EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CARRYING ON REGULATED ACTIVITIES BY WAY OF BUSINESS) (AMENDMENT) ORDER 2014

2014 No. 3340

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 The instrument ensures that article 5 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (which provides that a person entering into a regulated sale and rent back agreement with a person to whom they are not related is to be regarded as doing so by way of business) does not cease to have effect on 1st January 2015. It does so by amending the date, in article 6 of that Order, on which article 5 ceases to have effect.

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

3.1 The instrument is made under the powers at sections 419 and 428(3) of the Financial Services and Markets Act 2000, which do not contain express provision about the imposition of requirements for reviews or 'sunsetting' provisions, however it is clear from section 14A of the Interpretation Act 1978 that such provision may be made.

4. Legislative Context

4.1 The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 ("the By Way of Business Order") provides circumstances in which a person who is carrying on certain activities is to be regarded as doing so by way of business for the purposes of section 22 of the Financial Services and Markets Act 2000. That section sets out the scope of activities which are regulated activities under the Act.

4.2 Articles 5 and 6 of the By Way of Business Order were inserted by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011. Article 5 makes provision about the circumstances in which an activity is carried on by way of business. Article 6 is a 'sunsetting' provision, which required a review and report on article 5 by the end of 2012 and provided for article 5 to cease to have effect on 1st January 2015.

4.3 This order extends the 'sunsetting' provision by amending the date by which a review and report must be completed and the date on which article 5 ceases to have effect.

5. Territorial Extent and Application

5.1 The instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury, Andrea Leadsom MP, has made the following statement regarding Human Rights:

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

7. Policy background

7.1 In 2011 the Government made an amendment to the 'by way of business' test which affects whether financial activity is regulated, as it applies to the Sale and Rent Back market (the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011). The amendment made it clear that firms acting in this market are acting 'by way of business' and are therefore carrying on a regulated activity, unless they are closely related to the homeowner selling the property. This reduced the scope of firms to circumvent regulation and allowed the Financial Conduct Authority ("FCA") to regulate this market effectively, as was originally intended by the Government.

7.2 The 2011 Order included a requirement for the Government to conduct a statutory review of the amendment in 2012 and a provision for it to cease to have effect on 1 January 2015.

7.3 In 2012, the Government published a statutory review of the original amendment. The purpose of the review was to determine whether the amendment had been effective in addressing its objectives – to allow the FCA to regulate the market effectively. However, it was difficult to make this assessment as there had only been a very limited number of transactions in the market following the introduction of the amendment. At that time the Government suggested that without this evidence it would be difficult to justify the extension of the amendment.

7.4 Ahead of reaching a final decision about whether to extend the 'by way of business' amendment, the Government reviewed the case for regulation again. In the absence of data from transactions, this review focused on whether the original case for regulation was still valid. The Government concluded that structural factors in the Sale and Rent Back market mean that there is limited scope in this market for profitable business that also treats customers fairly. As such, there is still a strong case for this

amendment which ensures the FCA are able to regulate the Sale and Rent Back market effectively.

8. Consultation outcome

8.1 As this legislation maintains the present position, a full consultation was considered unnecessary. However, during the review period, collection of evidence for the impact assessment and final decision making on this policy, the FCA and industry trade bodies were consulted. They were all supportive of the Government's assessment and final decision.

9. Guidance

9.1 Since there will be no changes to Financial Conduct Authority regulation arising from this instrument, there is no intention to provide extra guidance.

10. Impact

10.1 This instrument will have no impact on business, charities or the voluntary sector.

10.2 This instrument will have no impact on the public sector.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website

11. Regulating small business

11.1 The instrument maintains the present position and so will not increase the regulatory burdens on small business.

12. Monitoring & review

12.1 HM Treasury will monitor the practical effects of the instruments to ensure they continue to meet the policy aims. The instrument amends the statutory requirement for the Government to review the impact of the amendment made in 2011, such that a review and report must be completed by the end of 2017.

12.2 The instrument also amends the sunset clause which applies to the amendment made in 2011, such that the amendment will cease to have effect as of 1 January 2022.

13. Contact

13.1 Simon Smith at HM Treasury (tel: 0207 270 1883 or email: simon.smith@hmtreasury.gsi.gov.uk) can answer any queries regarding the instrument.