EXPLANATORY MEMORANDUM TO

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) (AMENDMENT) (ENGLAND AND WALES) ORDER 2011

2011 No. [XXXX]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This instrument seeks to create a new exception in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the "Exceptions Order") for the Financial Services Authority when exercising certain functions under the Payment Services Regulations 2009. As a result of changes introduced by the Legal Services Act 2007 allowing alternative business structures to provide legal services, it adds the positions of Head of Legal Practice and Head of Finance and Administration for bodies with non-lawyer owners and managers which provide reserved legal activities. It also amends the current entry relating to *'actuary'* to reflect the merger of the Faculty of Actuaries and the Institute of Actuaries.

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

None.

4. Legislative Context

4.1 The Rehabilitation of Offenders Act 1974 ("the Act") protects rehabilitated offenders from having to reveal certain past convictions and cautions once a specified period of time has passed. Section 4(4) enables the Secretary of State by order to make provision that in certain circumstances and proceedings the protection against having to reveal spent convictions does not apply and exempted questions may be put resulting in the giving of information about such convictions.

4.2 The Exceptions Order, by providing for the right to put an exempted question, taken in conjunction with the provisions of the Police Act 1997 and regulations made under it, has the result that a full criminal records history may be provided for an individual involved in sensitive areas of activity and work. The Criminal Records Bureau (CRB) is able to provide the relevant disclosure information on application for any purpose listed on the Exceptions Order.

4.3 The Exceptions Order is amended periodically to ensure that the criminal disclosure regime meets the changing requirements of public protection.

5. Territorial Extent and Application

This Instrument applies to England and Wales.

6. European Convention on Human Rights

Crispin Blunt, the Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

> "In my view the provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2011 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Rehabilitation of Offenders Act 1974 designates convictions of 30 months imprisonment or less as 'spent' after a certain period of time has elapsed, which varies according to the seriousness of the sentence received. The Act seeks to aid the reintegration and resettlement of ex-offenders into employment by not requiring them to answer questions regarding their spent convictions for any purpose not included in the Exceptions Order.

7.2 While it is generally desirable to facilitate ex-offenders into employment, the Exceptions Order exists to ensure that the public remain adequately protected. Those areas of activity included on the Exceptions Order are considered to provide individuals with particular opportunities to harm the public, and therefore it is appropriate that it should be possible to know a person's full criminal history before an offer of employment is made and consideration can be made of any necessary safeguards to put in place.

Financial Services Authorities

7.3 Currently, the Financial Services Authority may take spent convictions into account when authorising a person to carry out regulated activities under the Financial Services and Markets Act 2000 (FSMA). The Payment Services Regulations 2009 implement the Payment Services Directive (2007/46/EC). These regulations create a new category of regulated activity, which is undertaken by the new Payment Institution. The payments institutions are a class of payment service providers, which provide services such as placing cash in a payment account and remitting it abroad.

7.4 The purpose of this amendment is to ensure that the Financial Services Authority can also take into account spent convictions of persons who are responsible for the management and control of payments institutions.

Legal Services Bodies

7.5 Part 5 of the 2007 Act reforms the provision and regulation of legal services. It introduces Alternative Business Structures ("ABS"), which enable lawyers and non-lawyers to work together to provide a range of legal and non-legal services. Once Part 5 is commenced later in 2011, all bodies that wish to become ABS entities ('licensed bodies') will need to be designated and regulated by licensing authorities. Licensed bodies must also appoint a Head of Legal Practice and Head of Finance and Administration. Those who undertake these positions must be authorised to act as such by the relevant licensing authority.

7.6 Individuals applying to these positions may have access to vulnerable clients and client money. Licensing authorities must therefore be satisfied that individuals applying to be a Head of Legal Practice or a Head of Finance and Administration are 'fit and proper persons' for appointment. This will help to ensure that licensed bodies are properly regulated when the ABS regime becomes fully operational later in 2011**.**

Institute and Faculty of Actuaries

7.7 There is currently an entry in the exceptions order for '*actuary'*. This is defined as 'a member of the Institute of Actuaries or a member or student of the Faculty of Actuaries'. On 1 August 2010 these two bodies merged to become the Institute and Faculty of Actuaries. In order to continue to give effect to the applicable exception the entry is to be updated to reflect this change.

Consolidation

7.8 Informal consolidated versions of the Order will be available at http://www.legislation.gov.uk/.

8. Consultation Outcome

8.1 The addition of the positions of Head of Legal Practice and Head of Financial Administration to the instrument has been considered by the approved regulators of the legal profession and the Legal Services Board. The approved regulators and the Legal Services Board have agreed that these positions need to be added to the instrument. The Legal Services Board and certain of the approved regulators have asked for consideration of whether other positions involving the management and ownership of ABSs should also be added to the Order. MoJ are assessing this request.

8.2 The amendments relating to payment institutions and actuaries were not consulted upon as they are purely technical amendments.

9. Guidance

9.1 Licensing authorities will be responsible for providing guidance for those applying for the role of Head of Legal Practice or a Head of Finance and Administration and the organisations in which they may be working.

10. Impact

10.1 The impact of the addition of Head of Legal Practice and Head of Finance and Administration is limited to the legal sector and those individuals seeking to become Head of Legal Practice or Head of Finance and Administration in ABS firms. The impact is not anticipated to be significant.

10.2 There are no financial implications for the private sector or public sector as a result of these reforms. Should applicants be added to the exceptions order they would cover the costs of the CRB checks themselves.

11. Regulating Small Business

The changes will not create new burdens on small businesses.

12. Monitoring and Review

The policy behind the Exceptions Order is kept under regular review by the Ministry of Justice.

13. Contact

Mary Strong at the Ministry of Justice, Tel: 020 3334 2863 or e-mail: mary.strong@justice.gsi.gov.uk can answer any queries regarding the instrument.