EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) (NO. 3) ORDER 2015

2015 No. 1863

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 instrument clarifies the correct regulatory treatment under the Financial Services and Markets Act 2000 for a small number of first charge mortgages dating from before 31st October 2004, and makes supplementary changes necessary to ensure that the legislative changes to the regulatory regime for mortgages which were made at the time of the UK's implementation of Directive 2014/17/EU on credit agreements relating to residential immovable property, more commonly known as the EU Mortgage Credit Directive (MCD), achieve the policy intent previously announced in the 2015 consultation response.

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

3.1 None.

4. Legislative Context

4.1 This order is made in exercise of the power to specify activities which are regulated under the Financial Services and Markets Act 2000. By virtue of paragraph 26(2) of Schedule 2 to that Act, the exercise of that power is subject to the affirmative resolution procedure where the order contains a statement by the Treasury that, in their opinion, one of the effects of the proposed order would be that an activity which is not a regulated activity would become a regulated activity.

4.2 The instrument does contain such a statement. Article 2(2) of the instrument amends the drafting of an exemption from regulation of credit agreements so that the exemption reflects more closely the corresponding exemption at section 16(6C) of the Consumer Credit Act 1974 (now repealed), which was the predecessor of the current exemption. Because the drafting of the current exemption is narrowed, it is possible that there may be a type of agreement which previously benefited from the exemption and which will no longer benefit from the exemption after the amendment.

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, Harriett Baldwin MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 3) Order 2015 are compatible with the Convention rights."

7. Policy background

7.1 The Government made the necessary legislative changes to implement the MCD in the Mortgage Credit Directive Order 2015 (S.I. 2015/910), which was made on 25 March 2015. More detail on the changes made can be found on the Government's consultation webpage: https://www.gov.uk/government/consultations/implementation-of-the-eu-mortgage-credit-directive .

7.2 In the summary of responses published in March 2015, it was announced that "the Government has amended [the Draft Mortgage Credit Directive Order 2015] so that any type of existing consumer credit regulated loans that would, if made after March 2016, be regulated as a mortgage, whether first or second charge will move to [the mortgages regime] as we implement the MCD".

7.3 The Government has engaged closely with industry in order to support implementation efforts. It has emerged, however, that in a number of areas further legislative change is necessary in order to ensure that the Government's policy aims are achieved fully.

7.4 The instrument therefore makes three amendments. First, it clarifies the scope of the exemption from regulation as a credit agreement for mortgages contracts and home purchase plans, so that they are only exempted from regulation as credit agreements if entering into them is in fact subject to regulation in one of those other categories. Second, it ensures that mortgages dating from before 31st October 2004 and which are currently regulated as credit agreements, are instead regulated as mortgages from 31st March 2016. And third, it ensures that an existing exemption from the regulation of credit agreements remains available for equitable mortgages used as bridging loans once they become regulated as mortgages rather than credit agreements from 31st March 2016.

8. Consultation outcome

8.1 The Mortgage Credit Directive Order 2015 was made on 25 March 2015. Following the General Election on 7 May 2015, the Government resumed consulting with industry groups in order to understand their emerging plans for compliance with the requirements of the MCD and support the transition to the new regulatory framework. At this point, it emerged that there were several issues that had not been identified previously but which warranted legislative action in order to ensure the policy intent that had previously been consulted on was put in place. The Government then developed this instrument in close coordination with relevant industry stakeholders.

9. Guidance

9.1 The Financial Conduct Authority (FCA) have responsibility for the conduct regulation of mortgages in the UK. The FCA provide guidance on their rules where this is appropriate, as well as on the scope of regulation.

10. Impact

10.1 The Equivalent Annual Net Cost to Business of the changes to be made to the regulation of mortgages in March 2016 is already covered within the Impact Assessment for the Mortgage Credit Directive Order 2015. As such this instrument adds no additional costs to business and the relevant EANCB is £0.

10.2 The impact on the public sector, charities or voluntary bodies is nil.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 This legislation will not alter the impact on small businesses of the changes to the mortgages regime in March 2016 as set out in the impact assessment for the Mortgage Credit Directive Order 2015. The changes contained in this Order were developed in response to queries from businesses and will clarify the impact of the original changes.

12. Monitoring & review

12.1 This instrument does not contain a requirement to conduct a separate review in relation to it. Under the Small, Business, Enterprise and Employment Act 2015, a Minister may publish a statement that it is not appropriate in the circumstances to make provision for review, rather than including such a provision. One of the circumstances in which a Minister may determine that it is not appropriate to make provision for review is where a review would be disproportionate taking into the economic impact of the regulation. The Economic Secretary to the Treasury, Harriett Baldwin MP, has made the following statement: "In my view the economic impact of this regulation is negligible. As such, it would be disproportionate to the economic impact of the regulation to include a separate statutory requirement for it to be reviewed".

12.2 HM Treasury will however monitor the practical effects of the instrument to ensure that it provides a useful clarification to firms seeking to comply with the UK's regulatory framework for mortgage lending. The Mortgage Credit Directive Order 2015 requires that a review of that Order be carried out by 1st September 2018 and at intervals of no more than five years thereafter, and that review will need to consider the regulatory regime for mortgages as amended up to the date of the review, including the amendments made by this instrument.

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.