EXPLANATORY MEMORANDUM TO

THE ELECTRONIC PRESENTMENT OF INSTRUMENTS (EVIDENCE OF PAYMENT AND COMPENSATION FOR LOSS) REGULATIONS 2018

2018 No. 832

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 The purpose of the legislation is to ensure that the Image Clearing System (ICS) for cheques, an industry innovation that reduces cheque clearing times by sending a digital image of the cheque for clearing rather than the paper cheque itself, has no detrimental impact on the existing position for cheque users.

2.2 The legislation makes provision for two measures to do this. The first ensures that a copy of the cheque (along with some additional information) is provided to the creator of the cheque upon his or her request and that this copy has the same evidential value as a paper cheque that has been paid. The second measure provides, subject to conditions being met, that if the customer of the bank which pays the cheque or the bank that pays the cheque, incurs a loss in connection with the presentment of a cheque under the ICS, and they have not already received compensation, they can obtain compensation from the banker who presented the cheque.

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 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 Section 13 of the Small Business, Enterprise and Employment Act 2015 amended the Bills of Exchange Act 1882 ("the 1882 Act") by inserting Part 4A to allow UK banks and building societies to accept presentment of cheques and similar instruments by electronic image.

4.2 Section 89D of the 1882 Act contains provisions to enable HM Treasury to make regulations requiring that a copy of a cheque (or other similar instrument) be provided, on request, to the creator of the cheque by their bank, and that this copy be accompanied by additional information. Section 89D also enables HM Treasury to make regulations which provide that a copy of the cheque be evidence of receipt by the payee of the sum payable by the cheque.

4.3 Section 89E contains provisions enabling HM Treasury to make regulations requiring the banker who presented the cheque to compensate the customer of the bank which

pays the cheque or the bank that pays the cheque for a loss incurred in connection with electronic presentment of a cheque (or other similar instrument).

5. Extent and Territorial Application

5.1 This instrument extends to all of the United Kingdom.

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

6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury, John Glen, has made the following statement regarding Human Rights:

"In my view the provisions of The Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Cheques continue to form a vital part of the British payments landscape. In 2016, 477 million cheques were used for payments and to acquire cash across the UK with a total value of £551 billion.

7.2 In 2015, HM Treasury introduced measures in the Small Business, Enterprise and Employment Act, amending the Bills of Exchange Act 1882, to allow UK banks and building societies to introduce cheque imaging, an innovation that aims to cut down cheque clearing times from a possible six days to one day by sending a digital image of the cheque for clearing, rather than the paper cheque itself.

7.3 The purpose of The Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018 ("the Regulations") is to ensure that the introduction of the ICS has no detrimental impact on the existing position for cheque users. It makes provision for two measures to do so.

7.4 The first requires that a copy of the cheque (along with some additional information) is provided to the creator of the cheque upon his or her request. Prior to ICS, a customer could require that the original cheque be returned to them. This will not be possible post-ICS, so this measure is intended to replicate the benefits that this provides to the customer. This measure also requires that additional information be provided with the copy of the cheque that may be useful to the customer in certain circumstances: confirmation of the decision of the banker that the payment should be made (including automated decisions); the date that the decision was made (or the date upon which the automated decision was made); the value of the payment made; the sort code and account number of the payer of the cheque; any reference number allocated by the banker authorised to collect payment of the instrument (used to identify the payment instrument).

7.5 The second ensures that if a customer of the bank which pays the cheque or the bank that pays the cheque, incurs a loss in connection with the presentment of a cheque under the ICS (that did not result from gross negligence or fraudulent activity on their part), and they have not already received compensation, they can claim compensation from the banker who presented the cheque.

7.6 There is currently no legislation in place to ensure that the creator or payer of a cheque is not left out of pocket in the event that they experience a loss. Compensation is generally determined via the scheme rules of the payment system operator (Cheque & Credit). The Regulations are not intended to override or replace other channels for compensation, such as the operator's scheme rules. The Regulations implement the compensation powers afforded to HM Treasury under section 89E of the 1882 Act and are intended only as a backstop to ensure that customers are not left out of pocket, which the government believes is necessary given that the ICS represents a significant change to the way cheques are processed.

Consolidation

7.7 Not applicable.

8. Consultation outcome

8.1 HM Treasury ran a public consultation on the Regulations. HM Treasury received fifteen responses, and engaged with four other institutions.

8.2 HM Treasury engaged with respondents following the consultation and has made minor amendments to the Regulations. HM Treasury has removed the requirement to provide some additional pieces of information with a copy of a cheque, and has clarified that the legislation regarding compensation is not intended to override existing channels for compensation. The consultation response can be found at https://www.gov.uk/government/consultations/legislation-to-support-cheque-imaging

9. Guidance

9.1 HM Treasury does not intend to publish guidance on this instrument, but has published a consultation response document. Users of cheques will be able to obtain guidance from Cheque & Credit, or from their banks, on how to receive copies of cheques and compensation.

10. Impact

10.1 An impact on businesses that allow their customers to pay using cheques (such as banks or building societies) is that they will be required to provide a copy of a cheque to the drawer of the cheque, along with the additional information noted above, should the customer request it. Most businesses consulted noted that this was already standard industry practice, so it is not expected to place a significant burden on industry.

10.2 An impact on businesses that allow their customers to receive payment via cheques (such as banks or building societies) is that, should a customer of the bank that pays the cheque, or the bank that pays the cheque, incur a loss in connection with the ICS (that did not result from gross negligence or fraudulent activity on their part), they can obtain compensation from the banker who presented the cheque (that is, the payee's bank). As noted above, scheme rules currently determine which party should pay compensation under what circumstances, and the Regulations are not intended to overwrite scheme rules, only to act as a backstop. Furthermore, the paying bank is still obliged to compensate a customer where they have debited their account incorrectly. It is therefore expected that the impact of the provision will be minimal.

10.3 The impact on the public sector, charities, voluntary bodies and businesses as users of cheques of the Regulations is that that they have the right to request a copy of their

paid cheque, and that they have the right, if certain conditions are met, to compensation should they incur a loss in connection with the ICS.

10.4 An Impact Assessment has not been prepared for this instrument. These measures are provided for in amendments made to the Bills of Exchange Act 1882 by the Small Business, Enterprise and Employment Act 2015. A full impact assessment for these amendments have already been provided, and can be found at https://www.gov.uk/government/publications/small-business-enterprise-and-employment-bill-impact-assessments

11. Regulating small business

11.1 The legislation applies to small businesses. The Regulations will enable anyone that uses cheques (including small businesses) to request a copy of their paid cheque, along with the additional information noted above, and, if certain conditions are met, to obtain compensation from the payee's bank in the event that they incur a loss in connection with ICS.

11.2 As noted in the section above, it is already standard industry practice to provide a copy of a cheque if requested and so these Regulations should not place a significant additional burden on small businesses. Additionally, the impact of the compensation provision on industry as a whole, including small businesses, is expected to be minimal.

11.3 Following the consultation outlined above, in order to help minimise the burden on industry (including small businesses), HM Treasury limited the requirement to provide additional pieces of information with a copy of a cheque to those noted in 7.4 above.

12. Monitoring & review

12.1 Regulation 10 of the instrument provides for the Treasury to undertake periodic reviews of the measures taken and for reports in respect of those reviews to be published.

13. Contact

13.1 James Evans at HM Treasury Telephone: 020 7270 5104 or email: James.Evans@hmtreasury.gov.uk can answer any queries regarding the instrument.