

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CONSUMER CREDIT)
(MISCELLANEOUS PROVISIONS) ORDER 2014

2014 No. 208

- 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 makes provision in connection with the transfer of consumer credit regulation from the Office of Fair Trading (“OFT”) to the Financial Conduct Authority (“FCA”) which is effected by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, S.I. 2013/1881, and the Financial Services Act 2012 (Consumer Credit) Order 2013, S.I. 2013/1882.

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

3.1 None

4. Legislative Context

4.1 The Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) Order 2014 is made under section 2(2) of the European Communities Act 1972 and section 426(1) of the Financial Services and Markets Act 2000.

5. Territorial Extent and Application

5.1 The instrument applies to all of 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

7.1 The instrument makes provision in connection with the transfer of consumer credit regulation from the OFT to the FCA as follows:

- to provide for persons to make an application to the FCA under the Financial Services and Markets Act 2000 (“FSMA”) for a determination enabling the enforcement of consumer credit agreements that would otherwise be unenforceable;
- to amend the Financial Services (Distance Marketing) Regulations 2004, S.I. 2004/2095. The amendments replace references to the Office of Fair Trading, which will cease to exist on 1st April 2004¹ with references to the Financial Conduct Authority and to the Competition and Markets Authority as appropriate;
- to amend the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, S.I. 2005/1529, so that communications made by an employer to an employee in relation to a loan which is an exempt credit agreement for the purposes of Financial Services and Markets Act 2000 (Regulated Activities) Order (S.I. 2001/544) (“the RAO”) are exempt from the restriction on financial promotions;
- to make a consequential amendment to the Consumer Credit (Disclosure of Information) Regulations 2010 (S.I. 2010/1013) to reflect the movement of the regulation of consumer credit from the Office of Fair Trading to the Financial Conduct Authority, and to make a related transitional provision;
- to make provision in respect of the enforceability of agreements for ancillary credit services and agreements made by unlicensed traders before 1st April 2014;
- to permit the Financial Conduct Authority to issue directions specifying dates before which an application for interim permission may not be submitted (as well as dates by which such applications must be submitted). The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 confers interim permission for the purposes of FSMA on persons holding consumer credit licences immediately before 1st April 2014 (or undertaking consumer credit activity in the relevant period before that date) who make an application to the Financial Conduct Authority and pay the relevant fee. Such persons must then apply for full permission under FSMA before 1st April 2016. This amendment will enable the Financial Conduct Authority to manage the flow of applications over that period, and to adopt a risk-based approach to the timetabling of applications for permission relating to various categories of regulated activity;
- to maintain the current position of persons who undertake regulated activities only when incidental to professional services or in relation to a connected contract. In the latter case, the amendments maintains eligibility for the connected contracts exemption up until the point the person is fully authorised under FSMA for

¹ Section 26 of the Enterprise and Regulatory Reform Act 2013 abolishes the Office of Fair Trading.

consumer credit activity, at which point they will also need to be fully authorised for any other regulated activity; and

- to permit the Financial Conduct Authority to claim legal professional privilege in relation to legal advice given to the Office of Fair Trading and transferred to the Financial Conduct Authority in connection with the transfer of the regulation of consumer credit.

8. Consultation outcome

8.1 The Government consulted the FCA during the preparation of these instruments.

8.2 The Finance and Leasing Association (FLA) was consulted in relation to the provision dealing with the connected contracts exemption.

9. Guidance

9.1 Further guidance will be made available by the FCA.

10. Impact

10.1 The impact on business, charities or voluntary bodies of the transfer of consumer credit regulation from the OFT to the FCA is set out in the accompanying impact assessment. The Government's best estimate of the total cost to business of the new regulatory regime is £336million over 10 years (at 2013 prices). The Government's best estimate of benefits of the regime is £689million over 10 years. The estimated net benefit over 10 years is £353million.

10.2 The impact on the public sector is not quantified as public sector organisations generally do not undertake consumer credit activities, apart from local authorities which offer certain types of unsecured credit agreements. The Government has consulted local authorities and found that comparatively few authorities would need to be authorised. As noted above, this SI also provides that local authorities which are authorised for consumer credit activities will be excluded from a requirement to be authorised for other FCA-regulated activities.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the regulatory regime for consumer credit has been designed so that small firms will be subject to proportionate and manageable burdens:

- Many small firms will be able to take advantage of the limited permission regime which will impose lower costs and reduced administrative requirements on eligible firms;
- Small firms (except lenders which apply interest and charges to loans) will have the option to become an appointed representative, as a way for smaller firms to operate without having to shoulder the burden of direct authorisation and regulation;
- Consumer credit firms will not be subject to minimum capital requirements (except where they undertake debt management business);
- Existing exemptions from regulation for agents of mail order firms and home credit providers will continue;
- Firms which specialise in finding or tracing individuals, where these are not carrying on a financial services business will be removed from the scope of regulation; and
- In addition, the FCA proposes to introduce a differentiated fee charging system, which will reflect the size of firms.

11.3 The basis for the final decision on what action to take to assist small business is ensure that small businesses gain from the reputational benefits of a better-regulated and well-functioning market and to ensure that small businesses are subject to appropriate and proportionate regulatory burdens. The Government has decided against exempting small business from this policy, as its objective is to strengthen consumer protection across the consumer credit market.

12. Monitoring & review

12.1 HM Treasury will monitor the practical effects of the instruments to ensure they continue to meet the policy aims.

13. Contact

13.1 Laura Hanoman at HM Treasury (tel: 0207 270 5507 or email: laura.hanoman@hmtreasury.gsi.gov.uk) can answer any queries regarding the instruments.