EXPLANATORY MEMORANDUM TO

THE HAZARDOUS SUBSTANCES AND PACKAGING (LEGISLATIVE FUNCTIONS AND AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument transfers legislative functions that are currently conferred upon the European Commission by Directive 2011/65/EU of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment ("the RoHS Directive"), to be exercisable instead by the Secretary of State in relation to England and Wales and Scotland after the end of the EU Exit transition period. It amends the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 (S.I. 2012/2032) ("the RoHS Regulations") as they apply in England and Wales and Scotland, to set out in domestic legislation a list of restricted substances and tables of exemptions from the restriction in regulation 3(1) of those Regulations, corresponding with provisions in the RoHS Directive. It also makes amendments to the RoHS Regulations and the Packaging (Essential Requirements) Regulations 2015 (S.I. 2015/1640) ("the Packaging Regulations") to help ensure the UK meets its obligations under the Protocol on Ireland / Northern Ireland to the Withdrawal Agreement ("the Protocol") in respect of placing on the market requirements for packaging and the restriction of the use of certain hazardous substances in electrical and electronic equipment.

Explanations

What did any relevant EU law do before exit day?

2.2 The RoHS Directive, which is implemented in the United Kingdom by the RoHS Regulations, requires member States to ensure that electrical and electronic equipment ("EEE") placed on the market does not contain certain hazardous substances, or does not contain those substances in concentrations exceeding specified maxima. It specifies particular applications of hazardous substances in EEE which are exempted from this restriction, in most cases for a limited period. It confers several legislative powers on the Commission, including power to amend the list of restricted substances, and power to grant, renew or revoke exemptions. It contains a procedure for persons to apply to the Commission for the grant, renewal or revocation of an exemption.

2.3 Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste ("the Packaging Directive") includes provisions specifying essential requirements to be met by packaging, and requiring Member States to ensure that packaging may only be placed on the market if it complies with those requirements. These provisions are implemented by the Packaging Regulations.

Why is it being changed?

2.4 The legislative powers conferred on the Commission by the RoHS Directive are being transferred into domestic law in order that the list of restricted substances in EEE may be amended following reviews, and exemptions may be granted, renewed or revoked, by secondary legislation. This will enable these changes, of a technical nature, to be made in a timely and proportionate manner.

2.5 The RoHS Directive and the Packaging Directive are both listed in Annex 2 to the Protocol, and will therefore continue to apply in Northern Ireland after the end of the transition period. Consequently, the RoHS Regulations and the Packaging Regulations need to be amended differently as they apply in Great Britain and in Northern Ireland, to reflect that the United Kingdom is no longer a Member State but the Packaging Directive and the RoHS Directive will still apply in Northern Ireland under the terms of the Protocol.

What will it now do?

2.6 This instrument will ensure the necessary amendments are made to The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 and The Packaging (Essential Requirements) Regulations 2015 so the Packaging Directive and the RoHS Directive will continue to apply in Northern Ireland at the end of the transition period as required by the Protocol. For details, see Section 6.1 and Section 7.1.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument varies between provisions.

3.3 Parts 2, 3, and 5 of, and Schedules 1 and 2 to, this instrument apply to England and Wales and Scotland, and Part 4 applies to Northern Ireland only.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is that Part 1 extends to the United Kingdom, Parts 2 and 3 and Schedules 1 and 2 extend to England and Wales and Scotland, and Part 4 extends to Northern Ireland. The amendments made by Part 5 have the same extent as the legislation being amended.

4.2 The territorial application of this instrument is that Part 1 applies to the United Kingdom, Parts 2, 3 and 5 and Schedules 1 and 2 apply to England and Wales and Scotland, and Part 4 applies to Northern Ireland.

4.3 Regulation 17, in Part 5, amends provisions of an existing EU Exit SI which amend two Commission Decisions on packaging, as they have effect as retained direct EU legislation. These amendments will have no practical application in Northern Ireland, because the Decisions are made under the Packaging Directive which is listed in Annex 2 to the Protocol, and therefore the Decisions in EU law will continue to apply in Northern Ireland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment Rebecca Pow MP has made the following statement regarding Human Rights:

"In my view the provisions of the Hazardous Substances and Packaging (Legislative Functions and Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is made in exercise of powers conferred by sections 8(1) and 8C of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018

6.2 The RoHS Regulations and the Packaging Regulations are also amended with effect from Implementation Period ("IP") completion day by regulations 18 and 20 of the Waste (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2019 (S.I. 2019/188) ("the 2019 Regulations"). Another instrument laid in draft before Parliament, the draft Waste and Environment Permitting etc. (Legislative Functions and Amendment etc.) (EU Exit) Regulations 2020, amends the 2019 Regulations before they come into force, to provide that regulations 18 and 20 extend only to England and Wales and Scotland. The RoHS Regulations and the Packaging Regulations are therefore amended as they apply in England and Wales and Scotland by the 2019 Regulations and by Part 3 of these Regulations, and are amended as they apply in Northern Ireland by Part 4 of these Regulations only.

7. Policy background

What is being done and why?

7.1 This instrument transfers powers under the RoHS Directive currently held by the European Commission to the Secretary of State, in relation to England and Wales and Scotland. These powers are for the purpose of enabling the Secretary of State:

- after IP completion day, to grant, renew or revoke exemptions to the restriction of hazardous substances in EEE specified in the RoHS regulations;
- to amend the list of restricted substances and maximum concentration values; and
- to prescribe detailed rules for complying with maximum concentration values.

7.2 Provision is included to enable applications to be made to the Secretary of State for the grant, renewal or revocation of exemptions, and for the procedure for determining such applications.

7.3 Transitional provision is made for cases where, before IP completion day, an application has been made to the Commission for the grant or renewal of an exemption in EU law. In such cases, the Secretary of State may determine whether to grant or renew a corresponding exemption, without a separate application being made to the Secretary of State. The Secretary of State may make an independent decision, but some procedural simplifications apply in cases where the Secretary of State's decision corresponds with that of the Commission.

7.4 New Schedules are inserted into the RoHS Regulations as they apply in England and Wales and Scotland, setting out a list of restricted substances and tables of exemptions corresponding with those in the RoHS Directive. This is so that it is clear which

substances are restricted, and which exemptions apply, in domestic law, and so that the list and the tables may in future be amended under the powers mentioned above.

7.5 This instrument also amends the RoHS Regulations and the Packaging Regulations, and makes minor amendments to provisions of two existing EU Exit SIs, in consequence of the Protocol. The Protocol is legal text forming part of the Withdrawal Agreement. It sets out that the whole of the UK will leave the EU customs union. Northern Ireland will align with EU regulations on some goods (e.g. product safety standards) to avoid regulatory checks at the Irish border. The RoHS Directive and the Packaging Directive are listed in Annex 2 to the Protocol, and therefore some amendments are required to domestic regulations in order to implement the Protocol.

7.6 The RoHS Regulations and the Packaging Regulations are amended separately by Part 3 of this instrument for England and Wales and Scotland, and by Part 4 of this instrument for Northern Ireland. The amendments applying to England and Wales and Scotland include provision to facilitate the access to the market within Great Britain of qualifying Northern Ireland goods. The amendments applying to Northern Ireland are to ensure that Northern Ireland remains compliant with the RoHS Directive, whilst reflecting that Northern Ireland has ceased to be an EU Member State.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. It also makes provision to implement the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement.

8.2 This instrument is also made under paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 Not considered necessary as it is not considered that enough amendments have been made that consolidation is required at this point in time.

10. Consultation outcome

10.1 Beginning in January 2020, regular discussions were held with representatives from the Department of Agriculture, Environment and Rural Affairs, Environment Agency, Northern Ireland Environment Agency, and Office for Product and Safety Standards about how to best implement measures relating to the Protocol.

10.2 Regular discussions with representatives from the Scottish Government, Welsh Government, Environment Agency, Northern Ireland Environment Agency, Scottish Environment Protection Agency, and Natural Resources Wales began in June 2020.

10.3 The discussions referred to in 10.1 and 10.2 led to the approach implemented by this instrument.

11. Guidance

11.1 Industry facing guidance supporting the implementation of the protocol for the RoHS and Packaging Directives can be found at their respective pages on Gov.UK. Additionally, guidance has been published for businesses on the movement of goods into and out of Northern Ireland under the terms of the Protocol. This guidance can be viewed at: https://www.gov.uk/government/publications/moving-goods-under-the-northern-ireland-protocol.

12. Impact

12.1 There will be an impact on business. The impact will include familiarisation and new labelling costs (UKCA) mark. These impacts will be incurred alongside other requirements on businesses to familiarise with new regulation and relabel products that result from a number of other statutory instrument listed in 12.3. These impacts on businesses are captured in a regulatory triage assessment (RTA) written by BEIS.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no significant impact on business, charities or voluntary bodies is foreseen, with any costs or benefits falling below £5 million in any one year. Some costs to business below this threshold will arise as a result of the amendment of the RoHS Regulations as they apply in Great Britain, to provide for regulation 34A of those Regulations (as inserted by S.I. 2019/188) to expire after a period of 12 months. Regulation 34A permits the continued placing on the Great Britain market of EEE which complies with the RoHS Directive, and after its expiry, with the exception of qualifying Northern Ireland goods, only EEE which complies with the RoHS Regulations and bears a UK marking may be placed on the market. The Department for Business, Energy & Industrial Strategy (BEIS) have prepared a regulatory triage assessment (RTA) for the draft Product Safety and Metrology etc. (Amendment etc.) (UK(NI) indication) (EU Exit) Regulations 2020, which make similar amendments to related legislation including the General Product Safety Regulations 2005 (S.I. 2005/1803) and the Electrical Equipment (Safety) Regulations 2016 (S.I. 2016/1101). Those draft regulations are expected to be laid on 14th October 2020 and the RTA will be published later this year. A separate RTA has not been produced for this instrument because the businesses in scope of the BEIS RTA broadly include the businesses that we expect to be in scope of the RoHS changes made by this instrument. To include the costs on businesses of complying with the RoHS amendments (new labels and familiarisation costs) would result in double counting of these costs as they have already been included in the BEIS RTA.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is consistent with the Government's approach to implementing the Protocol, as set out in the Command Paper published on 20 May 2020. The Command Paper can be viewed at: https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol. The paper specifies that there will be no new physical customs infrastructure required for goods arriving in Northern Ireland and reiterates that nothing shall prevent Northern Ireland businesses enjoying unfettered access to the

rest of the UK internal market. This instrument and any resulting impacts from it are consistent with this approach.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that no specific monitoring arrangements are needed.

14.2 As this instrument is made under the European Union Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Dawn Woodward at the Department for Environment, Food and Rural Affairs, Telephone: 02080 263 028 or email: Waste-EUExit@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Chris Preston, Deputy Director for Resources and Waste Policy, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under Secretary of State for the Environment Rebecca Pow MP at the Department for Environment, Food and Rural Affair can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Hazardous Substances and Packaging (Legislative Functions and Amendments) (EU Exit) Regulations 2020 does no more than is appropriate".

1.2 This is the case because the legislation makes the necessary amendments to The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 and The Packaging (Essential Requirements) Regulations 2015 to ensure the UK meets its obligations under the Protocol to the Withdrawal Agreement.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: to ensure the UK meets its obligations under the Protocol on Ireland / Northern Ireland to the Withdrawal Agreement.

3. Equalities

3.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

3.2 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Rebecca Pow MP have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.".

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.