EXPLANATORY MEMORANDUM TO

THE REGULATORS' CODE

AND

THE LEGISLATIVE AND REGULATORY REFORM (REGULATORY FUNCTIONS) (AMENDMENT) ORDER 2014

2014/XXXX

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Code and the instrument

2.1. The Regulators' Code replaces the Regulators' Compliance Code which was first published in 2008. The revised Code clarifies in a shorter and accessible format the principles and expectations that Regulators should follow when exercising their regulatory functions.

2.2. The Legislative and Regulatory Reform (Regulatory Functions) (Amendment) Order 2014 ("the 2014 Order") amends the Legislative and Regulatory Reform (Regulatory Functions) Order 2007[1] ("the 2007 Order"), which specifies regulatory functions which are within the scope of the better regulation principles and the Regulators' Code. The Order updates the 2007 Order by adding and removing specific regulatory functions.

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

3.1. None.

4. Legislative Background

4.1. Section 24 of the Legislation and Regulatory Reform Act 2008 ("the Act") makes provision for an Order specifying the regulatory functions to which the duties in sections 21 and 22 of the Act apply.

4.2. Section 21 imposes a duty on any person exercising a specified regulatory function to have regard to the five principles of good regulation. The principles provide that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent and should be targeted only at cases in which action is needed.

4.3. Section 22(2) provides that any person exercising a specified regulatory function must have regard to a Code ("the Regulators Code"), when

[1] S.I. 2007/3544

determining general policies or principles by reference to which that person exercises those functions.

4.4. The regulatory functions to which the duties in sections 21 and 22 of the Act apply were first specified in the 2007 Order. The functions are grouped in the 2007 Order in the following categories:

(i) functions exercised by statutory regulators, including those that deal primarily with public sector matters in England but only when such functions affect businesses and third sector organisations;

(ii) functions exercised by Ministers of the Crown; and

(iii) functions exercised by local authorities in Scotland, Northern Ireland and Wales in relation to certain matters reserved to the UK Parliament.

4.5. Section 22(1) of the Act enables a Minister to issue and revise the Regulators' Code.

4.6. The first Regulators' Code (then called the Regulators' Compliance Code) was issued on 17 December 2007 and brought into force on 6 April 2008 by the Legislative and Regulatory Reform Code of Practice (Appointed Day) Order 2007/3548.

4.7. The Regulators' Code and the 2014 Order are subject to approval, by affirmative resolution, of both Houses of Parliament. It is intended that the Code and the Order will come into force on the next Common Commencement Date.

5. Territorial Extent and Application

5.1. The Code and the Order applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Michael Fallon, Minister of State for Business and Enterprise, has made the following statement regarding Human Rights:

In my view the provisions of the Regulators' Code and the Legislative and Regulatory Reform (Regulatory Functions) (Amendment) Order 2014 are compatible with the Convention rights.

7. Policy Background

7.1 A key aim of the Legislative and Regulatory Reform Act 2006 was to promote good regulatory principles that reduced unnecessary burdens on business. A central policy designed to achieve this was the Regulators' Code which aimed to promote efficient and effective approaches to regulatory delivery by requiring regulators to have regard to the Codes principles. In doing so it was

intended that regulators would carry out their functions in a way which reduces regulatory burdens on those they regulate and increases the benefits that regulation can bring through increased transparency and accountability. The regulatory functions within the scope of the Code are specified in the 2007 Order.

7.2 Evidence gathered from the Transforming Regulatory Enforcement consultation and a post implementation review suggested that changes were needed to the Regulators' Compliance Code and it was announced in the Autumn Statement 2012 that the Government would consult on a revised Regulators' Compliance Code to improve regulators' interaction with businesses. The 'Amending the Regulators' Compliance Code' Consultation ran from 8 March to 3 May 2013. Responses were submitted by businesses, trade bodies, local authorities and national regulators. These indicated that although regulators had largely adopted its principles, its delivery was inconsistent and it had not changed regulatory culture and practice. The new Regulators' Code is designed to address these concerns. It is part of a package of measures to improve the relationship between those they are regulating to overcome barriers to growth by improving the way regulation is delivered.

7.3 The new Regulators Code contains the following principles:

(i) Regulators should carry out their activities in a way that supports those they regulate to comply and grow;
(ii) Regulators should provide simple and straightforward ways to communication with those they regulate;
(iii) Regulators should base their regulatory activities on risk;
(iv) Regulators should share information about compliance and risk;
(v) Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply; and
(vi) Regulators should ensure that their approach to their regulatory activities is transparent.

7.4 The Government believes that the better regulation principles and the Regulators' Code should be applied to the broadest range of non-economic regulatory functions possible. To this end, the 2014 Order would amend the 2007 Order to specify additional regulatory functions exercised by the following bodies:

(i) the Groceries Code Adjudicator;

(ii) Monitor (other than those functions which concern competition, pricing and financial assistance in special administration cases under or by virtue of Chapters 2, 4 and 6 of Part 3 of the Health and Social Care Act 2012);

(iii) the Regulator of Community Interest Companies;

(iv) the Claims Management Unit of the Ministry of Justice (MoJ) who carry out regulatory functions under Part 2 of the Compensation Act.

7.5 In addition the 2014 Order removes the Hearing Aid Council and the Postgraduate Medical Education and Training Board and the United Kingdom Sports Council from the 2007 Order because they have both been abolished. The 2014 Order also removes the United Kingdom Sports Council as their anti-doping functions have been transferred to UK Anti-Doping which is a non-statutory body.

8. Consultation Outcome

8.1. Section 23(3) of the Act requires that before issuing or revising a Code the Secretary of State should consult persons appearing to him to be representative of persons exercising the regulatory functions and such other persons as he considers appropriate.

8.2. As set out in paragraph 7.2, the Department for Business, Innovation and Skills (BIS) launched a consultation 'Amending the Regulators' Compliance Code'[1] on 8 March 2013. The consultation closed on 3 May 2013 and received 95 written responses from a variety of organisations including trade associations, local authorities, national regulators, professional bodies and the devolved administrations.

8.3. In addition a number of workshops and face to face meetings were held with interested organisations and individuals to discuss the revised Code.

8.4. The consultation highlighted that there was support for the principles contained in the revised Regulators' Code and the efforts made to increase transparency, accountability and create a more open and mature dialogue between regulators and those subject to regulation. The shorter, simpler to understand and principles based nature of the Code were also generally welcomed. Some regulators raised concerns that the Code was too prescriptive and did not allow for local delivery. Businesses were generally positive about the changes made to the Code, welcoming the increase in transparency and understanding of what they could expect from their regulator. Some had concerns that regulators would not fully comply by the Code as it remains at a policy level.

8.5. As a consequence of the consultation, the requirements in the Regulators' Code have been simplified and developed to ensure they are not prescriptive but allow for local delivery by individual regulators. The Code now addresses concerns raised in the consultation such as clarification that regulators should still take immediate action to prevent a serious breach and that there are circumstances in which regulators will have to take non-risk based interventions such as when applying EU legislation. The Code has been remodelled adding Section 6, 'Regulators should ensure that their approach to

[1] http://www.bis.gov.uk/assets/brdo/docs/publications-2013/13-685-rcc-consultation.pdf

their regulatory activities is transparent' so that requirements for the development of 'service standards' are easily accessible and transparent. The revised Code also clarifies the language used around customer satisfaction surveys and Government monitoring intentions.

8.6 Section 24(6) of the Act provides that, before making an order under section 24, the relevant authority must consult any person whose functions are to be specified in the order and any other person the authority considers appropriate. Accordingly, the Secretary of State has consulted Monitor, the Groceries Code Adjudicator, the Regulator of Community Interest Companies and the Ministry of Justice who were content with the policy intention and the clauses as drafted.

9. Guidance

9.1. No guidance has been issued. In due course the Government intends to provide regulators with examples of good practice and practical tools which will assist them to apply the Code. A list of Frequently Asked Questions will also be maintained on the gov.uk website to ensure that more detailed information is provided. A draft list of these Frequently Asked Questions to the Code can be found at the Annex to this Memorandum.

10. Impact

10.1. The impact on business, charities or voluntary bodies will be zero cost as the Regulators' Code only applies to non-economic regulators. Where a business, charity or voluntary body is regulated by a regulator within scope of the Code, the impact is anticipated to be positive and result in greater transparency and certainty, supporting compliance and growth.

10.2. The impact on the public sector is anticipated to be minimal. The Regulators' Code amends the existing statutory Regulators' Compliance Code, making it simpler and clearer for regulators to follow enabling their regulatory efforts to be focused on the non-compliant as well as providing greater clarity for those being regulated.

10.3. A New Burdens Assessment has been completed and will be published alongside the Explanatory Memorandum on the OPSI website.

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. The Government has committed in the Code to monitor published policies and standards which relate to the specified regulatory functions to ensure they are consistent with the principles in the Code.

12.2. There will also be a post implementation review of the revised Code 3 to 5 years after it comes into effect to check that the Code is operating as intended.

13. Contact

Stewart Gibbon at the Better Regulation Delivery Office, Department for Business, Innovation and Skills

Tel: 020 7215 4987 or email: stewart.gibbon@bis.gsi.gov.uk can answer any queries regarding the Code.

ANNEX

REGULATORS' CODE: FREQUENTLY ASKED QUESTIONS

General Questions

1. When will the Regulators' Code come into force?
It is anticipated that the Regulators' Code will come into statutory force in April 2014. BRDO will confirm the exact date in due course.

We recommend that regulators start the process now of reviewing policies and procedures to ensure they are compliant with the new Regulators' Code, ahead of its statutory introduction.

2. Does the Regulators' Compliance Code (RCC) continue to apply?
The RCC continues to apply until the Regulators' Code comes into statutory force. At that point, the Regulators' Code will replace the RCC.

3. Who does the Regulators' Code apply to?
The Regulators' Code will apply to a range of non-economic regulatory functions exercised by regulators, Ministers and local authorities.

These regulatory functions are specified in the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 in accordance with section 24 of the Legislative and Regulatory Reform Act 2006.

The full list of national regulators and legislation within scope of the Code will be available on the gov.uk website.

The Regulators' Code will apply to local authorities in Wales and Scotland where they exercise regulatory functions in relation to reserved matters.

4. What is the legal basis of the Regulators' Code?
The Regulators' Code will be issued by the Secretary of State in accordance with section 22 of the Legislative and Regulatory Reform Act 2006.

5. Will the Regulators' Code replace the Enforcement Concordat?
The Enforcement Concordat was adopted by the majority of regulators, on a voluntary basis, prior to the introduction of a statutory Code in 2008.

We recommend that regulators acting outside the scope of the statutory Code adopt it on a voluntary basis, in place of the Enforcement Concordat. This will help to provide a clear and consistent approach across regulators that businesses and others can understand.

6. Does the new Regulators' Code differ from the Regulators' Compliance Code?
Yes - the Regulators' Code provides a clear framework for transparent, open and accountable regulatory delivery. It sets out new expectations, including a provision for regulators to publish 'service standards' setting out what those they regulate should expect from them.

7. Will the Regulators' Code stop regulators from taking appropriate action against those who are non-compliant?
No - the Regulators' Code promotes proportionate, consistent and targeted regulatory activity, which includes taking appropriate action where non-compliance is identified.

8. Regulators acting within scope "must have regard to the code". What does this mean in practice?
As set out in section 22 of the Legislative and Regulatory Reform Act 2006, regulators acting within scope of the Regulators' Code must have regard to the Code in 'determining any general policies or principles' by reference to which they exercise their regulatory function. This means that the regulator must explicitly consider the Code when determining relevant policies and principles, and any decision to deviate from the provisions contained within the Code should be properly reasoned and based on material evidence.

The legislation also requires regulators acting within scope of the Code to have regard to it when 'setting standards or giving guidance generally in relation to the exercise of other regulatory functions'. For example, where a national regulator issues statutory guidance to local authorities in relation to a regulatory function within scope of the Code, the national regulator must have regard to the Code in producing the guidance, and should be conscious that the local authority will be required to have regard to the Code in developing their policies under the statutory guidance.

9. How does the Regulators' Code impact on frontline officers?
The Legislative and Regulatory Reform Act 2006 requires regulators to have regard to the Code when developing the policies and principles that guide their regulatory activities. These policies and principles govern the activities of frontline officers and these officers will therefore be directly influenced, in their daily activities, by the provisions of the Code.

Each regulator should ensure that their staff understand the statutory principles of good regulation and the Code, and that they act in accordance with the regulator's own published service standards and enforcement policy.

Regulators' Code questions

1. How can a regulator 'improve confidence in compliance for those they regulate by providing greater certainty'? (paragraph 1.2) and ensure that advice can be relied on (paragraph 5.5) ?
Businesses need clear regulatory information, guidance and advice that they can rely on in order to invest and grow.

This wording in the Code recognises the importance for businesses of having confidence that they understand what is required, and that their chosen approach to complying with regulations is accepted by regulators. Regulators should aim to provide certainty for those they regulate so that where a regulator issues advice to a business the business should have confidence that, if they comply with that advice, they will not face enforcement action.

2. What is meant in paragraph 5 of the Code by 'information, guidance and advice'?
Regulators and businesses sometimes use different terminology when talking about the support that is provided to raise awareness and understanding of regulatory requirements, and to help businesses to comply with them. For the purposes of the Code, the following terminology is used:

***'Information'** – this term is used to refer to knowledge communicated about facts. An example of information provided by a regulator to a group of businesses could be a bulletin announcing that new legislation that may be relevant to the businesses has been passed, with an indication of the commencement date.*

***'Guidance'** – this term is used to refer to an interpretation given of regulations or regulatory requirements. An example of guidance could be a leaflet explaining and interpreting legislative requirements in plain English and suggesting ways in which businesses might meet the requirements.*

***'Advice'** – this term is used to refer to a specific recommendation or recommendations given in a particular context or in the light of a particular set of circumstances. An example of advice could be detailed recommendations on the steps that an individual business might take to comply with a particular requirement, taking account of the business' operating model.*

3. What is considered a 'serious breach', in paragraph 2.2 of the Code?
The Regulators' Code covers a wide range of non-economic regulatory functions and the nature of a serious breach will depend to some extent on the regulator's specific objectives. The Government expects each regulator to apply their own discretion in deciding whether a breach is 'serious' and the appropriate actions to be taken. However, it is the Government's opinion that a regulator might rationally take the view that a 'serious breach' would be one that had caused, or had the potential to cause, significant harm to the public or the environment.

Service Standards

1. What are 'Service Standards'?

The Regulators' Code includes the provision that regulators should ensure their approach to regulatory activity is transparent. This should be communicated via a regulator's published 'Service Standards', setting out what those they regulate should be able to expect from their regulator. Details of what should be included in a regulator's 'Service Standards' are included in paragraph 6 of the Code (Examples of how local authority regulatory services might approach service standards will be available on the gov.uk website).

2. My organisation already publishes service standards. Will these need to be changed?

We recommend that existing published information, such as customer service standards or charters, and enforcement policies, should be reviewed to see whether they are in line with the provisions of the new Code. There is no need to change published information that already satisfies the Code's provisions – it will be sufficient to provide any additional information that is not currently made available.

We recommend also that regulators review their provision of information to ensure that it is clear and easily accessible to those they regulate, including on the regulator's website.

3. Local Authorities comprise many services, does each regulatory service have to publish individual 'Service Standards'?

It is for each local authority to consider the way in which it organises and delivers its regulatory services and to determine an approach to service standards that will work best for itself and those it regulates.

This may mean that the local authority chooses to develop and publish a single set of service standards, or it may choose to develop and publish separate service standards for each of its regulatory services. A key concern, whichever approach is taken, is that those regulated by the local authority should be able to find the information that is relevant and applicable to them. This means that where multiple sets of service standards are published, they will need to clearly explain their applicability and each set should signpost the others.

Monitoring

1. Will my organisation need to submit annual returns to the Government?

No - the Code does not require regulators to submit any returns to the Government. However, regulators should be publishing information that allows their service users, including those they regulate, to see what they are doing and how they are performing.

2. How will compliance with the Regulators' Code be monitored?

The Government expects regulators to take responsibility for ensuring that they meet their statutory responsibility to have regard to the Code on an ongoing basis.

We expect that improved transparency will make it easier for businesses and others to understand how regulators should deliver their services. We also anticipate that businesses and others will feel better able to challenge regulators, using their published complaints and appeals processes, where they are not meeting their statutory responsibilities, or are not acting in accordance with their published policies and service standards.

We will keep a watching brief on regulators, in order to understand the impact of the Code.

3. What are the consequences should an organisation fail to act in accordance with the Regulators' Code?

It is a statutory requirement for regulators acting within scope of the Regulators' Code to have regard to its provisions. The Government is confident that regulators will meet their statutory responsibility.

The Code provides that the Government will challenge regulators where there is evidence that policies and standards are not in line with the Code or are not followed. Where there is evidence that a regulator is failing to have regard to the provisions of the Code, we will liaise directly with that regulator.