EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (MARKET ABUSE) REGULATIONS 2011

2011 No. 2928

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 These Regulations extend the sunset clauses in the Financial Services and Markets Act 2000 ("FSMA"), which would otherwise cease on 31 December 2011 so that subsections (4) and (8) of section 118 of the Act and related ancillary provisions will remain in force until 31 December 2014.

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

3.1 None

4. Legislative Context

4.1 These Regulations amend sections 118 and 118A of FSMA which were substituted, together with sections 118B and 118C, for the original section 118 by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005, as from 1 July 2005. Such Regulations implemented, in part, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation ("the Market Abuse Directive"). These sections were subsequently amended by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2008 (S.I. 2008/1439) and the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2009 (S.I. 2009/3128) ("the 2009 Regulations").

4.2 Subsections 118(4), 118(8), 118A(2) and 118A(3) of FSMA retain definitions of market abuse which are broader than those in Articles 1 to 5 of the EU Market Abuse Directive and were already in the original section 118. Section 118(9) (as amended by the 2009 Regulations) provides that the provisions in section 118 will cease to have effect on 31 December 2011; section 118A(6) does the same for the related provisions in section 118A.

Regulations 3(2) and 3(3) amend sections 118(9) and 118A(6) of FSMA; they change the date on which the provisions affected by those sections will cease to have effect. The result of these amendments is that subsections (4) and (8) of section 118 of FSMA and related ancillary provisions will remain in force until 31 December 2014.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Services Secretary to the Treasury has made the following statement regarding Human Rights:

In my view the provisions of the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The United Kingdom currently has a wider definition of market abuse than that established in the EU's 2003 Market Abuse Directive, which results from the UK having in place a preexisting domestic framework since 2001. When the Treasury transposed the Directive, the main challenge was to decide how much change was appropriate to the civil market abuse regime that had been put in place as part of FSMA in 2000. The FSMA regime and the Market Abuse Directive cover similar ground but adopt a slightly different approach to prohibiting abusive behaviour. The original FSMA regime defined market abuse in fairly broad terms and then qualified it by the requirement that behaviour is only abusive if it is likely to be regarded as such by a 'regular user' of the market. The Directive set out more specific descriptions of the type of behaviour that is to be prohibited.

7.2 On balance, it was decided to retain the scope of the UK's existing market abuse prohibitions (sections 118(4) and 118(8) of FSMA) as these go beyond the narrower prohibitions in the Directive, but to make them subject to a sunset clause whereby the provisions would expire after a period of three years pending the outcome of a review by HM Treasury to assess whether they remain justified.

7.3 Following consultation in February 2008, it was decided to extend the sunset clauses until 31 December 2009 in order to align with the outcome of the EU's review of the Market Abuse Directive. The review of the Market Abuse Directive was then repeatedly delayed following the financial crisis. This resulted in the UK's sunset provisions being extended on two occasions in total – in 2008, following the first consultation, and in 2009 when it became clear that the outcome of the EU review would be significantly delayed.

7.4 The European Commission launched a call for evidence on 20 April 2009, followed by a public consultation in June 2010. The Commission finally adopted proposals for a new Market Abuse Regulation to amend the Market Abuse Directive on 20 October 2011. It has therefore been decided to extend the sunset clauses further until 31 December 2014, reflecting the existing policy to align with the outcome of the EU review, which will likely take approximately three years to come into effect across Member States. This decision also follows an informal consultation in September 2011 to gauge the reaction of affected market participants. In the context of the wider EU review of the market abuse regime, the renewal of the sunset measures was supported by industry stakeholders.

- ***Consolidation***

7.5 There are no current plans to consolidate the Financial Services and Markets Act 2000. Commercial publishers produce consolidated versions of the Act, and a free consolidated version will be available on the Statute Law Database.

8. Consultation outcome

8.1 The Treasury held a three-month consultation between February and May 2008 to review whether the superequivalences remain justified and to seek views on whether the sunset clauses should be retained in the United Kingdom's civil market abuse regime. At this time, a small majority of the 16 respondents who took part felt it was appropriate to extend the UK's regime, pending the outcome of the European Commission's review.

8.2 Due to the existence of a previous review, in September 2011 an informal consultation was undertaken by HM Treasury, involving 17 affected market participants spanning investor groups, financial intermediaries and exchanges. The consultation elicited greater support for retaining the sunset measures, largely reflecting the fact that the EU review was shortly about to commence, and due to the Commission's policy objectives now being widely understood (which in 2008 were still unknown).

8.3 In light of these factors, it was proposed that the sunset clauses be extended for a short period until the outcome of the EU review is known, and to avoid two sets of changes in short order to the market abuse framework operating in the UK. On the outcome of the review, the UK will align with the standards imposed by the new EU Market Abuse Regulation. The sunset measures are therefore being extended for a further 3 years, which reflects our understanding of the likely period of time the negotiation will take and when this will come into effect.

9. Guidance

9.1 The FSA's Market Conduct sourcebook (MAR) contains the Code of Market Conduct and applies to all persons seeking guidance on the market abuse regime. MAR is available on the FSA website www.fsa.gov.uk

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

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 legislation applies to small business, but like other businesses should not affect them as the aim of the Regulations is to preserve the current legislative requirements.

12. Monitoring & review

12.1 This policy will be subject to review in 2014.

13. Contact

Camila Saunders at HM Treasury Tel: 020 7270 4427 or email: camila.saunders@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.