EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 AND THE FINANCIAL SERVICES (BANKING REFORM) ACT 2013 (DISCLOSURE OF CONFIDENTIAL INFORMATION) (AMENDMENT) REGULATIONS 2017

2017 No. 456

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 ("the 2001 Regulations") and the Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014 ("the 2014 Regulations"). The amendments to the 2001 Regulations and the 2014 Regulations add the Comptroller and Auditor General ("the C&AG") and the National Audit Office ("the NAO") to the list of persons to whom and by whom confidential information may be disclosed, subject to any restrictions on disclosure provided for in EU law. Disclosure is permitted for the purpose of enabling or assisting the C&AG in the discharge of the C&AG's functions of carrying out examinations into the economy, efficiency and effectiveness with which the Financial Conduct Authority ("the FCA"); the Payment Systems Regulator ("the PSR") and the Bank of England ("the Bank") (including when acting in its capacity as the Prudential Regulation Authority ("the PRA")) (together "the Financial Regulators") have used their resources in discharging their functions. Disclosure is also permitted for the purpose of enabling or assisting the NAO in the discharge of its functions in relation to such examinations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 These Regulations are being made in response to a recommendation made by the House of Commons' Public Accounts Committee regarding information sharing arrangements between the FCA and the C&AG. Further detail as to the policy context in which that recommendation came to be made is set out at paragraph 7 below.

4.2 The C&AG, as statutory auditor for the FCA and the PSR has a power under section 6 of the National Audit Act 1983 to carry out examinations into the economy, efficiency

and effectiveness with which those bodies have used their resources in discharging their functions.

4.3 By virtue of section 7D of the Bank of England Act 1998, the C&AG may carry out examinations into the economy, efficiency and effectiveness with which the Bank (including when acting in its capacity as the PRA) or a Bank company (i.e. a subsidiary undertaking of the Bank or a company in which the Bank has an interest and which the Treasury has directed to send its accounts to the C&AG) has used its resources in discharging its functions.

4.4 Under the Budget Responsibility and National Audit Act 2011, the NAO has functions in relation to the C&AG's examinations mentioned in paragraphs 4.2 and 4.3 above, including providing resources for the C&AG (see section 22 of, and Schedule 3 to, that Act which contain provision about the relationship between the NAO and the C&AG).

4.5 In their work, the Financial Regulators frequently obtain confidential information. The Financial Services and Markets Act 2000 ("FSMA") and the Financial Services (Banking Reform) Act 2013 ("FSBRA") provide the legislative framework for the disclosure of confidential information (except for information received for the functions of the FCA or the PSR under the Competition Act 1998 or the Enterprise Act 2002. For provision about the disclosure of such information, see Part 9 of the Enterprise Act 2002).

4.6 Confidential information is defined in section 348(2) of FSMA and in section 91(2) of FSBRA. In both provisions, it is principally defined as information which relates to the business or other affairs of any person and which was received by the primary recipient for the purposes of, or in the discharge of any functions of, the FCA, the PRA or the Secretary of State under any provision made by or under FSMA or in the discharge of any functions of the PSR under Part 5 of FSBRA.

4.7 Section 348(1) of FSMA and section 91(1) of FSBRA provide that confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of the person from whom the primary recipient obtained the information and if different, the person to whom it relates.

4.8 However, section 349(1) of FSMA and section 92(1) of FSBRA provide that the general prohibition on the disclosure of confidential information referred to in paragraph 4.7 above does not prevent a disclosure where it is made for the purpose of facilitating the carrying out of a public function and is permitted by regulations made by HM Treasury. The 2001 Regulations and the 2014 Regulations made under those sections specify the circumstances in which confidential information may be disclosed, including the persons to whom and by whom, and purposes for which, confidential information may be disclosed. Unauthorised disclosure or use of confidential information is an offence.

4.9 These regulations amend the 2001 Regulations and the 2014 Regulations in order to add the C&AG and the NAO to the list of persons:

- to whom confidential information may be disclosed by a primary recipient;
- by whom confidential information, having been received from a primary recipient, may be further disclosed;

subject to restrictions on disclosure set out in certain EU legislative instruments and provided that the disclosure is made in respect of the functions set out in paragraph 4.10 below.

4.10 The functions for which disclosure may be made are:

- the C&AG's functions of carrying out economy, efficiency and effectiveness examinations under section 6 of the National Audit Act 1983 and section 7D of the Bank of England Act 1998;
- the NAO's functions under Schedule 3 to the Budget Responsibility and National Audit Act 2011 in relation to economy, efficiency and effectiveness examinations carried out by the C&AG.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 On 24 February 2016, the C&AG published a report ("the C&AG's report") on "Financial services mis-selling: regulation and redress". The C&AG's report made a recommendation, in paragraph 24 of the Summary, that "HM Treasury should: Strengthen the FCA's accountability by removing restrictions on the disclosure to the Comptroller and Auditor General of information that the FCA holds on firms, where this is permitted in EU law."

7.2 The C&AG's report and its recommendation were discussed further at the House of Commons' Public Accounts Committee ("PAC") hearing on 2 March 2016. On 7 April 2016, the Chair of the PAC wrote to HM Treasury to express the expectation that any action by HM Treasury to remove the restrictions on the FCA's sharing of confidential information should equally apply to the PSR, the PRA and the Bank. HM Treasury responded that it would give the PAC's suggestion "extremely careful consideration."

7.3 Page 7 of the PAC's Forty-first Report of Session 2015-16 ("the PAC's report"), published on 13 May 2016, stated that "Parliamentary accountability for financial regulation is undermined by restrictions on the NAO's access to information held by the FCA" and recommended that "HM Treasury should outline a timetable for proposing legislation to give the NAO access to information so that it can carry out full examinations of value for money."

7.4 The Government accepted the recommendation of the PAC in section 6 of the Treasury Minute published on 21 July 2016, stating that "the Government recognises that the Comptroller and Auditor General should have access that he reasonably requires to information from the financial regulators in order to fulfil his functions." The Government furthermore indicated that it would be considering how to provide the appropriate gateways necessary to facilitate this access.

7.5 The Government accepted the PAC's recommendation as it agreed that the NAO's evidential requirements for value for money assessments are such that the NAO would sometimes need to see confidential information. For example, if the NAO wanted to examine how effectively a regulator is measuring the impact of its regulation/supervision, it would need to look at how the regulators have documented behavioural responses from individual firms. This information is highly likely to be confidential information under section 348 of FSMA, and the creation of an appropriate legislative gateway was therefore deemed to be necessary.

Consolidation

7.6 There are no current plans to consolidate the 2001 Regulations.

8. Consultation outcome

8.1 This instrument has not been subject to a dedicated consultation. Whilst there is no legal requirement to consult, the financial regulators and the NAO have been informally consulted on the content of the instrument.

9. Guidance

9.1 The Treasury is not planning to produce any guidance for these Regulations.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The financial regulators will monitor and review the effectiveness and operation of these provisions from time to time.

13. Contact

13.1 Daniel Poxon at HM Treasury Telephone: 0207 270 6534 or email: Daniel.Poxon@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.