**EXPLANATORY MEMORANDUM TO**

**THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) ORDER 2014**

**2014 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 makes provision in connection with the transfer of consumer credit regulation from the Office of Fair Trading to the Financial Conduct Authority which is effected by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, S.I. 2013/1881, and the Financial Services Act 2012 (Consumer Credit) Order 2013, S.I. 2013/1882.

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

3.1 Part 5 of the instrument makes provision for the Financial Conduct Authority ("FCA") to undertake a review of the provisions of the Consumer Credit Act 1974 ("CCA"). The review will, in particular, consider whether the remaining provisions of the CCA could be replaced by rules or guidance made by the FCA under FSMA, and the FCA's report may make recommendations relating to the exercise by the Treasury of its powers to make an order under section 107 of the Financial Services Act 2012; those powers include the power to repeal provisions of the CCA.

3.2 The Government considers that it is appropriate to make the provisions in Part 5, under paragraph 25(1)(f) of Schedule 2 to FSMA, to supplement the provisions in the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 made in connection with the transfer of consumer credit regulation from the Office of Fair Trading ("OFT") to the FCA and which repeal a large number of provisions of the CCA. That Order was made under section 22 of, and paragraph 25 of Schedule 2 to, FSMA and is a "relevant provision" for the purposes of paragraph 25 in respect of this instrument.

## 4. Legislative Context

4.1 The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 ("the Order") will be made under sections 22 and 428 of, and

Schedule 2 to, the Financial Services and Markets Act 2000 and section 118 of the Financial Services Act 2012.

## 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 has made the following statement regarding Human Rights:

In my view the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 are compatible with the Convention rights.

## 7. Policy background

7.1 This instrument makes provision in connection with the transfer of consumer credit regulation from the OFT to the FCA which is effected by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, S.I. 2013/1881, and the Financial Services Act 2012 (Consumer Credit) Order 2013, S.I. 2013/1882[1].

7.2 Part 2 of the Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, S.I. 2001/544 ("the RAO"), to specify additional credit-related activities which are to be treated as "regulated activities" for the purposes of the FSMA, in particular certain activities in relation to the operation of an electronic system in relation to lending, and to provide for exclusions from various regulated activities. Certain of these exclusions replace the current exemptions for local authorities and insolvency practitioners: section 38(2) of FSMA provides that an authorised person cannot make use of an exemption; by replacing the exemptions with exclusions, the Order maintains the position of local authorities and insolvency practitioners in respect of other FCA-regulated activities, where such persons hold an authorisation for consumer credit activity.

7.3 The order also makes provision in two further respects in relation to local authorities. First, local authorities are only required to be authorised where they undertake credit-related activity that is within scope of the Consumer Credit Directive (2008/48/EC). So, for example, local authorities will require authorisation for consumer lending undertaken by way of business, but not credit brokerage. Second, the Order also provides that local authorities will be eligible for the lower cost 'limited permission' authorisation regime if carrying out unsecured lending; this will reduce the administrative and resource burdens arising from authorisation.

[1] The explanatory memorandum to those instruments is available at http://www.legislation.gov.uk/uksi/2013/1881/memorandum/contents.

7.4 The Order also makes consequential amendments to other primary and secondary legislation, including provision ensuring that the FCA can impose prohibitions and restrictions on credit activities undertaken by EEA authorised payment institutions and EEA electronic money issuers exercising passport rights in the UK.

7.5 Part 5 of the Order provides for the FCA to undertake a review of the CCA. Substantive provisions of the CCA that can be replicated by rules made by the FCA under Part 9A of FSMA are repealed by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, S.I. 2013/1881. The review under Part 5 of the Order will, in particular, consider whether the remaining provisions of the CCA could be replaced by rules or guidance made by the FCA under FSMA, and the FCA's report may make recommendations relating to the exercise by the Treasury of its powers to make an order under section 107 of the Financial Services Act 2012; those powers include the power to repeal provisions of the CCA.

7.6 The reason for not making provision in the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 and the Financial Services Act 2012 (Consumer Credit) Order 2013 for repealing the CCA in full was given in the Government's March 2013 consultation document, '*A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority*'[2]:

> 2.7 However, the Government is committed to carrying forward in 2014 important consumer rights and protections in the CCA where they cannot be replicated easily under FSMA because of the differences between the CCA and FSMA statutory frameworks (for example, where the CCA provides for specific rights for consumers or other non-authorised persons, or those provisions to which unenforceability conditions apply). These CCA provisions will continue to apply for the initial years of the FCA regime.
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> 2.8 In the longer term, the Government is confident that many of these provisions can be replaced by rules-based consumer protections. It intends therefore to put a requirement on the FCA, by 2019, to review retained CCA conduct requirements and to develop rules-based alternatives where possible, considering the implications for consumer protection and on burdens for firms. As part of the review, the FCA will be required to consult with stakeholders to ensure that the rules-based alternatives it develops offer strong protection for consumers.

## 8. Consultation outcome

8.1 The FCA was consulted on, and closely involved in the preparation of, the draft Order.

8.2 The Finance Leasing Association, the British Vehicle Rental and Leasing Association and the Peer-to-Peer Finance Association were consulted in relation to provisions in the Order which amend the RAO to effect a clearer distinction between

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2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221913/consult_transferring_consumer_credit_regulation_to_fca.pdf.

credit broking (article 36A of the RAO) and operating an electronic system in relation to lending (article 36H of the RAO). All were supportive of these provisions.

8.3 The Government consulted on the proposal to require the FCA to undertake a review by 2019 of retained CCA provisions in its March 2013 consultation document, *'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority'*. Respondents were in general supportive of the proposed approach.

8.4 The Government set out the principles behind its proposed approach to regulation of local authorities carrying on consumer credit activities in its March 2013 consultation, that is to carry forward the current arrangements (i.e. an exemption from a requirement to be licensed) as far as possible, except where the Consumer Credit Directive requires local authorities to be directly regulated and supervised. The Government conducted informal consultation with a sample of local authorities and other interested parties to inform its final decision on appropriate regulatory arrangements for local authorities in the FCA consumer credit regime.

## 9. Guidance

9.1 Further guidance will be made available by the FCA.

## 10. Impact

10.1 The impact on business, charities or voluntary bodies of the transfer of consumer credit regulation from the OFT to the FCA is set out in the accompanying impact assessment. The Government's best estimate of the total cost to business of the new regulatory regime is £336million over 10 years (at 2013 prices). The Government's best estimate of benefits of the regime is £689million over 10 years. The estimated net benefit over 10 years is £353million.

10.2 The impact on the public sector is not quantified as public sector organisations generally do not undertake consumer credit activities, apart from local authorities which offer certain types of unsecured credit agreements. The Government has consulted local authorities and found that comparatively few authorities would need to be authorised. As noted above, this SI also provides that local authorities which are authorised for consumer credit activities will be excluded from a requirement to be authorised for other FCA-regulated activities.

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

## 11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the regulatory regime for consumer credit has been designed so that small firms will be subject to proportionate and manageable burdens:

- Many small firms will be able to take advantage of the limited permission regime which will impose lower costs and reduced administrative requirements on eligible firms;
- Small firms (except lenders which apply interest and charges to loans) will have the option to become an appointed representative, as a way for smaller firms to operate without having to shoulder the burden of direct authorisation and regulation;
- Consumer credit firms will not be subject to minimum capital requirements (except where they undertake debt management business);
- Existing exemptions from regulation for agents of mail order firms and home credit providers will continue;
- Firms which specialise in finding or tracing individuals, where these are not carrying on a financial services business will be removed from the scope of regulation; and
- In addition, the FCA proposes to introduce a differentiated fee charging system, which will reflect the size of firms.

11.3 The basis for the final decision on what action to take to assist small business is ensure that small businesses gain from the reputational benefits of a better-regulated and well-functioning market and to ensure that small businesses are subject to appropriate and proportionate regulatory burdens. The Government has decided against exempting small business from this policy, as its objective is to strengthen consumer protection across the consumer credit market.

## 12. Monitoring & review

12.1 HM Treasury will monitor the practical effects of the Order to ensure it continues to meet the policy aims.

## 13. Contact

13.1 Laura Hanoman at HM Treasury (tel: 0207 270 5507 or email: laura.hanoman@hmtreasury.gsi.gov.uk) can answer any queries regarding the instrument.