EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) (NO. 2) 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 This instrument creates a new regulated activity in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, S.I. 2001/544 ("the RAO"). The new activity concerns the giving of advice on the conversion or transfer of a class of pension benefits known as safeguarded benefits.

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

3.1 In the new regulated activity in article 53E, this instrument mirrors four definitions ("flexible benefits"; "safeguarded benefits"; "subsisting rights" and "survivors") set out in the Pension Schemes Bill 2014-15 ("the Bill").

3.2 The Government expects the Bill to receive Royal Assent in February or March of this year. The Bill will, for all presently relevant purposes, have commenced by 6 April 2015. Given the anticipated prorogation of Parliament and in order that this instrument might receive the scrutiny of the Joint Committee on Statutory Instruments, and thereafter be debated by both Houses in time to take effect by 6 April 2015, the Government believes it is necessary to lay this instrument in draft before the Bill receives Royal Assent.

3.3 Accordingly, this instrument mirrors – or copies out – the definitions in the Bill. To the extent that the relevant provisions of the Bill are amended in the course of its further passage through the House, this will not alter the effectiveness of this instrument, which is capable of having effect without the provisions of the Bill.

3.4 A separate matter which may be of interest to the Joint Committee on Statutory Instruments is the amendment to article 82 of the RAO in so far as new article 82(3) specifies an investment which is then confined by article 82(4) solely for the purposes of the new activity specified in new article 53E. This avoids the dual regulation of pension

schemes which offer safeguarded benefits and maintains the current regulatory position for all matters other than advice on the conversion and transfer of safeguarded benefits.

4. Legislative Context

4.1 This instrument will be made under sections 22 and 428 of, and Schedule 2 to, the Financial Services and Markets Act 2000. It is made to ensure that where someone is required to take advice by clause 48 of the Pension Schemes Bill 2014-15, the person providing the advice is regulated by the Financial Conduct Authority.

4.2 In addition, the Government intends that regulations made under clause 48 (independent advice in respect of conversions and transfers: Great Britain) of the Pension Schemes Bill 2014-15 will refer to the new regulated activity created by this instrument. This approach was indicated during Committee stage of the Pensions Schemes Bill,[1] and in a letter from the Minister for Pensions, Steve Webb MP, to the Delegated Powers and Regulatory Reform Committee.[2] Amendments to clause 48 tabled for debate at Report stage in the House of Lords on 27 January, further indicated this intention on the face of the Bill, providing that an "authorised independent advisor", means a person who "has permission under Part 4a of the Financial Services and Markets Act 2000, or resulting from any other provision of that Act, to carry on a regulated activity specified in regulations made by the Secretary of State". The government intends that the regulated activity referred to will be that which is created by this instrument.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Financial Secretary to the Treasury, David Gauke, has made the following statement regarding human rights:

"In my view the provisions of the Financial Services and Markets Act 2000 (Regulated Activity) (Amendment) (No. 2) Order 2015 are compatible with the Convention rights."

7. Policy background

7.1 This instrument provides for advice on the conversion and transfer of safeguarded benefits into flexible benefits to be regulated by the Financial Conduct Authority (FCA) in accordance with the regulatory framework established by the Financial Services and Markets Act 2000.

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[1] http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150112-0002.htm, 12 Jan 2015, column 607.
[2] http://data.parliament.uk/DepositedPapers/Files/DEP2015-0011/20150106_response_to_DPRRC.pdf

7.2 Article 2(2) of this Order amends the RAO to specify an additional activity – of providing advice on the conversion and transfer of safeguarded benefits into flexible benefits – which is to be treated as a "regulated activity" for the purposes of the Financial Services and Markets Act 2000.

7.3 Article 2(4) of this Order amends an existing kind of investment (rights under a pension scheme) to include rights and interests under a pension scheme which provides safeguarded benefits and specifies that such rights and interests are only specified for the purposes of the new regulated activity.

7.4 Article 2(3) and (5) make minor and technical adjustments to the RAO to prevent the insertion to prevent the changes detailed above otherwise altering the activities and investments that the FCA regulates.

7.5 Article 2(3) and (5) make minor and technical adjustments to the RAO to prevent the insertion to prevent the changes detailed above otherwise altering the activities and investments that the FCA regulates.

7.6 The effect of the SI is to help deliver on the commitment in the Government's response to the consultation on "Freedom and choice in pensions" that advice required under a new safeguard for those wishing to transfer their defined benefit rights, would be provided by an FCA authorised advisor.[3]

7.7 This consultation response document explained that since the new pension flexibilities announced at Budget 2014 would allow those with defined contribution pension wealth more flexible access to this wealth, this may lead to a greater demand from those with defined benefit wealth to transfer in order to take advantage of these flexibilities. Since the government expects that it will be in the best interest of the majority of those with defined benefit pots to remain in their schemes, a commitment was made to introduce a safeguard requiring that all those who wished to exchange defined benefit rights for rights that could be accessed flexibly, should obtain professional advice before doing so.

7.8 The provisions to create the advice safeguard are contained in the Pension Schemes Bill 2014-15. In this bill the benefits that require advice before being transferred are defined as 'safeguarded benefits', which is broadly equivalent to rights that are 'defined benefit'. This SI allows the nature of advice specified under the safeguard to be linked to the standard of advice the FCA currently applies to transfers from defined benefit to contract based defined contribution schemes. This new regulated activity allows the FCA to extend their advice standards to all transfers of safeguarded rights and interests to trust-based schemes that can be accessed flexibly. This ensures the proper operation and consistent regulation of advice provided under the safeguard.

[3] Freedom and choice in pensions: government response to the consultation, July 2014, pp 29
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332714/pensions_response_online.pdf

8. Consultation outcome

8.1 The pensions flexibilities reforms were subject to a 12 week consultation over the summer of 2014, culminating in the publication 'Freedom and choice in pensions: government response to the consultation' on the 20 July 2014.[4] This document set out the government's intention that transfers from funded defined benefit schemes will continue to be allowed in the context of flexibility, but that there would be a safeguard ensuring that professional advice is received before a decision to transfer defined benefit (now known as 'safeguarded' benefits) is made. The proposal to make it a statutory requirement to take professional financial advice was recommended by a large number of stakeholders including the Association of British Insurers and the Confederation of British Industry.

8.2 The FCA was consulted, and was involved with the preparation of, this draft order.

8.3 The approach of extending the RAO to ensure the proper regulation of advice under the safeguard was subject to consultation with industry at a meeting on the 12 December. The specific approach of creating the safeguard required by clause 48 of the Pension Schemes Bill 2014-15 by reference to a new regulated activity that will be created in this statutory instrument, was subject to consultation with industry in a stakeholder meeting on the 9 January. The membership of these groups consisted of all major industry stakeholders, including the National Association of Pension Schemes, the Association of British Insurers, the Association of Pension Lawyers and the Association of Consulting Actuaries.

9. Guidance

9.1 The FCA will provide guidance to advisers about their obligations under this instrument as it relates to the provision of advice under the advice safeguard and will subsequently update their rules accordingly.

10. Impact

10.1 The impact on business, charities or voluntary bodies is expected to be negligible. The Regulatory Policy Committee confirmed this measure as a low cost proposal on 12 January 2015.

10.2 The impact on the public sector entails the resources of the FCA being used to monitor and direct this new regulated activity. However, the FCA are reshaping their pension regulatory regime in response to the new pension flexibilities, and in this context the extra resource required to monitor this new regulated activity is not significant.

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332714/pensions_response_online.pdf

10.3 An Impact Assessment of the wider advice safeguard policy was published alongside the relevant amendments to the Pension Schemes Bill and can be found at the following link: http://www.parliament.uk/documents/impact-assessments/IA14-13A.pdf

10.4 The Regulatory Triage Assessment that sets out the effect that this Order will have on the costs of business and the voluntary sector will be made available from Her Majesty's Treasury and published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 This legislation applies to small business. Many financial advice firms will be small businesses, and the policy of requiring advice on transfers of safeguarded benefits is expected to generate business to these firms (the government's impact assessment estimated an annual benefit to advisors of £3.39m).[5] Therefore it would be unfair to exempt small business from this instrument, as it would prevent them delivering the appropriately regulated advice that would allow them to take advantage of this opportunity.

12. Monitoring & review

12.1 The Government will keep this legislative framework under review as a matter of course, and are committed to monitoring the practices which emerge around the transfer of safeguarded benefits, including the advice safeguard, as the new pension flexibilities bed in after April 2015. The Tax Information & Impact Note published at Budget 2014, and republished at Autumn Statement 2014, commits the Government to continuing to monitor the tax flexibilities policy through tax data, and HMRC publishes significant amounts of data on tax receipts and liabilities annually. The Government has published costings and analysis of the measure at Budget 2014 and has updated these at Autumn Statement 2014, in line with revisions to the policy made as a result of consultation.

13. Contact

Liam Izod at HM Treasury can answer any queries regarding the instrument. Tel: 0207 270 1407 or email: liam.izod@hmtreasury.gsi.gov.uk.

[5] http://www.parliament.uk/documents/impact-assessments/IA14-13A.pdf, pp 5