ministry's preferred option was to introduce a threshold at £1,000.

9. Guidance

9.1 A preview summarising the Regulation will be published alongside Civil Procedure changes on the Ministry of Justice website in January 2013 at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-

rules/civil/index.htm. The Ministry of Justice will also write to key stakeholders detailing the changes in January 2013.

9.2 The Regulations will be published by the Stationery Office and will be available on the Ministry of Justice website when they come into force in April 2013.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business, but is not anticipated to have any detrimental effect.

11.2 MoJ has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The Regulation does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

12.1 A Post-Implementation Review Plan is included on page 19 of the Impact Assessment. We are committed to review these Regulations in 2015, three years after the new provisions come into force.

13. Contact

Louise Blundell at the Ministry of Justice Tel: 020 3334 4120 or email: louise.blundell@justice.gsi.gov.uk , can answer any queries regarding the instrument.