EXPLANATORY MEMORANDUM TO

THE HERITABLE BANK PLC TRANSFER OF CERTAIN RIGHTS AND LIABILITIES (AMENDMENT) ORDER 2009

2009 No. 310

AND

THE KAUPTHING SINGER & FRIEDLANDER LIMITED TRANSFER OF CERTAIN RIGHTS AND LIABILITIES (AMENDMENT) ORDER 2009

2009 No. 308

1. This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty. It relates to the Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities (Amendment) Order 2009 and the Heritable Bank plc Transfer of Certain Rights and Liabilities (Amendment) Order 2009. These Orders are linked and the issues raised by each Order are very similar. In light of this, a single memorandum has been prepared for both instruments.

2. Purpose of the instruments

2.1 The Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities (Amendment) Order 2009 amends and modifies the Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008 (SI 2008/2674) ("the Kaupthing transfer order"). The Heritable Bank plc Transfer of Certain Rights and Liabilities (Amendment) Order 2009 amends and modifies the Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008 (SI 2008/2644) ("the Heritable transfer order").

2.2. In both cases, the Orders update the transfer orders to reflect changes which have taken place since they were made and correct certain drafting errors and ambiguities. The key changes being made are outlined below.

2.3 Articles 14(5) and (6) of the Kaupthing transfer order and article 13(5) of the Heritable transfer order provide that the Financial Services Compensation Scheme ("the FSCS") may revise from time to time the estimate of its liabilities in relation to the amount payable to ING in respect of FSCS eligible depositors who would have been entitled to have made claims from the FSCS had the transfers not taken place and whose deposits were transferred to ING (i.e. up to the cap of £50,000 per eligible depositor). Similarly, Kaupthing and Heritable may revise from time to time the estimate of the transferred liabilities i.e. the sum of the accounts transferred to ING. The Treasury consider that it would be appropriate to clarify these provisions to make clear that the parties (the FSCS, the Treasury, ING and Heritable/Kaupthing) may

agree that no further revisions are appropriate or necessary and that no further corresponding payments need to be made in accordance with those revisions. In such a case, the Treasury consider that the parties should be enabled to agree that Articles 14(5) and (6) of the Kaupthing transfer order and article 13(5) of the Heritable transfer order, as appropriate, shall cease to have effect. Accordingly the Treasury have inserted a new article 13(5a) into the Heritable transfer order and a new article 14(6a) into the Kaupthing transfer order.
2.4 Article 21(11) of the Kaupthing transfer order provides that certain disposals of assets by the administrator of Kaupthing, Singer and Friedlander may only be made if approved by (i) the court, (ii) the Treasury or (iii) the creditors committee established in accordance with insolvency law and the Treasury. As a creditors' committee has now been established for Kaupthing Singer & Friedlander and is operating effectively, there is no longer a requirement for Treasury approval, in addition to that of the creditor committee, for disposal of Kaupthing Singer & Friedlander's assets. The Kaupthing transfer order is therefore amended to remove this requirement.

2.5 Article 23 of the Heritable transfer order provides that the Treasury must reimburse Heritable for the costs and expenses incurred by the administrator in fulfilling his obligations under article 20*(1).* Article 20(1) does not impose any obligations on the administrator. However article 20(2) does and it is considered sufficiently clear that this was the legislative intention that a court would be likely to interpret the reference in the Heritable transfer order to article 20(1) as a reference to article 20. However to remove doubt on the point, the Heritable transfer order is amended to address this point. The amendment is to have effect from the date on which the Heritable transfer order took effect.

2.6 Article 23 of the Heritable transfer order requires the Treasury to bear the costs of the administrator incurred in exercising his functions under article 20 of the Heritable transfer order. From the date on which the deposits were transferred to ING Direct, it has been ING Direct which has received the benefit of the obligation imposed on the administrator. Having discussed this matter with ING Direct, it is considered appropriate to modify article 23 of the Heritable transfer order to provide that, from the date on which the deposits were transferred to ING Direct, it is ING Direct who should reimburse the administrator for costs incurred.

2.7. The appropriateness of making the modifications to the Heritable transfer order with retrospective effect is considered below.

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

3.1 It has not been possible to comply with the 21 day rule in making these instruments. The primary enabling power in each case is section 6 of the Banking (Special Provisions) Act 2008. Under section 2(8) of that Act that power may not be exercised after the end of the period of one year beginning with the day on which the Act was passed. This period ends on 20 February

2009. It is therefore necessary to make the orders before that date. The Treasury had originally proposed to make the orders before that date but to allow at least 21 days before bringing the orders into force.

3.2 However, it has recently become apparent that there may be some doubt as to whether this approach would be permitted under the Banking (Special Provisions) Act 2008. This is because section 2(8) of the Act provides that section 2(8) does not affect "the continuation in force or effect of any order made" under section 6 before the end of the specified period. It is now considered that this might cast doubt on the ability of the Treasury to make an order under section 6 which did not come into force prior to 21 February 2009. This issue has only recently come to light.

3.3 As noted above, certain provisions of the Heritable Bank plc Transfer of Certain Rights and Liabilities (Amendment) Order 2009 (article 2(3) and (4)) have retrospective effect, pursuant to the power conferred by section 14 of the Banking (Special Provisions) Act 2008. These provisions relate to the reimbursement of the expenses of the administrator in performing his functions under article 20 of the Heritable transfer order in connection with the transferred accounts. The effect of these amendments is to clarify the drafting of the provision and to provide that, from the date at which the accounts were transferred to ING Direct, it is ING Direct (rather than the Treasury) which is to reimburse the administrator for the costs incurred.

3.4 These amendments have been discussed with ING Direct who confirm that they consider that current drafting of the Heritable transfer order does not reflect the intentions of ING Direct and the Treasury at the time the accounts were transferred and that it is not aware of any reason why these amendments should not be made with retrospective effect. In particular, ING Direct has confirmed that it has not taken any action or changed its position in reliance on the existing wording.

4. Legislative Context

4.1 Both Orders are made under the Banking (Special Provisions) Act 2008.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

7.1 In the interests of maintaining the financial stability of the UK financial system and to protect retail depositors, the Treasury, using powers under the Banking (Special Provisions) Act 2008, transferred retail deposits and associated rights in the UK subsidiaries of two Icelandic banks. The two subsidiaries concerned were Heritable (a subsidiary of Landsbanki) and Kaupthing Singer & Friedlander (a subsidiary of Kaupthing). The deposits were initially transferred to companies wholly owned by the Treasury (in the case of Heritable) and by the Bank of England (in the case of Kaupthing Singer and Friedlander).The retail deposits were subsequently transferred to ING Direct. This action was taken to protect savers' money and provide certainty for retail depositors.

7.2 The purpose of these orders is to make amendments to the transfer orders to reflect changes which have taken place since the original transfer and to amend drafting errors and ambiguities in the transfer orders.

8. Consultation outcome

8.1 None

9. Guidance

9.1 The Treasury will not be publishing guidance on the amendments to the Transfer Orders.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for these instruments as they have no impact on business, charities or the voluntary sector. In the case of the Heritable transfer order, the cost on business of this measure is incurred voluntarily and it is assumed that the business involved (ING Direct) was doing so because it made commercial sense and the benefit outweighed the cost. In the case of the Kaupthing transfer Order, the removal of the requirements for Treasury consent, in addition to that of the Creditor Committee, for disposal of Kaupthing Singer & Friedlander's assets does not impose any costs. Infact, it provides for a more efficient process.

10.2 There is no impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 No monitoring or review is considered necessary.

13. Contact

Victoria Gibbs, at the Treasury. Tel: 020 7270 4427 or email: Victoria.Gibbs@hm-treasury.x.gsi.gov.uk can answer any queries regarding the instrument.