EXPLANATORY MEMORANDUM TO

THE PAYMENT TO TREASURY OF PENALTIES (ENFORCEMENT COSTS) ORDER 2013

2013 No. 418

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 This Order relates to new arrangements to require revenue from fines received by regulators of financial services to be passed to the Treasury net of enforcement case costs for the year. The Order further specifies the enforcement functions which are relevant in netting off enforcement costs. The Order specifies the functions of prosecuting any criminal offence under the law of any part of the United Kingdom (other than those already specified in section 109 of the Financial Services Act 2012), the functions of the Financial Services Authority's (FSA) and the Financial Conduct Authority's (FCA) in relation to insolvency proceedings where there has been a breach of the regulatory perimeter. The Order also allows the FSA, FCA and Bank of England to net off against FSMA penalties those enforcement costs incurred under the various "stand alone" regulatory regimes which those regulators operate – such as the Money Laundering Regulations 2007.

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

3.1 None.

4. Legislative Context

4.1 This Order relates to provisions of the Financial Services and Markets Act 2000 (c.8) ("FSMA 2000") and the Financial Services Act 2012 (c.21) ("the 2012 Act") which require the regulator of financial services (the Financial Services Authority, the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England, depending on the context) to pay to the Treasury the amounts received by the regulator by way of penalties imposed under the FSMA 2000 or (in the case of the Bank of England) under the Banking Act 2009 (c.1). The regulator must make the payment after deducting its enforcement costs.

5. Territorial Extent and Application

5.1 This 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 Financial Services Act 2012 provides for financial services regulatory fines revenue net of enforcement case costs for the year to be passed to the Treasury, who must surrender it to the Consolidated Fund (the Government's "current account" with the Bank of England). The new arrangements are effective in relation to penalties received from 1 April 2012 and will apply to the FSA, to the FSA's successors, the new Financial Conduct Authority and Prudential Regulation Authority as regulators of the financial services sector, and to the Bank of England in its role in regulating payment systems and clearing houses.

7.2 Allowing the regulators to net off enforcement costs helps protect compliant firms from costs directly attributable to the misconduct of other firms. The Financial Services Act 2012 provides that enforcement costs include costs involved in the investigation and prosecution of "relevant offences" specified in the legislative framework for the regulation of financial services and markets (such as FSMA 2000) and allows the Treasury to specify other "relevant offences" by order.

7.3 Whilst the regulators primarily prosecute for offences created by or under FSMA 2000 or those specifically listed in section 402 of FSMA 2000, they do on occasion prosecute other offences such as theft. The Order therefore specifies that all offences – except those created under foreign law, those which have already been specified by the relevant legislative provisions or (in the case of the Prudential Regulation Authority and the Bank of England) offences which the regulator would not have any role in prosecuting – are "relevant offences".

7.4 In addition, where the FSA or FCA identifies that a person has been carrying on a regulated activity without permission under FSMA 2000 in contravention of the offence under section 19 of that Act, one possible course of action (usually as an alternative to prosecution) may be to instigate insolvency proceedings. For example where a company has been conducting regulated activities without permission in breach of the general prohibition, the FSA have the power to wind up the company as a means of stopping the unauthorised activity and obtaining recovery of funds for consumers in a speedy and effective manner.

7.5 The Order also allows the FSA, FCA and Bank of England to net off against FSMA penalties enforcement costs incurred under the various "stand alone" regulatory regimes which those regulators operate – such as the Money Laundering Regulations 2007. This is necessary to ensure that, where possible, revenue from penalties is used to protect compliant firms from the direct costs of enforcement cases in the "stand alone" regulatory regimes.

8. Consultation outcome

8.1 HM Treasury has consulted the FSA and the Bank of England in the preparation of this instrument.

9. Guidance

9.1 None.

10. Impact

10.1 The instrument, in itself, does not impose any additional regulatory burdens on business, charities or voluntary bodies.

10.2 An Impact Assessment has not been prepared specifically for this instrument. Instead the overarching Impact Assessment that covers the changes to the regulatory system provided for by the 2012 Act is available on the Treasury website as Annex H to the following publication: http://www.hm-treasury.gov.uk./d/condoc_fin_regulation_draft_secondary_leg.pdf.

11. Regulating small business

11.1 This instrument will not impose additional burdens on small businesses.

12. Monitoring & review

12.1 HM Treasury will monitor the practical effects of this instrument to ensure it continues to meet the policy aims.

13. Contact

James Aitken at HM Treasury Tel: 0207 270 6152 or email: james.aitken@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.