EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CARRYING ON REGULATED ACTIVITIES BY WAY OF BUSINESS) (AMENDMENT) ORDER 2018

2018 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 This order amends the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (S.I. 2001/1177) ("the By Way of Business Order") to clarify circumstances in which a person who carries on the specified activity of accepting deposits does not do so "by way of business" where that activity is facilitated by a person operating an electronic system in relation to lending. Where a specified activity is not carried on "by way of business" the activity is not a regulated activity under the Financial Services and Markets Act 2000 ("the Act").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

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.

4. Legislative Context

4.1 The By Way of Business Order defines when a person who is carrying on certain specified activities is to be regarded as doing so by way of business for the purposes of section 22 of the Act. Such persons must be authorised or exempt as provided for by section 19 of the Act.

4.2 Accepting deposits is a specified activity as provided for by article 5 of the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 ("the RAO").

4.3 This Order amends the By Way of Business Order to clarify the circumstances in which a person who carries on the specified activity of accepting deposits does not do so "by way of business" where that activity is facilitated by a person operating an electronic system in relation to lending. In the amendment, the term "operating an electronic system in relation to lending" is defined by reference to the activity specified in article 36H of the RAO, and other similar activity. The term defines activity which is commonly known as operating a peer-to-peer lending platform.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury, Stephen Barclay 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 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Peer-to-peer platforms facilitate lending to private individuals and businesses. Where a business borrows funds via a peer-to-peer platform there is a risk that in some circumstances they might be carrying on the specified activity of accepting deposits. This creates uncertainty for businesses borrowing via peer-to-peer platforms, and for the platforms themselves.

7.2 The consequences of this uncertainty are undesirable. If a business borrowing via a peer-to-peer platform was to be carrying on the specified activity of accepting deposits it would need to be properly authorised by the Financial Conduct Authority ("FCA") and the Prudential Regulatory Authority ("PRA"). This is inappropriate as most peer-to-peer borrowers are unlikely to be financial services firms. The Order makes it clear that businesses meeting the conditions specified are not to be properly regarded as accepting deposits "by way of business" and do not need to be authorised or exempt persons to carry on that activity lawfully.

7.3 This amendment provides certainty for businesses looking to take advantage of the opportunities provided by peer-to-peer lending and clarifies that businesses that meet the conditions specified are not accepting deposits "by way of business" when they borrow funds via a peer-to-peer platform. In turn, this provides certainty for peer-to-peer platforms who can be certain that where the conditions specified are met they are not facilitating unlawful deposit taking.

Consolidation

7.4 There are currently no plans to consolidate the Business Order.

8. Consultation outcome

8.1 The FCA and the PRA were consulted on, and involved in, the preparation of this Order and supported the Government's intention to provide clarity for businesses.

9. Guidance

9.1 No guidance is necessary for this amendment.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses. Some businesses borrowing via peer-to-peer platforms are likely to be small businesses and will therefore benefit from the added clarity this amendment provides.

12. Monitoring & review

12.1 The Economic Secretary to the Treasury has made the following statement regarding review:

"In my view, and having had regard to the "Small Business, Enterprise and Employment Act 2015 – Statutory Guidance for Departments", it is not appropriate to make provision for the review of the provisions of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2018. This is because a review would be disproportionate taking into account the economic impact and in particular the low impact on businesses of this Order. In my view, there are no other policy reasons to justify a need for a review."

13. Contact

13.1 Luke Aylward at HM Treasury (telephone: 020 7270 1910 or email: luke.aylward@hmtreasury.gsi.gov.uk) can answer any queries regarding the instrument.