EXPLANATORY MEMORANDUM TO

THE CONSUMER CREDIT ACT 1974 (GREEN DEAL) (AMENDMENT) ORDER 2014

2014 No. [XXXX]

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

2. Purpose of the instrument

This instrument relates to the Green Deal energy efficiency scheme. It makes some amendments to the Consumer Credit Act 1974 ("1974 Act") for the purposes of the Green Deal to clarify (i) the circumstances in which a green deal plan is treated as a consumer credit agreement, (ii) the persons who are to be treated as the "debtor" in respect of a green deal plan in relation to specified sections of the 1974 Act, and (iii) the persons who are to be treated as the "creditor" in respect of a green deal plan.

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

None.

4. Legislative Context

4.1 This instrument relates to the Green Deal energy efficiency scheme established by Chapter 1 of Part 1 of the Energy Act 2011 ("2011 Act"). It is being made in exercise of the power contained in section 30 of the 2011 Act.

4.2 The 2011 Act provides for a new type of arrangement for the installation of energy efficiency measures, called a "green deal plan". Under a green deal plan, energy efficiency measures are installed in a property and then paid for wholly or partly in instalments which are collected though electricity bills for the property.

4.3 This instrument is part of a suite of instruments relating to the Green Deal. The other instruments in this suite include the following.

(a) The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 (S.I. 2012/2079)[1]. These regulations, which were subject to the affirmative procedure, were made on 6 August 2012. Some provisions came into

[1] These regulations were amended by the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.)(Amendment) Regulations 2012 (S.I. 2012/3021), which were made on 4 December 2012 and came into force on 5 December 2012 and by the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.)(Amendment) Regulations 2013 (S.I. 2013/139), which were made on 27 January 2013 and came into force on 28 January 2013.

force on 7 August 2012 and some on 1 October 2012, with the remainder coming into force on 28 January 2013.

(b) The Green Deal (Energy Efficiency Improvements) Order 2012 (S.I. 2012/2106). This Order, which was subject to the affirmative procedure, was made on 6 August 2012 and came into force on 7 August 2012.

(c) The Green Deal (Qualifying Energy Improvements) Order 2012 (S.I. 2012/2105). This Order, which was subject to the affirmative procedure, was made on 6 August 2012 and came into force on 28 January 2013.

(d) The Green Deal (Disclosure) Regulations 2012 (S.I. 2012/1660), which were subject to the negative procedure, were made on 27 June 2012 and came into force on 28 January 2013.

(e) The Green Deal (Acknowledgment) Regulations 2012 (S.I. 2012/1661), which were subject to the negative procedure, were made on 27 June 2012 and came into force on 28 January 2013.

(f) The Green Deal (Acknowledgment) (Scotland) Regulations 2012 (S.S.I 2012/214), which were subject to the negative procedure in the Scottish Parliament, were made on 28 June 2012 and came into force on 28 January 2013.

(g) The Green Deal Code of Practice, which is subject to the Parliamentary procedure described in section 39 of the 2011 Act. Version 1 of the Code of Practice was laid before Parliament at the end of June 2012 and issued by the Secretary of State on 27 September 2012. Since then the Code of Practice has been updated. Version 3 of the Code of Practice was laid in Parliament on 19 June 2013 and came into force on 31 July 2013.

(h) The Consumer Credit (Green Deal) Regulations 2012 (S.I. 2012/2798), which were subject to the negative procedure, were made on 7 November 2012 and came into force on 28 January 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England, Scotland and Wales.

6. European Convention on Human Rights

6.1 The Secretary of State has made the following statement regarding Human Rights:

> In my view the provisions of the Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014 are compatible with the Convention rights.

7. Policy background

7.1 The 2011 Act made provision for the development of the Green Deal. The Green Deal introduces a framework to support the delivery of energy efficiency measures that

includes the option of entering into a new type of credit arrangement. This enables owners and occupiers to make energy efficiency improvements to their property and pay for them over time through instalments added to their electricity bill. The arrangement introduced by the Green Deal is termed a "green deal plan" which includes a unique type of unsecured credit for energy efficiency improvements arranged at the initiative of an owner or occupier of a property (known as the improver). Under a green deal plan, instalments are paid by the person who is the bill payer at the time the instalment is due. Accordingly, when the electricity bill payer for a property changes, the obligation to pay Green Deal instalments passes to the new bill payer. The organisations that offer green deal plans to customers and provide the finance package for the installation of the improvements are known as Green Deal Providers.

7.2 Many green deal plans, particularly those in the domestic sector, will be regulated consumer credit agreements under the 1974 Act. That Act gives debtors under such agreements certain rights and protections. The Act also regulates the manner in which credit agreements are entered into as well as the conduct of the creditor during the term of the agreement.

7.3 The 1974 Act defines a consumer credit agreement as an agreement between an "individual" (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount.

7.4 Due to the unique nature of the Green Deal, stakeholders sought clarification on which parties ought to be treated as the "debtor" in section 189 of the 1974 Act for the purposes of the Green Deal, particularly in relation to green deal plans in the rental sector, where the improver and electricity bill payer may be different.

7.5 In response to stakeholders concerns the Department of Energy and Climate Change are amending the definition of "debtor" in section 189 of the 1974 Act for the purposes of the Green Deal in exercise of the power conferred by section 30 of the 2011 Act. The Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014 provides for this amendment which will come into force on the day after the day on which it is made.

7.6 Article 3 of the draft Order amends section 8 of the 1974 Act to make clear section 8(1) of that Act does not apply in relation to an agreement that is a green deal plan, and instead section 189B should be referred to. Article 4 of the draft Order sets out that the exemption relating to businesses in section 16B(1A)(c) of the 1974 Act will only apply where the agreement is a green deal plan (within the meaning of section 1 of the 2011 Act) made in relation to a property that is not a domestic property. This will ensure that domestic green deal plans will be regulated by the 1974 Act, regardless of whether they are being entered into for business purposes (unless exempt by virtue of sections 16-16C of the 1974 Act). Article 5 of the draft Order makes consequential changes to the existing definitions of "creditor" and "debtor" in the 1974 Act following the insertion of a new section 189B into that Act.

7.7 Article 6 of the draft Order makes provision for the insertion of new sections 189B, 189C and 189D into the 1974 Act specifically for green deal plans.

7.8 Section 189B sets out:

a) the circumstances in which a green deal plan is to be treated as a consumer credit agreement;
b) the parties to be treated as the creditor in relation to a green deal consumer credit agreement;
c) the person(s) to be treated as the debtor in relation to a green deal consumer credit agreement for relevant sections of the 1974 Act.

7.9 Section 189C makes provision to supplement section 189B, in particular that a green deal consumer credit agreement is to be treated as a fixed-sum, restricted-use agreement that falls within section 11(1)(a) of the 1974 Act.

7.10 Section 189D makes a temporary provision which sets out how references to "debtor" are to be read for the purposes of specific sections of the 1974 Act. Section 189D will cease to have effect on 1 April 2014 when consumer credit regulatory responsibility passes from the Office of Fair Trading to the Financial Conduct Authority and the repeal of the listed sections takes effect.

7.11 Article 7 of the draft Order inserts a new schedule which sets out, for each relevant section of the 1974 Act, whether the term "debtor" is to be read as a reference to the improver, first bill payer, current bill payer or previous bill payer.

7.12 Article 8 of the draft Order makes consequential amendments to sections 21, 77, 77A, 77B, 86B and 95B of the 1974 Act.

8. Consultation outcome

Consultation – May 2013

8.1 On 9 May 2013 the Department of Energy and Climate Change (DECC) launched a consultation proposing to amend the definition of "debtor" in section 189 of the 1974 Act for the purpose of the Green Deal. This was in response to queries received from stakeholders who sought clarification on whether an improver landlord and tenant bill payer would both need to be classed as debtors under a single green deal plan in certain instances.

8.2 The aim of the consultation was to seek views on a draft amendment that would provide Green Deal Providers (as creditors) with confidence as to the identity of the "debtor" under a regulated green deal plan.

8.3 The draft amendment was written on the basis that it would apply specifically to:

i) a consumer credit agreement that is a green deal plan to which section 1(6)[2] of the 2011 Act applies;
ii) a consumer credit agreement that is a green deal plan to which section 1(6) of the 2011 Act does not apply; and
iii) a prospective consumer credit agreement which is intended to be a green deal plan.

8.4 With regards to a consumer credit agreement that is a green deal plan to which section 1(6) of 2011 Act applies, the May consultation proposed that "debtor" would mean:

a) the individual who is liable to pay instalments under the plan as a result of being liable for the time being to pay the energy bills for the property; and
b) any other individual with outstanding payment liabilities under the plan as a result of having been liable in a prior period to pay the energy bills for the property.

8.5 In relation to a consumer credit agreement that is a green deal plan to which section 1(6) of the 2011 Act does not apply, the consultation proposed that "debtor" would mean the individual who will be liable to pay the energy bills for the property from the time when section 1(6) of the 2011 Act applies to the plan (the "completion date").

8.6 In relation to a prospective consumer credit agreement which is intended to be a green deal plan, the "debtor" would be the individual who will be liable to pay the energy bills for the property from the completion date. This proposal therefore required Providers to look forward and work out who would be the bill payer on the completion date in the future when they are, for example, issuing pre-contract information, performing creditworthiness assessments and arranging for the plan to be signed. The consultation then set out a number of presumptions that Providers could use to determine who the bill payer on the completion date would be.

8.7 The consultation sought stakeholder's views on this proposed amendment to the 1974 Act. For full details, a copy of the May consultation can be found at the following link: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197645/Consultation_on_the_proposal_to_amend_the_definition_of_debtor_in_Section_189_of_the_Consumer_Credit_Act__1974__for_the_purposes_of_the_Green_Deal_-_9_May_2013.pdf

Government response – August 2013

8.8 Nineteen responses to the consultation were received overall. Most respondents indicated that they felt a clarifying amendment would be sensible and that such an amendment was necessary to ensure that Providers have greater clarity and confidence when issuing green deal plans.

8.9 However, some were concerned that provisions relating to prospective consumer credit agreements which required Providers to work out who "will be" liable to pay the

[2] A green deal plan is confirmed, after installation of the energy efficiency measures, when all the conditions in Section 1(4) and (5) of the 2011 Act have been met.

property's energy bills at a future point in time (as set out in paragraph 8.5 above) could create confusion and ambiguity and therefore might be difficult to apply in practice. Some respondents asked what would happen if the intended future bill payer did not actually become the bill payer and enquired whether the agreement could be deemed to be improperly executed in such an instance.

8.10 One respondent suggested that the owner of the property ought to be the debtor for the purposes of the 1974 Act, rather than a non-owner bill payer. They felt that such an approach may have a number of advantages from the perspective of the 1974 Act, but recognised that a more detailed consideration of this proposal would be necessary in order to confirm this and to identify any legislative amendments that would be required to implement such a proposal. Another respondent suggested that credit is granted initially to the improver.

8.11 On 6 August DECC published a response to the May consultation. A copy of the Government response can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226657/Government_response_-_FINAL.pdf

8.12 As part of DECC's response it was confirmed that the Department would proceed with the amendment to the definition of "debtor" in section 189 of the 1974 Act but that in the case of a prospective credit agreement, the amendment would clarify that the "debtor" will be the person who is the bill payer at the point at which the credit agreement is entered into (and who therefore signs the credit agreement). This would remove the requirement to look at a point in the future.

8.13 DECC also proposed to amend the 1974 Act to clarify that a green deal plan will be both:

a) restricted-use credit and
b) a debtor-creditor-supplier agreement,

irrespective of whether the improver and the debtor are the same person and hence whether the supply contract and credit agreement are "linked" in the usual sense under the 1974 Act.

Addendum to the Government response – January 2014

8.14 Since the Government response was published in August, DECC has received some further representations from stakeholders with regards to the proposed amendment. In particular, stakeholders raised concerns that:

i) it might be difficult for Providers to determine whether green deal plans ought to be regulated or not, particularly in the domestic rented sector;
ii) unregulated green deal plans might be issued on a domestic property to a corporate landlord that could then be passed onto consumer tenants;
iii) the improver should be entitled to certain rights and protections under the 1974 Act, particularly at the outset.

8.15 In response to this additional feedback DECC has refined its approach and is publishing an addendum to the Government response on the date this draft Order is laid in Parliament, explaining these refinements.

8.16 To address stakeholder concerns relating to the difficulty in determining the regulated status of the plan, and concerns that unregulated plans might be issued on a domestic property, the new section 189B(1) provides that:

- all domestic green deal plans will be regulated by the 1974 Act regardless of the identity of the improver or bill payer (unless exempt by virtue of sections 16-16C of the 1974 Act), and
- non-domestic green deal plans will be regulated only if the improver (i.e. the occupier or owner of the property who makes the arrangement for the plan) is an individual.

8.17 In light of feedback that the improver should be entitled to certain rights and protections under the 1974 Act, while the Government remains of the view that the bill payer should be treated as the debtor for the purpose of all material protections in the 1974 Act, the Government also considers that the improver should be treated as a debtor for the purposes of certain sections in the 1974 Act. This will ensure that these parties receive specific rights and protections that are relevant to their roles under a green deal plan.

9. Guidance

9.1 DECC plans to update its Green Deal Provider Guidance after the Order is made, to reflect these amendments. The existing version of the Green Deal Provider Guidance can be found at the following link:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65611/6975-green-deal-provider-guidance.pdf

10. Impact

10.1 The Green Deal is a voluntary scheme. This instrument and those referred to in section 4 above only apply to business, charities, voluntary bodies and others if they choose to participate in the Green Deal scheme.

10.2 A full regulatory impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sectors is foreseen. However, a full regulatory impact assessment of the effect that the overall Green Deal scheme will have on the costs of business and the voluntary sector is available from the Green Deal Legislation Team, Department of Energy and Climate Change at 3 Whitehall Place, SW1A 2AW and is published alongside the Green Deal Framework (Disclosure, Acknowledgment, redress etc.) Regulations 2012 (S.I. 2012/2079) on www.legislation.gov.uk.

11. Regulating small business

11.1 The Green Deal is a voluntary scheme and it does not therefore place mandatory regulation on small businesses. However, SMEs can play a vital role in the Green Deal market and the Green Deal has been designed to allow a variety of models to develop which may include for example SME participation:

- as part of the supply chain for a larger firm;
- as partners to Providers or, in some cases, as Providers in their own right.

11.2 Some small businesses may be covered by the 1974 Act if they do not enter into a green deal plan wholly for business purposes, in which case they will benefit from the rights and protections that are offered by the 1974 Act. However they will not be treated any differently to any other consumer.

12. Monitoring & review

12.1 This Order will come into force on the day after the day on which it is made.

12.2 The Secretary of State is not obliged to carry out a review of this instrument but in accordance with best practice the Secretary of State will carry out a review on the findings five years after the amendment comes into force.

13. Contact

13.1 Jenna Owen at the Department of Energy and Climate Change, tel: 0300 068 5285 or email: jenna.owen@decc.gsi.gov.uk, can answer queries regarding this instrument.