EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMERCE DIRECTIVE (FINANCIAL SERVICES AND MARKETS) (AMENDMENT) ORDER 2015

2015 No.

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The instrument confers powers on the Financial Conduct Authority ("FCA") to take action against consumer credit firms which establish themselves in another EEA state with a direct view to evading FCA regulation, through the E-Commerce Directive ("ECD"), but which direct all or most of their activity towards the UK.

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

3.1 None

4. Legislative Context

4.1 This Order amends the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 (S.I. 2002/1775). Article 2 of this Order makes provision about persons who carry out certain consumer credit related activities and direct all or most of their activity to the United Kingdom market, but do so from another country in the European Economic Area in order to avoid certain regulatory requirements. Where the Financial Conduct Authority is satisfied that this is the case it may impose new regulatory requirements upon that person (new regulations 11A and 11B). The Authority may also determine that the person requires authorisation under the Financial Services and Markets Act 2000 in order to carry on the activity (new regulation 11C).

4.2 Article 3 of this Order also makes a consequential amendment to the Financial Services and Markets 2000 (Regulated Activities) Order 2001 (S.I. 2001/554), which lists activities which are prohibited without authorisation from the relevant financial regulator (see s19 and 22 Financial Services and Markets Act 2000).

5. Territorial Extent and Application

5.1 The instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

7.1 The Government has fundamentally reformed regulation of the consumer credit market. Consumer credit regulation transferred from the Office of Fair Trading ("OFT") to the FCA on 1 April 2014. This new more robust, regulatory system will help to deliver the Government's vision for a well-functioning and sustainable consumer credit market which is able to meet consumers' needs.

7.2 The ECD allows firms based in the EEA to operate in the UK without being subject to FCA regulation; they are instead subject to the regulation of their home state, provided that they only operate online and have no physical presence in the UK. However, under the Directive a State retains the right to take measures against a firm that is established in another EEA State but directs all or most of his activity to the territory of the first Member State, if the firm chose its place of establishment with a view to evading that state's legislation.

7.3 In view of the introduction of the FCA's more robust regulatory regime, and in particular the cap on the cost of High Cost Short Term Credit (i.e. payday loans) which comes into force on 2 January 2015, it has been assessed that there is an increased risk of firms seeking to use the pretext of the ECD to relocate to another EEA country and avoid FCA regulation on their credit activities in the UK and continue to offer loans to UK customers online. This could undermine the UK regulatory regime, in particular the cap on the cost of payday loans, and pose significant risk of consumer detriment.

7.4 As a result, the Government has decided to give the FCA certain powers to address this risk. This instrument confers powers on the FCA to allow it to take action against credit firms, including payday lenders, which establish themselves in another EEA state with a view to evading FCA regulation but which direct all or most of their activity towards the UK.

7.5 These powers enable the FCA to require credit firms to comply with some or all FCA rules or to seek full authorisation to continue carrying out their activities. The FCA will need to go through its standard process of serving warning and decisions notices on a firm in order to require a firm to apply for full authorisation. The instrument also makes provision for the FCA to impose an interim ban on a firm's activities in the UK of up to three months, which will give it time to go through this process.

7.6 To complement this legislative instrument, the FCA has introduced rules preventing UK-based debt collectors from collecting debts arising under HCSTC agreements entered into by incoming lenders using the ECD whose charges exceed the

price cap. UK-based debt administrators will also not be able to enforce or exercise rights on behalf of a lender under such HCSTC agreements.

8. Consultation outcome

8.1 The Government consulted the FCA during the preparation of this instrument. This power was designed to support the implementation of the FCA's cap on the cost of payday loans. Having been required by Government to introduce this cap, the FCA followed its usual rule-making processes, including extensive consultation, in which the FCA made clear its intention to address the risk of 'gaming' by lenders.

9. Guidance

9.1 Further guidance will be made available by the FCA.

10. Impact

10.1 No impact on business or the voluntary sector is foreseen as the power is not directed at UK businesses undertaking credit activities, who will already be regulated by the FCA, but at firms who establish themselves in another EEA state. It will also not increase any regulation on any firm which was established in the UK and relocates overseas, as those firms would have been regulated in the UK prior to its relocation.

11. Regulating small business

11.1 No impact on small business or the voluntary sector is foreseen as the power is not directed at UK business undertaking credit activities, who will already be regulated by the FCA, but at firms who establish themselves in another EEA state.

12. Monitoring & review

12.1 HM Treasury in collaboration with the FCA will monitor the practical effects of the instrument to ensure the provisions continue to meet the policy aims.

13. Contact

13.1 George Langdon Davies at HM Treasury (tel: 0207 270 5193 or email: george.langdondavies@hmtreasury.gsi.gov.uk) can answer any queries regarding this instrument.