EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CARRYING ON REGULATED ACTIVITIES BY WAY OF BUSINESS) (AMENDMENT) ORDER 2011

2011 No. [XXXX]

1. 1.1 This explanatory memorandum has been prepared by the Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001 (S.I. 2001/1177) to clarify the circumstances in which a person who carries on the regulated activity of entering into a sale and rent back agreement as an agreement provider is carrying on that activity "by way of business".

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

3.1 None.

4. Legislative Context

4.1 Section 19 of the Financial Services and Markets Act 2000 ("FSMA") prohibits a person from carrying on a "regulated activity" in the United Kingdom unless they are authorised by the Financial Services Authority ("FSA") or exempt. Article 63J(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) provides that entering into regulated sale and rent back agreements as an agreement provider is a "regulated activity". However, section 22 of FSMA provides that an activity is only a regulated activity if it is carried on by way of business. Section 419 of FSMA gives the Treasury power to make provision as to the circumstances in which a person who would otherwise not be regarded as carrying on a regulated activity by way of business is to be regarded as doing so and the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (S.I. 2001/1177) has been made under this power. This Order clarifies that a person who enters into a regulated sale and rent back agreement as an agreement provider is to be regarded as carrying on that activity "by way of business" unless that person is related to the agreement seller.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Mark Hoban MP has made the following statement regarding Human Rights:

"In my view the provisions of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) (Amendment) Order 2011 are compatible with the Convention rights".

7. Policy background

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

7.1 Sale and rent back schemes allow public or private sector organisations to buy a property and rent it back to the occupant. This can enable homeowners in financial difficulties to avoid the distress and expense of repossession. An interim system of FSA regulation of such agreements started in July 2009, and was replaced by a full regime on 30 June 2010. The intention of introducing FSA regulation was to improve outcomes for consumers entering into sale and rent back transactions, increase the transparency of information provided by sale and rent back providers, reduce the potential for consumers to enter into unsuitable arrangements, and increase product quality by encouraging providers to improve or exit the market.

7.2 The regulatory regime only applies to firms that meet the 'by way of business' test. This test is intended to include firms that carry out the specified activity as a business arrangement but exclude those that carry it out for other purposes, such as arrangements with immediate family members. Following feedback, the FSA was concerned that many sale and rent back transactions were still being entered into by unauthorised persons (and were unregulated), on the basis that the person did not believe they were carrying on the activity "by way of business", where, for example, they only entered into a small number of such agreements.

7.3 This Order is intended to make clear that a person who enters into a sale and rent back agreement will be regarded as doing so "by way of business", unless they are closely related to the agreement seller. This will ensure that the original policy intention is achieved ie appropriate consumer protection in the sale and rent back market will apply to all consumers except where it is clearly a private arrangement involving a close relative.

8. Consultation outcome

8.1 There has been no new consultation on this instrument as the underlying policy has not changed. HM Treasury consulted previously on regulation of the sale and rent back market in 2009, leading to the introduction of an interim system of FSA regulation in July 2009, and the introduction of a full regime on 30 June 2010.

9. Guidance

9.1 The FSA will update its guidance for firms following this Order.

10. Impact

10.1 This measure will have an impact on investors and small firms who enter into sale and rent back agreements and currently consider that they are outside FSA regulation on the basis that they are not carrying on such activity "by way of business". The amendment makes clear that they need to be authorised and comply with FSA rules in relation to such agreements.

10.2 It is possible that there will be some restructuring and consolidation of the sale and rent back market in response to this Order. Some small sale and rent back providers may exit the market.

10.3 There is no significant impact on the public sector.

10.4 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to small business. The Government's objective is a market of authorised and regulated sale and rent back providers. This will provide a better outcome for consumers.

12. Monitoring & review

12.1 The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009 (SI 2009/1342), which introduced FSA regulation of the sale and rent back market, is due to be reviewed in 2012. This Order provides that the amendment to the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 must also be reviewed by the Treasury before the end of 2012 and that the amendment will expire at the end of 2014. A new Order will be required to maintain the amendment in force following the review (with or without any changes).

13. Contact

13.1 Rohan Lee at HM Treasury Tel: 020 7270 5826 or email: rohan.lee@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.