

Regulating the sale and rent back market: a consultation

February 2009



HM TREASURY



HM TREASURY

Regulating the sale and rent back market: a consultation

February 2009

© Crown copyright 2009

The text in this document (excluding the Royal Coat of Arms and departmental logos) may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the document specified.

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

For any other use of this material please write to Office of Public Sector Information, Information Policy Team, Kew, Richmond, Surrey TW9 4DU or e-mail: licensing@opsi.gov.uk

HM Treasury contacts

This document can be found in full on our website at:
hm-treasury.gov.uk

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

Correspondence and Enquiry Unit

HM Treasury

1 Horse Guards Road

London

SW1A 2HQ

Tel: 020 7270 4558

Fax: 020 7270 4861

E-mail: public.enquiries@hm-treasury.gov.uk

Printed on at least 75% recycled paper.
When you have finished with it please recycle it again.

ISBN 978-1-84532-558-9
PU689

Contents

		Page
Chapter 1	Introduction	3
Chapter 2	Background to the consultation	9
Chapter 3	Issues for consideration	17
Chapter 4	Next steps	25
Annex A	Impact assessment	27
Annex B	Draft statutory instrument	47

1

Introduction

Subject of the consultation

1.1 The sale and rent back market offers homeowners the option of selling their properties at discounted rates in exchange for tenancy arrangements. A range of stakeholders, including the mortgage industry and consumer groups, has expressed concerns regarding this market. At Budget 2008, the Government asked the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) to investigate the sale and rent back market, focusing on consumers' experience of these arrangements, and consider options where appropriate to strengthen consumer protections. On 14 May 2008 the OFT announced that it would conduct a formal market study, working to an expedited timetable in light of stakeholder concerns.

1.2 The OFT published its report on 15 October 2008.¹ The report made three recommendations to Government, that:

- the sale and rent back sector should be regulated by the Financial Services Authority (FSA) and the regulations should cover transparency, advice and reducing the risks to consumers;
- in the short term, Government programmes targeted at people experiencing financial difficulty should include efforts to raise awareness of sale and rent back, with the key message being that it is a risky product and that those considering it should seek independent advice; and
- the Department for Work and Pensions (DWP) should provide greater clarity on the eligibility of sale and rent back tenants for Housing Benefit.

1.3 The Government accepted these recommendations, and at the 2008 Pre-Budget Report confirmed the intention to consult on strengthening consumer protections in the sale and rent back market, including extending the scope of FSA regulation to include sale and rent back agreements. The purpose of this consultation is to help ensure appropriate consumer protections in the sale and rent back market. It seeks stakeholder views on the following questions:

¹ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008. Available at: http://www.of.gov.uk/shared_of/reports/consumer_protection/oft1018.pdf.

Question 1: Do you agree with the OFT's analysis of the sale and rent back market, as presented in Chapter 2 of this consultation?

Question 2: Do you agree that the sale and rent back market does not currently work well for consumers?

Question 3: Do you agree with the estimated costs and benefits of the three options, as presented in the Impact Assessment in Annex A?

Question 4: Do you agree with the OFT that the existing regulatory framework is unlikely to provide appropriate consumer protection in the sale and rent back market?

Question 5: Do you agree with the OFT that self-regulation is unlikely to provide appropriate consumer protection in the sale and rent back market?

Question 6: Do you agree with the OFT that FSA regulation would provide appropriate consumer protections in the sale and rent back market?

Question 7: Does the proposed definition of a regulated sale and rent back agreement capture existing and potential sale and rent back models?

Question 8: Does the proposed definition of a regulated sale and rent back agreement exclude arrangements which are not sale and rent back agreements, for example equity release products?

Question 9: Do you agree with the Government's proposed approach to the situation where there is a gap between sale and taking up of occupancy?

Question 10: Do you agree with the Government's approach to intermediaries in relation to sale and rent back agreements?

Question 11: Do you agree with the Government's approach to the regulation of third parties?

Question 12: Do you agree with the Government's approach to administering activities relating to sale and rent back activities?

Question 13: Do you agree with the Government's proposed approach to activities to be excluded from the regulatory regime for sale and rent back agreements?

Question 14: Do you agree with the Government and the FSA's proposed approach to an interim regime for sale and rent back agreements?

Question 15: Do you agree with the proposed restrictions to those who may receive interim permission in relation to sale and rent back agreements?

Structure of the consultation

1.4 The main body of the consultation is divided into five sections:

- Chapter 2 – provides the background to the consultation, including the policy responses the Government is considering.
- Chapter 3 – sets out the issues considered by this consultation, and the context in which the Government seeks views on the questions above.
- Chapter 4 – outlines the next steps Government will take following this consultation.

- Annex A – presents an impact assessment for the policy proposed in this consultation.
- Annex B – presents the draft Statutory Instrument which would extend the scope of FSA regulation to cover the sale and rent back market.

Responding to the consultation

1.5 This consultation document represents part of a wider process of discussion and engagement with stakeholders. In particular, HM Treasury has met with market participants and consumer groups.

1.6 Comments on the specific questions raised in the consultation are welcome. Where possible, stakeholders are encouraged to provide evidence to support specific points. This consultation began with the publication of this document and will last for a period of 12 weeks, closing on 1 May 2009. Responses should be sent by email if possible to:

Saleandrentback@hm-treasury.x.gsi.gov.uk. Or by post to:

Sale and rent back consultation

c/o Michael Cornford

Mortgage and credit policy

HM Treasury

1 Horse Guards Road

London

SW1A 2HQ

1.7 Please note our preference is to receive responses in electronic format only (all email responses will be acknowledged).

1.8 This document can be found on the website of HM Treasury (www.hm-treasury.gov.uk). When responding, please state whether you are responding as an individual or as part of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the members' views were assembled.

Consultation disclosure

1.9 All written responses may be made public on the Treasury's website unless the author specifically requests otherwise in writing.

1.10 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regime. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004.

1.11 If you would like the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances.

1.12 In the case of electronic responses, general confidentiality disclaimers that often appear at the bottom of emails will be disregarded for the purpose of publishing responses unless an explicit request for confidentiality is made in the body of the response.

1.13 Subject to the previous two paragraphs, if you wish part (but not all) of your response to remain confidential, please supply two versions – one for publication on the website with the confidential information deleted, and another confidential version for use by the Treasury.

1.14 Any Freedom of Information Act queries should be sent by email to:

public.enquiries@hm-treasury.gov.uk. Or by post to:

Correspondence and Enquiry Unit

Freedom of Information Section

HM Treasury

1 Horse Guards Road

London

SW1A 2HQ

Code of practice for written consultation

1.15 This consultation is being conducted in line with the Code of Practice for written consultation (a full version can be found at www.cabinetoffice.gov.uk/regulation/code.htm), which sets down the following criteria:

- consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
- be clear about what the proposals are, who may be affected, what questions are being asked, and the timescale for responses;
- ensure the consultation is clear, concise and widely accessible;
- give feedback regarding the responses received and how the consultation process influenced the policy;
- monitor the department's effectiveness at consultation, including through the use of a designated consultation coordinator; and
- ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

1.16 If you feel that this consultation does not fulfil these criteria, please contact:

Angela.Carden@hm-treasury.gov.uk. Or by post:

Angela Carden

Better Regulation Unit

HM Treasury

1 Horse Guards Road

London

SW1A 2HQ

Impact assessment

1.17 An impact assessment for the options under consideration is published with this document in Annex A and should be read in conjunction with this consultation. The impact assessment considers qualitative, and where possible quantitative, benefits and costs for implementation. It draws on results of the OFT market study.

FSA consultation

1.18 Alongside this consultation, the FSA is publishing its consultation on a potential interim regulatory regime. The FSA's consultation closes on 1 May 2009, and is available at: www.fsa.gov.uk/Pages/Library/Policy/CP/index.shtml.

2

Background to the consultation

Supporting homeowners in difficulty

2.1 The Government is committed to supporting homeowners in financial difficulty and preventing the exploitation of vulnerable consumers. The Government has recently announced a range of measures to help homeowners during these difficult times.

2.2 Statutory regulation of mortgages and credit provides homeowners with important protections and appropriate means of redress. In 2004 the Government extended the scope of Financial Services Authority (FSA) regulation to cover first charge residential mortgages. Regulation of other credit business is covered by consumer credit legislation, administered by the Office of Fair Trading (OFT). The OFT's regime has been strengthened by the recent implementation of the Consumer Credit Act 2006.

2.3 The Government's recently announced Mortgage Rescue Scheme and Homeowner Mortgage Support Scheme, together with recent changes to make Support for Mortgage Interest (SMI) more generous, will help homeowners who experience a temporary income shock, lose employment, or are otherwise vulnerable, to remain in their homes.¹

2.4 The Government is determined to ensure that every household struggling with debts can access free and impartial debt advice. In the 2008 Pre-Budget Report, the Chancellor of the Exchequer announced £5.85 million additional investment in telephone advice during the period to March 2011, and £10 million to March 2010 for Citizens Advice bureaux to expand face-to-face debt advice capacity. Both measures will help to ensure that advice and support is available for borrowers who may need it.

2.5 In the Pre-Budget Report, the Government also announced the creation of a new Lending Panel bringing together Government, lenders, trade bodies, regulators, and consumer groups to monitor lending to businesses and households. The major mortgage lenders on the Panel have agreed to a moratorium on repossessions - committing not to repossess for at least three months after an owner-occupier falls into arrears. Some mortgage lenders have now gone further, and committed not to repossess for at least six months after an owner-occupier is in arrears. The Government welcomes these commitments.

The sale and rent back market

2.6 The sale and rent back (also known as sale and lease back) market offers homeowners the option of selling their properties at discounted rates in exchange for tenancy arrangements. Sale and rent back agreements effectively combine two transactions – firstly, individual homeowners sell their property at a discount, and secondly they are offered an agreement to remain in the home as a tenant.

¹ Information on the mortgage rescue scheme can be found at: <http://www.communities.gov.uk/housing/buyingselling/mortgagerescuemeasures/>. Information on the Homeowner Mortgage Support Scheme can be found at: <http://www.communities.gov.uk/housing/buyingselling/mortgagesupportscheme/>. Information on Support for Mortgage Interest can be found at: <http://www.dwp.gov.uk/mediacentre/pressreleases/2008/dec/hse116-191208.asp>.

2.7 A range of stakeholders, including consumer groups and mortgage industry representatives, have raised concerns about the sale and rent back market. The main concerns are: first, that these arrangements are often taken up by vulnerable homeowners facing repossession; second, that these homeowners may be entering into sale and rent back agreements mistakenly believing that these agreements offer secure tenure in the medium to long term; and third, that with increasing numbers of homeowners experiencing financial difficulty, the scale of the problem is likely to increase.

2.8 In order to improve the evidence base, Budget 2008 announced that the OFT would investigate the sale and rent back market that year, drawing on contributions from the FSA. The OFT announced on 14 May 2008 that it would conduct a formal market study, working to an expedited timetable.²

OFT Report

2.9 The OFT published its report on 15 October 2008.³ The OFT's market study found that the potential for severe consumer detriment in connection with sale and rent back agreements is unlikely to be addressed through the existing framework of consumer protection, other Government initiatives to help homeowners in difficulty underway at the time of reporting, or industry self-regulation of the sale and rent back market. It therefore recommended statutory regulation of this market.

2.10 The Government welcomed the OFT's report. The following section of this consultation draws on its analysis.

Product Analysis

2.11 The OFT reported that most firms offer a bespoke package to each individual, with the exact discount payable and the level of rent being matters for negotiation between the sale and rent back provider and the original homeowner.

2.12 There is evidence to suggest that most sale and rent back providers pay between 70 and 90 per cent of the market value of the property, although in some cases paid less than 50 per cent.⁴ This market value may be determined in a number of ways. While some firms use independent surveyors, the OFT also reported instances of firms using "drive-by" valuations or valuations conducted by an agent of the sale and rent back provider.

2.13 The agreement allowing the former homeowner to remain in the home as a tenant, and the level of security it provides, varies between sale and rent back providers. The typical rental agreement offered by sale and rent back providers is an assured shorthold tenancy (AST). Most ASTs are granted for an initial fixed period of six or twelve months, during which the landlord may only recover possession if there is a breach of the tenancy conditions. After this period, the landlord may recover possession at his own initiative. A small number of sale and rent back providers may offer an assured tenancy (AT), which provides a more secure tenancy.

2.14 The rent charged by providers of these agreements also varies. Many firms offer rent at local market rates, but some will offer rents at below the market rate in exchange for a larger discount on the sale price. Some firms agree future rent increases in advance, or offer rent increases in line with inflation. The OFT also found some cases where large increases in rent were demanded when the initial fixed term of the AST expired.

² <http://www.offt.gov.uk/news/press/2008/62-08>.

³ <http://www.offt.gov.uk/news/press/2008/118-08>.

⁴ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Chapter 3.

2.15 Some sale and rent back providers offer consumers the option to buy back the property in future. This may be an attractive option for consumers in financial difficulty at the time of entering the agreement, but who believe that their financial circumstances will improve in future. The OFT's report suggested that where this option exists few consumers, if any, have exercised it.

Market analysis

2.16 The sale and rent back market is a relatively new market, and has grown rapidly in recent years. The sector appears to be highly fragmented, comprising a very large number of small firms, including non-professional landlords, and only a few firms operating on a national or regional basis.

2.17 The OFT report suggested that there are upwards of 1,000 firms currently active, together with an unknown number of non-professional landlords. The OFT also considered research which found that 5 per cent of landlords held at least one sale and rent back property, and suggested that, based on an estimate of 750,000 landlords in the UK, there might be around 37,500 sale and rent back landlords in the UK.⁵

2.18 Sale and rent back firms operate in different ways, and the OFT described a number of business models in its report. Some of those active in the market undertake every aspect of the deal: finding consumers, brokering the deal, buying the property and renting it back. Others focus on particular activities, such as sourcing potential consumers, or purchasing a property subject to an existing sale and rent back agreement. Some of the larger firms active in the market create a formal structure around these roles through franchises, which specialise in sourcing leads that are then purchased by franchisees.

2.19 Sale and rent back firms are known to operate in many regions across the UK, although individual firms often focus on specific regions. The OFT estimated that around 50,000 transactions had taken place across the UK by the time it published its report.

2.20 Consumers who consider sale and rent back do so for a number of reasons. Some consumers may enter into sale and rent back agreements to finance retirement, release equity in a property following relationship breakdown, or to facilitate relocation by selling the property, remaining in it for a short time and becoming a cash buyer.

2.21 The majority of consumers in the sale and rent back market appear to be in arrears on mortgage repayments or have other debts. Consumer research conducted for the OFT, and interviews with firms, indicate that many of these consumers are facing repossession of their property. A consumer must have a sufficient portion of equity in the property for sale and rent back to be feasible. In these cases, the consumer may view a sale and rent back agreement as a favourable alternative to repossession.

2.22 The OFT's report considered the future prospects for the sale and rent back market. Although the number of repossessions has been increasing recently, the number of households affected remains small. The OFT suggested that a continuation of this trend might lead to increased demand for sale and rent back agreements, as consumers entered into these agreements to avoid repossession. The OFT's report also noted that Government initiatives to support borrowers in financial difficulty may affect the scale of any increase in demand.

2.23 Other aspects of changing economic conditions also affect the supply of sale and rent back agreements. Constraints on the supply of credit are making it difficult for landlords, including sale and rent back providers, to acquire new properties, while falling house prices may lead

⁵ As above.

some sale and rent back providers to expect lower capital gain from transactions. Given the need for homeowners to have a positive equity stake to enter this kind of arrangement, the accompanying reduction in homeowners' equity also means that fewer people may be eligible for sale and rent back agreements, even as demand grows.

Question 1: Do you agree with the OFT's analysis of the sale and rent back market, as presented above?

Fair treatment of consumers

2.24 The OFT found evidence of market failure in the sale and rent back market. Sale and rent back agreements may benefit some consumers, but the OFT's report argued that they entail an unacceptable level of risk which consumers are not well placed to assess. In this sense, the sale and rent back market may not be working well for all consumers.

2.25 Consumers may be misled about sale and rent back agreements. In particular, they are typically left with a firm impression that they will be able to remain in their home for as long as they wish, although this is rarely the case. Consumers may also be misled about the market value of their home and the level of market rent, and may find that sale and rent back providers levy unexpected charges at a late stage in the transaction process.⁶ In addition, it appears that many consumers do not feel able to talk openly to others about their problems, placing considerable weight on informal assurances. Of the respondents to the OFT omnibus survey who had made enquiries about sale and rent back, over a third had not taken advice from anyone, including friends and family.⁷

2.26 As a result, consumers may be persuaded to enter into a sale and rent back agreement when it is not the most suitable option for them. They may be unaware of, or unable properly to assess, the other options available to them.

2.27 Consumers considering sale and rent back agreements are vulnerable to high pressure sales tactics. In particular, consumers typically take decisions relating to these products in pressurised circumstances, in some cases where there is an imminent danger of repossession. There is some evidence of sale and rent back providers dropping the sale price just before consumers are due in court for repossession hearings.⁸ Sales people may also play on the emotional or psychological aspects of sale and rent back (for example, attachment to a family home). Transactions take place in the customer's home, where people are typically more vulnerable to persuasion and deals can take place very quickly, as was found in relation to the OFT's study on doorstep selling.⁹

2.28 Sale and rent back agreements typically offered by the market place a high burden of risk on the consumer who is at risk of being evicted from the property after a short time period. Sale and rent back providers may suddenly and significantly increase the rent, forcing tenants to leave a home which is no longer affordable.¹⁰ There is also evidence of sale and rent back providers defaulting on the mortgage, leading to repossession by the lender and eviction of the tenant. In some cases tenants also lost money that the sale and rent back provider had retained as a deposit or pre-paid rent.¹¹ Case study analysis published by the OFT indicated that in 31 per

⁶ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Annex A.

⁷ As above.

⁸ As above.

⁹ Doorstep Selling – A report on the market study, *Office of Fair Trading*, May 2004.

¹⁰ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Annex A.

¹¹ As above.

cent of cases recorded by Citizens Advice and other advice agencies, sale and rent back agreement tenants had been evicted or were threatened with eviction (even though the majority of these were not reported as having difficulties with affording the rent). Around half of these were facing eviction because their landlord had defaulted on the mortgage.¹²

2.29 The OFT compared the levels of risk presented by sale and rent back with those associated with other regulated products, and found that the risks were at least as great with the former.

2.30 The OFT concluded that many consumers were not aware of or able to assess the full costs and risks they faced in sale and rent back transactions. This resulted in some consumers being persuaded to enter into sale and rent back arrangements when this was not a sustainable solution for them, incurring significant unnecessary costs.

Question 2: Do you agree that the sale and rent back market does not currently work well for consumers?

Existing consumer protection

2.31 There is no specific regulation of the sale and rent back market at present. Regulation and legislation already in place, including general consumer protection legislation, may however apply to sale and rent back activity.

2.32 The sales and marketing practices of sale and rent back providers fall within the scope of the Consumer Protection Regulations (CPRs), which came into force in April 2008. These include a general prohibition on businesses treating consumers unfairly, which obliges businesses not to use:

- aggressive practices (such as pressure selling); or
- misleading practices (including not disclosing relevant information).

2.33 The CPRs allow prosecution of businesses guilty of unfair practices.¹³ However, the OFT argued that the CPRs do not offer protection commensurate with the risk in the sale and rent back market. In particular, the CPRs do not provide for any rights for consumers to address specific problems in the sale and rent back market, such as pre-contractual disclosure of important information. The deterrent effect of action under the CPRs may also be weak, given the fragmented nature of the sale and rent back market.

2.34 In addition to the CPRs, the Consumer Credit Act 1974 (CCA) and Estate Agents Act 1979 (EAA) have some application to sale and rent back providers. These provide limited protection, as they apply to only a subset of sale and rent back providers. The CCA, for example, applies to those sale and rent back providers that offer debt adjusting or debt counselling, while the EAA covers sale and rent back providers engaged in estate agency.

2.35 A summary of existing consumer protection legislation, and its application to sale and rent back agreements, is included in the Impact Assessment published with this document in Annex A.

2.36 The Government recognises that there are a number of self-regulatory initiatives emerging. These are considered in more detail in the Impact Assessment.

¹² Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Annex C.

¹³ The CPR regime provides for a number of bodies – including the OFT, Local Authority Trading Standards Services, and sector regulators such as the FSA – to take enforcement action against firms that breach the CPRs.

OFT recommendations

2.37 On the basis of the evidence of market failure, and the inability to address this failure through the existing regulatory framework, the OFT concluded in its report that regulation of the sale and rent back market was warranted, in order to provide consumers with suitable protections and appropriate means of redress. The OFT argued that sector-specific regulation, targeted at reducing the risk to consumers, would provide an effective way of ensuring consumer protection and driving up standards in the market.

2.38 The OFT also considered the positive reputational effect that regulation might have, giving greater confidence to consumers and other businesses dealing with the market. At present, some buy-to-let mortgages require the landlord to offer tenancies of no more than six to twelve months. Lenders with more confidence in the sale and rent back market might offer mortgages that allowed longer time periods, and so provided a more secure tenancy than those currently offered by sale and rent back providers. It is important to recognise, however, that even with a change in the regulatory framework, this would be unlikely to happen in the short term given current mortgage market conditions.

2.39 In its report the OFT made three recommendations to Government. These were that:

- the sale and rent back market should be regulated by the FSA, and regulations should cover transparency, advice and reducing the risks to consumers;
- in the short term, Government programmes targeted at people experiencing financial difficulty should include efforts to raise awareness of sale and rent back, with the key message being that this is a risky product and that those considering it should seek independent advice; and
- the Department for Work and Pensions (DWP) should provide greater clarity on the eligibility of sale and rent back tenants for Housing Benefit.

Government response

2.40 The Government responded to the OFT's report on 22 October 2008, welcoming the OFT's recommendations.¹⁴

2.41 In response to the recommendation that the sale and rent back market should be regulated by the FSA, the Government announced that HM Treasury would consult on the framework of consumer protections covering the sale and rent back market. At the 2008 Pre-Budget Report the Government confirmed that it would bring forward a consultation on extending the scope of FSA regulation to include the sale and rent back market.

2.42 In response to the recommendation that the Government programmes targeted at people experiencing financial difficulty over housing should include efforts to raise awareness of sale and rent back, the Government agreed to continue work to raise consumer awareness of the potential risks involved in entering into a sale and rent back agreement. The box below includes some of the actions taken as part of this work.

¹⁴ http://www.hm-treasury.gov.uk/press_108_08.htm

Box 2.A: Government actions to raise awareness of potential risks involved in sale and rent back

The Government will continue work to raise awareness of the risks involved in sale and rent back agreements, and together with the FSA has taken a number of actions to this end.

These include:

- the Department for Communities and Local Government has produced an advice leaflet with the National Homelessness Advice Service, "Are you worried about your mortgage? Get advice now", which includes advice for homeowners who are offered sale and rent back agreements.
- the FSA includes messages on the potential risks involved with sale and rent back agreements in the information it produces for consumers facing difficulties paying their mortgage. This material is available on its *money.madeclear* website and in the printed guide sent by mortgage lenders to all customers who fall into arrears. This free guide is also available to consumers direct from the FSA.

2.43 In response to the recommendation that DWP should provide greater clarity on the eligibility of sale and rent back tenants for Housing Benefit, the Government agreed that it would consider how best to draw together existing guidance for the benefit of consumer bodies which will be made available for their information. DWP is currently working on guidance on the benefit entitlement implications of entering into sale and rent back agreements. This guidance will be issued to consumer and financial organisations operating across the UK in early 2009.

3

Issues for consideration

Policy options for consultation

3.1 In line with better regulation principles, this consultation seeks views on a full range of options to ensure appropriate consumer protections. These options are:

- option 1 – Maintain the existing framework. The Government continues to enforce existing regulatory regimes where applicable, and takes no further action to improve consumer protection;
- option 2 – Self-regulation. The Government encourages the development by industry of one or more voluntary codes of self-regulation; and
- option 3 – Financial Services Authority (FSA) regulation. The Government brings forward legislation to extend the scope of FSA regulation to cover the sale and rent back market.

3.2 The costs and benefits of these options are set out in the Impact Assessment published with this document in Annex A, which should be read in conjunction with this consultation. The Impact Assessment considers qualitative, and where possible quantitative, costs and benefits of implementation. It draws on results of the Office of Fair Trading (OFT) market study.

3.3 Options 1 and 2 would not require any changes to legislation. Extending the scope of FSA regulation to include the sale and rent back market would require secondary legislation. This consultation also seeks views on a detailed proposal to legislate to extend the scope of FSA regulation.

Question 3: Do you agree with the estimated costs and benefits of the three options, as presented in the Impact Assessment in Annex A?

Question 4: Do you agree with the OFT that the existing regulatory framework is unlikely to provide appropriate consumer protection in the sale and rent back market?

Question 5: Do you agree with the OFT that self-regulation is unlikely to provide appropriate consumer protection in the sale and rent back market?

Question 6: Do you agree with the OFT that FSA regulation would provide appropriate consumer protections in the sale and rent back market?

Draft legislation

3.4 The framework of financial services regulation in the UK is established through the Financial Services and Markets Act 2000 (FSMA). The activities which are regulated under FSMA are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO).¹

3.5 The FSA is the body responsible for regulating these activities under FSMA. It sets the standards that firms must meet and can take action against firms if they fail to meet the required standards. Only FSA authorised or exempt persons are legally permitted to carry on a regulated activity.

3.6 To extend the scope of FSA regulation to cover the sale and rent back market, the Government would need to amend the RAO so that it included activities relating to sale and rent back agreements. A copy of the draft Statutory Instrument (referred to in this section as ‘the draft order’) by which the Government proposes to do this, subject to responses to this consultation, is published with this document in Annex B. Specific questions on the draft order are set out below.

3.7 In 2004 the Government introduced FSA regulation for first charge residential mortgages. In 2006, the Government brought forward secondary legislation to extend the scope of FSA regulation to cover the market for home reversion plans (a form of equity release product bearing some structural similarity to sale and rent back agreements). The Government considers that the most appropriate way to extend the scope of FSA regulation to cover the sale and rent back market would be through similar legislation.

Box 3.A: Definition of a home reversion plan

As set out in Article 63B(3)(a) of the RAO:

“a regulated home reversion plan” is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into—

- (i) the arrangement is one under which a person (the “plan provider”) buys all or part of the qualifying interest in land (other than a timeshare accommodation) in the United Kingdom from an individual or trustees (the “reversion seller”); and
- (ii) the reversion seller (if he is an individual) or an individual who is the beneficiary of the trust (if the reversion seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so; and
- (iii) the arrangement specifies one or more qualifying termination events, on the occurrence of which that entitlement will end.

3.8 Home reversion plans are a type of equity release product. Under a typical home reversion plan, a homeowner sells all or part of their property (these variations are known as “full reversions” and “partial reversions” respectively) at a discounted price in return for a lump sum, or payments over a period of time, as well as the right to remain in the property until they die or

¹ In order for an activity to be regulated under FSMA it must be carried on by way of business and be specified in an Order made under section 22 of FSMA. Schedule 2 to FSMA sets out, in broad terms, a non-exhaustive list of the sorts of activities and investments that may be specified in such an Order. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) is the Order made under section 22 of FSMA (as read with Schedule 2 to FSMA), which sets out the specified activities that are subject to FSA regulation.

move into residential care. The amount paid to the homeowner depends on a number of factors including the age of the owner, an actuarial assessment of life expectancy, and the value of the property. Home reversion plans differ from sale and rent back agreements in that they specify one or more “qualifying termination event” (for example, when the homeowner dies or moves into residential care), after which the plan provider is entitled to sell the property.

3.9 The Government wishes to ensure that the regulatory regimes for equity release products and sale and rent back agreements remain distinct, as the markets for these different arrangements pose different risks to consumers. Home reversion plans are therefore excluded from the proposed definition of sale and rent back agreements, as presented below.

Definition of a sale and rent back agreement

Box 3.B: Definition of a sale and rent back agreement

For the purposes of legislation, the Government proposes that:

“a regulated sale and rent back agreement” is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into—

- (i) the arrangement is one under which a person (the “agreement provider”) buys all or part of the qualifying interest in land (other than a timeshare accommodation) in the United Kingdom from an individual or trustees (the “agreement seller”); and
- (ii) the agreement seller (if the agreement seller is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so;

but such an arrangement is not a regulated sale and rent back agreement if it is a regulated home reversion plan.²

3.10 The draft order refers to sale and rent back providers as “agreement providers” and sale and rent back consumers as “agreement sellers”. These terms have been chosen for consistency with the approach taken for home reversion plans, and this section of the consultation will use these terms for clarity. Where the terms “landlord” and “occupier” are used, these have distinct and separate meanings.

3.11 The definition refers to “an arrangement comprised in one or more instruments or agreements” since sale and rent back agreements may comprise several instruments and may encompass contractual or trust arrangements.

3.12 The definition provides that an arrangement is a regulated sale and rent back agreement if the conditions in (i) and (ii) are met at the time the arrangement is entered into, and the arrangement is not a regulated home reversion plan. This means that if, after being entered into, the arrangement is amended and (i) and (ii) are no longer met, it will still be considered a regulated sale and rent back agreement. This enables greater certainty as it means that judgements are not required about whether possible variations might have led or will lead to a change in the regulatory position.

² Proposed article 63J(3)(a) of the RAO, as inserted by article 17 of the draft order.

3.13 Under paragraph (i) of the definition of a sale and rent back agreement, the agreement provider must buy all or part of a qualifying interest in land from the agreement seller. This is because the intention is to capture variations to the typical sale and rent back agreement. In a typical sale and rent back agreement all of the qualifying interest is sold. The definition refers to “all or part of a qualifying interest in land” because it is possible that sale and rent back providers may draft the agreement in such a way that the qualifying interest in land is held in trust by the agreement seller and agreement provider as tenants in common or as joint tenants. This structure is used in some home reversion plans (specifically partial reversions, as described above).

3.14 A typical sale and rent back agreement involves a discount to the sale element of the agreement. The draft order does not include a reference to a discount, as it is possible that sale and rent back agreements which do not involve a discount to the sale element will emerge in time (or which do not appear to involve a discount, for example because of lower valuations).

3.15 Paragraph (ii) of the definition means that the occupier is entitled (and intends) to use at least 40 per cent of the land as their home, for the specified period. This follows the approach taken for home reversion plans. The agreement seller no longer owns all the land, but the occupier is still entitled to occupy it notwithstanding this. The typical way in which this entitlement is conferred to an agreement seller is by way of a tenancy agreement (usually an assured shorthold tenancy). The draft order does not refer to a precise form of tenancy, as it is possible that other rental or leasing arrangements may be used to confer this entitlement.

3.16 It is not the Government’s intention to capture arrangements that would not normally be considered as part of the sale and rent back market. These include family arrangements, such as where one family member sells property to another but continues to occupy the property. They also include property transactions in which the buyer of a property unintentionally gives the seller a right to occupy by remaining in the house for some time after sale, for example for the purposes of clearing the property. The Government considers that the majority of these arrangements would not be carried out by way of business and so would not be caught by the draft order, unlike smaller sale and rent back providers. The Government expects that exclusions of these arrangements will be clarified through FSA guidance on the “not by way of business” exemption.

3.17 The Government intends that the definition would include as a regulated sale and rent back agreement the situation where there is a gap between the sale and taking up of occupancy.

Question 7: Does the proposed definition of a regulated sale and rent back agreement capture existing and potential sale and rent back models?

Question 8: Does the proposed definition of a regulated sale and rent back agreement exclude arrangements which are not sale and rent back agreements, including but not limited to, equity release products?

Question 9: Do you agree with the Government’s proposed approach to the situation where there is a gap between sale and taking up of occupancy?

Arranging or advising on a sale and rent back agreement

3.18 Arranging sale and rent back agreements, arranging to vary the terms of sale and rent back agreements, and advising on entry into or variation of sale and rent back agreements, will be regulated activities.³

3.19 The rationale behind this provision is to capture in regulation the activities of persons acting as intermediaries on behalf of both consumers considering a sale and rent back agreement (as agreement seller) and also persons (such as individuals or small companies) considering investing in a sale and rent back agreement by becoming an agreement provider, where the actual sale and rent back agreement will be between these two parties. It will allow the FSA to draw up rules for intermediaries that will protect the consumer as well as the investor or provider. It is not the Government's intention to regulate, under this instrument, the activities of investors in sale and rent back firms where the sale and rent back agreement is between the agreement provider and the agreement seller.

Question 10: Do you agree with the Government's approach to intermediaries in relation to sale and rent back agreements?

Entering into a sale and rent back agreement

3.20 Entering into a sale and rent back agreement as an agreement provider will be a regulated activity.⁴

3.21 It is possible for agreement providers to transfer all or part of their rights or obligations under a sale and rent back agreement, or the interest in land acquired under a sale and rent back agreement, to a third party (who may not contract directly with the agreement seller). The Government intends that, in this case, the third party will be regulated as a sale and rent back provider.⁵ This is to ensure agreement sellers continue to be protected by regulation in the situation that their current agreement provider sells the property to another party.

3.22 In order for the third party to be regulated the agreement provider will be defined as both the original agreement provider and a person to whom the rights or obligations under a sale and rent back agreement, or the interest in land of the original agreement provider, are transferred. The draft order makes use of this definition of agreement provider throughout, in particular in relation to regulated activities, exclusions relating to sale and rent back agreements and consequential amendments.

Question 11: Do you agree with the Government's approach to the regulation of third parties?

Administering a sale and rent back agreement

3.23 Administering a sale and rent back agreement will also be a regulated activity.⁶ The definition of administering sale and rent back agreements includes making payments to the

³ Proposed article 25E of the RAO, as inserted by article 4 of the draft order; and proposed article 53D of the RAO, as inserted by article 13 of the draft order.

⁴ Proposed article 63J(1) of the RAO, as inserted by article 17 of the draft order.

⁵ Proposed article 63J(6) of the RAO, as inserted by article 17 of the draft order.

⁶ Proposed article 63J(2) of the RAO, as inserted by article 17 of the draft order.

agreement seller and notifying them of changes in payments due or other matters required under the arrangement. The Government has not made provision for rights relating to enforcement action because it is not relevant to the administering activities conducted for sale and rent back agreements.

Question 12: Do you agree with the Government's approach to administering activities relating to sale and rent back activities?

Exclusions and exemptions

3.24 For the purpose of secondary legislation the Government proposes to mirror the exclusion of activities that apply to the regulatory regime for home reversion plans and regulated mortgage contracts. These exclusions relate to arranging a sale and rent back agreement, advising on an agreement, and administering an agreement.⁷

3.25 The Government also proposes to mirror the exemptions that apply to the regulatory regime for home reversion plans. This would mean that the following persons would be exempt from the need for authorisation:

- an exempt professional firm (for example, a firm of solicitors, accountants, actuaries) carrying on regulated activities incidental to its main business;
- a registered social landlord in Scotland, England and Wales (but not a subsidiary);
- the Homes and Communities Agency, the Tenants Advisory Service, Scottish Homes and the Northern Ireland Housing Executive; and
- a local authority.

Question 13: Do you agree with the Government's proposed approach to activities to be excluded from the regulatory regime for sale and rent back agreements?

Consequential amendments

3.26 For the purpose of secondary legislation the Government proposes to make consequential amendments equivalent to those made when implementing the home reversion plan regime.

3.27 The primary legislation that will be amended consists of the Companies Act 1985, the Law of Property (Miscellaneous Provisions) Act 1989, the Financial Services and Markets Act 2000 (FSMA) and the Companies Act 2006.

3.28 The scope orders made under FSMA that will be amended consist of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001, the

⁷ Exclusions relating to arranging sale and rent back agreements are: Article 26 of the RAO, as amended by article 5 of the draft order; article 27 of the RAO, as amended by article 6 of the draft order; article 28A of the RAO, as amended by article 7 of the draft order; article 29(1) of the RAO, as amended by article 8 of the draft order; article 29A of the RAO, as amended by article 9 of the draft order; article 33 of the RAO, as amended by article 10 of the draft order; article 33A of the RAO, as amended by article 11 of the draft order; and article 36(2) of the RAO, as amended by article 12 of the draft order.

Exclusions relating to advising on sale and rent back agreements are: Article 54 of the RAO, as amended by article 14 of the draft order; article 54A of the RAO, as amended by article 15 of the draft order; article 55(2) of the RAO, as amended by article 16 of the draft order.

Exclusions relating to administering a sale and rent back agreement are: proposed article 63K of the RAO, as inserted by article 17 of the draft order; proposed article 63L of the RAO, as inserted by article 17 of the draft order; proposed article 63M of the RAO, as inserted by article 17 of the draft order; article 66 of the RAO, as amended by article 18 of the draft order; article 67(1) of the RAO, as amended by article 19 of the draft order; and article 72 of the RAO, as amended by article 20 of the draft order.

Financial Services and Markets Act 2000 (Exemption) Order 2001, the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001 and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

3.29 Other secondary legislation that will be amended consists of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008.

Interim regime

3.30 Subject to the Government bringing forward the proposed legislation and Parliamentary approval, the FSA proposes to put in place its regulatory regime via a two-stage approach. This would involve an interim regulatory regime which would take effect as soon as the statutory changes come into force, followed by a full regulatory regime at a later date (following a second full consultation and cost benefit analysis).⁸

3.31 This two-stage approach will provide a level of consumer protection much sooner than would otherwise be possible. The interim regulatory regime proposed is a very different approach to that taken on interim authorisation in the past, as it would allow firms to be permitted to do business without going through the full FSA authorisation process. The Government and the FSA view this as an appropriate and proportionate way of balancing quick action, which may be necessary to protect consumers, with the rights of firms already conducting business in the market.

3.32 The effect will be that relevant firms (as outlined below) wishing to undertake regulated activities relating to sale and rent back agreements during the period of the interim regulatory regime will be required to hold "interim permission" (or "interim variation of permission"). Agreement providers with interim permission will be required to comply with the relevant FSA rules and be subject to supervision and enforcement requirements.

3.33 The exact details of interim regime will be for the FSA to determine. Alongside this consultation, the FSA is publishing its consultation on the proposed interim regime. The FSA's consultation closes on 1 May 2009, and is available at: www.fsa.gov.uk/Pages/Library/Policy/CP/index.shtml.

3.34 Interim permission will be available to firms which were conducting business as a sale and rent back provider before the interim regime is put in place. In order not to disrupt business in which they are currently lawfully engaged, firms that are already conducting business as a sale and rent back provider, and request interim permission within a specified period, will receive it, dating from the commencement of the interim regime. However, the Government and the FSA are concerned that new firms should not be able to take advantage of the lower requirements of the interim regime, and enter the market prior to the full regime taking effect.

3.35 Firms that are already regulated by the FSA (for the purposes of another regulated activity), which have already met the threshold conditions for full regulation and are less likely to cause consumer detriment than unregulated firms, will be able to apply for an interim variation of permission to allow them to undertake regulated activities in relation to sale and rent back agreements.⁹

3.36 Restricting those eligible for interim permission will have the effect of preventing unauthorised persons taking over a firm with existing interim permission. Restricting those eligible for interim permission will also have the effect of preventing a firm from changing its

⁸ The arrangements for the interim regime are set out in articles 33 and 34 of the draft order.

⁹ Article 33(b) of the draft order.

legal status, for example becoming a body corporate. The Government understands that these changes in legal status are unlikely during the interim regime, but seeks views on whether this is the case.

3.37 The procedure for the FSA to accept or reject applications for interim permission is set out in the draft order.¹⁰ In the event that the FSA rejected an application, the sale and rent back provider would have access to a review process.¹¹ This process differs from the usual appeals process under FSMA, and allows for a swifter final decision. Sale and rent back providers who make a request for interim permission will hold interim permission from the commencement of the interim regime, including during this review process. Shortening the time for this review process will therefore allow the FSA to reach a final decision sooner and, where necessary, withdraw permission from firms which do not meet the requirements of its interim regime, in order to protect consumers.

3.38 The draft order includes an expiry date for interim permission¹². This is to ensure that once the full regulatory regime is put in place, firms seek authorisation under the full regime. This will ensure that consumers experience the benefit of the full regime once it is in place. The draft order also provides for interim permission to lapse on the occurrence of other specified events.¹³

Question 14: Do you agree with the Government and the FSA's proposed approach to an interim regime for sale and rent back agreements?

Question 15: Do you agree with the proposed restrictions to those who may receive interim permission in relation to sale and rent back agreements?

Other comments

3.39 In addition to the specific questions above, the Government would welcome any other comments relating to the three options under consideration, and the detail of the draft order to ensure that consumers benefit from an appropriate level of protection.

¹⁰ Article 33(6) – (18) of the draft order.

¹¹ Article 33(8) of the draft order.

¹² Article 33(14)(d) of the draft order.

¹³ Article 33(14)(a) – (c) of the draft order.

4

Next steps

Government response to consultation

4.1 This consultation began with the publication of this document and will last for a period of 12 weeks, closing on 1 May 2009. After the consultation period has closed, the Government will consider the responses to the consultation.

4.2 In line with the Code of Practice for written consultation the Government will publish a response to the consultation, giving feedback regarding the responses received and how the consultation process influenced the policy. This response will also set out which of the three policy options under consideration the Government considers most appropriate in light of the consultation, and how the Government proposes to pursue this option.

Next steps

4.3 If, following consultation, the Government proceeds with extending the scope of FSA regulation, the next steps will be as follows:

- the Government will lay before Parliament secondary legislation to bring activities relating to sale and rent back agreements into FSA regulation;
- subject to Parliamentary approval, the FSA will commence its interim regime for the sale and rent back in July 2009;
- firms will need to apply for interim permission from the FSA to conduct activities relating to sale and rent back agreements;
- the FSA will draw up and consult on rules for a full regulatory regime regarding activities relating to sale and rent back agreements;
- subject to this consultation, the FSA will publish these rules and commence its full regulatory regime for sale and rent back agreements;
- firms will need to apply for authorisation from the FSA to conduct activities relating to sale and rent back agreements; and
- interim permission to conduct activities relating to sale and rent back agreements will expire after the commencement of the FSA's full regulatory regime.

4.4 The Government aims to minimise any disruption to existing consumers as a result of regulation. The Government will open discussions with sale and rent back providers, consumer groups and other stakeholders to discuss how best to ensure existing tenants are protected.

A

Impact assessment

Summary: Intervention & Options

Department /Agency: HM Treasury	Title: Impact Assessment of regulating the sale and rent back market	
Stage: Consultation	Version: Final	Date: 05 February 2009
Related Publications: Regulating the sale and rent back market: a consultation, <i>HM Treasury</i> , January 2009 Sale and rent back – An OFT market study, <i>Office of Fair Trading</i> , October 2008		

Available to view or download at: <http://www.hm-treasury.gov.uk>

Contact for enquiries: saleandrentback@hm-treasury.x.gsi.gov.uk

What is the problem under consideration? Why is government intervention necessary?

The sale and rent back market offers some homeowners the option of selling properties at discounted rates in exchange for tenancy arrangements, typically with limited security of tenure. There is a large amount of risk involved, often borne by vulnerable consumers in pressured circumstances.

An asymmetry of information between consumers and sale and rent back providers has caused market failure. This information asymmetry can manifest itself through a lack of transparency in information provided by the sale and rent back provider, leading to consumers being unaware of, or unable to make a good assessment of the costs and benefits of the sale and rent back agreement.

Relevant existing regulations and legislation do not seem to address the full extent of potential costs to consumers. The Office of Fair Trading (OFT) has conducted a formal market study of this market, and in publishing its findings recommended specific statutory regulation of this market.

What are the policy objectives and the intended effects?

The policy objective is to ensure appropriate consumer protections in the sale and rent back market. The intention is increase the transparency of information provided by sale and rent back providers, reduce the potential for consumers to enter into unsuitable arrangements, and increase product quality by driving providers to improve or exit the market. Effective regulation may also facilitate the operation of competitive forces through increased transparency and potential entry of new providers previously discouraged by reputational risk.

What policy options have been considered? Please justify any preferred option.

The following options have been considered:

- maintaining existing framework;
- self-regulation; and
- statutory regulation by the Financial Services Authority (FSA), as recommended by the OFT.

The costs and benefits of each option, insofar as it has been possible to ascertain these, are set out in the relevant sections below.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The Government keeps all legislation under review, and in line with good practice would expect to review the policy within three years.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 5 February 2009

Summary: Analysis & Evidence

Policy Option: 1. Maintain existing framework	Description: Continue to enforce existing regulatory regimes where applicable, and take no further action to improve consumer protection
---	--

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Costs to consumers of foregone equity in selling their property at less than fair value. The negative figure at the lower end of the range indicates a potential benefit (which would be the case if the majority of consumers received more than fair value).		
	One-off (Transition)	Yrs			
	£ N/A	0			
	Average Annual Cost (excluding one-off)				
	£ -6.9m to 83.7m	10			
			Total Cost (PV)	£ -59.4m to 720.5m	
Other key non-monetised costs by 'main affected groups' Costs incurred by consumers during the tenancy period of the sale and rent back agreement.					

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' N/A		
	One-off	Yrs			
	£ N/A	0			
	Average Annual Benefit (excluding one-off)				
	£ N/A				
			Total Benefit (PV)	£ N/A	
Other key non-monetised benefits by 'main affected groups' N/A					

Key Assumptions/Sensitivities/Risks:
 Assumes 5,000 sale and rent back agreements entered into per year.

Price Base Year 2008	Time Period Years 10	Net Benefit Range (NPV) £ -720.5m to 59.4m	NET BENEFIT (NPV Best estimate) £ -720.5m to 0
-------------------------	-------------------------	--	--

What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?	N/A				
Which organisation(s) will enforce the policy?	N/A				
What is the total annual cost of enforcement for these organisations?	N/A				
Does enforcement comply with Hampton principles?	N/A				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	N/A				
What is the value of changes in greenhouse gas emissions?	N/A				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro N/A</td> <td style="width: 25%; text-align: center;">Small N/A</td> <td style="width: 25%; text-align: center;">Medium N/A</td> <td style="width: 25%; text-align: center;">Large N/A</td> </tr> </table>	Micro N/A	Small N/A	Medium N/A	Large N/A
Micro N/A	Small N/A	Medium N/A	Large N/A		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	N/A	N/A	N/A	N/A
N/A	N/A	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of	£ N/A	Net Impact £ N/A
Decrease of	£ N/A	

Key: Annual (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2. Self-regulation	Description: Encourage the development by industry of one or more voluntary codes of self-regulation
---	--

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' N/A		
	One-off (Transition)	Yrs			
	£ Unknown	0			
	Average Annual Cost (excluding one-off)				
	£ Unknown			Total Cost (PV)	£ Unknown
Other key non-monetised costs by 'main affected groups' Potential compliance costs to providers. Costs incurred by consumers during the tenancy period of sale and rent back agreement.					

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' N/A		
	One-off	Yrs			
	£ Unknown	0			
	Average Annual Benefit (excluding one-off)				
	£ Unknown			Total Benefit (PV)	£ Unknown
Other key non-monetised benefits by 'main affected groups' Potentially reduced costs (relative to option 1) to consumers of foregone equity; reputational benefits for providers.					

Key Assumptions/Sensitivities/Risks

Price Base Year 2008	Time Period Years 10	Net Benefit Range (NPV) £ Unknown	NET BENEFIT (NPV Best estimate) £ Unknown
-------------------------	-------------------------	---	---

What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?	Unknown				
Which organisation(s) will enforce the policy?	Industry trade bodies				
What is the total annual cost of enforcement for these organisations?	Unknown				
Does enforcement comply with Hampton principles?	N/A				
Will implementation go beyond minimum EU requirements?	N/A				
What is the value of the proposed offsetting measure per year?	N/A				
What is the value of changes in greenhouse gas emissions?	N/A				
Will the proposal have a significant impact on competition?	Yes				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; background-color: #f2f2f2;">Micro Unknown</td> <td style="width: 25%; background-color: #f2f2f2;">Small Unknown</td> <td style="width: 25%; background-color: #f2f2f2;">Medium Unknown</td> <td style="width: 25%; background-color: #f2f2f2;">Large Unknown</td> </tr> </table>	Micro Unknown	Small Unknown	Medium Unknown	Large Unknown
Micro Unknown	Small Unknown	Medium Unknown	Large Unknown		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	N/A	N/A	N/A	N/A
N/A	N/A	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of	£ Unknown	Decrease of	£ Unknown
		Net Impact	£ Unknown

Key: Annual costs (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 3. FSA regulation	Description: Extend the scope of Financial Services Authority regulation to cover the sale and rent back market
--	---

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Costs to providers of regulation (one-off £26m to £35m; ongoing £7m to £12m); costs to providers of offering consumers a fair value sale (ongoing -£6.9m to £83.7m)*; costs to Government of regulation (ongoing £80,000).		
	One-off (Transition)	Yrs			
	£ 26m to 35m	1			
	Average Annual Cost (excluding one-off)				
	£ 0.1m to 95.7m	10		Total Cost (PV)	£ 26.8m to 858.8m
Other key non-monetised costs by 'main affected groups' Costs to Government of impact on work of advice centres.					

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Reduced costs to consumers of foregone equity (relative to option 1) as a result of receiving a 'fair' price for the sale of their property*.		
	One-off	Yrs			
	£ N/A	0			
	Average Annual Benefit (excluding one-off)				
	£ -6.9m to 167.4m	10		Total Benefit (PV)	£ -59.4m to 1440.9m
Other key non-monetised benefits by 'main affected groups' Reduction of costs incurred during the tenancy period of the sale and rent back agreement.					

Key Assumptions/Sensitivities/Risks

Assumes 5,000 sale and rent back agreements entered into per year.

*Costs and benefits are relative to those set out in option 1 and discussed in the evidence base.

Price Base Year 2008	Time Period Years 10	Net Benefit Range (NPV) £ -912.2m to 1414.1m	NET BENEFIT (NPV Best estimate) £ 582.1m to 1414.1m
-------------------------	-------------------------	--	---

What is the geographic coverage of the policy/option?			UK		
On what date will the policy be implemented?			July 2009		
Which organisation(s) will enforce the policy?			FSA		
What is the total annual cost of enforcement for these organisations?			£ 80,000		
Does enforcement comply with Hampton principles?			Yes		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			N/A		
What is the value of changes in greenhouse gas emissions?			N/A		
Will the proposal have a significant impact on competition?			Yes		
Annual cost (£-£) per organisation (excluding one-off)		Micro £2000	Small £2000	Medium £13000	Large £13000
Are any of these organisations exempt?		No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)

(Increase - Decrease)

Increase of £ Unknown Decrease of £ Unknown **Net Impact** £ Unknown

Key:

Annual costs and benefits:

(Net) Present Value

Evidence Base (for summary sheets)

Introduction

This Impact Assessment should be read in conjunction with HM Treasury's consultation: *Regulating the sale and rent back market: a consultation* (available at: <http://www.hm-treasury.gov.uk>). It is informed by the data collected and presented by the Office of Fair Trading (OFT) in its report: *Sale and rent back – An OFT market study* (available at: http://www.offt.gov.uk/shared_offt/reports/consumer_protection/offt1018.pdf).

The sale and rent back market offers some homeowners the option of selling properties at discounted rates in exchange for tenancy arrangements. Some stakeholders have expressed concerns regarding this market. At Budget 2008, the Government announced that the Office of Fair Trading (OFT) would lead a study of the sale and rent back market, focusing on consumers' experience of these arrangements, and consider options where appropriate to strengthen consumer protections.

The OFT launched a formal market study on 14 May 2008 and published its findings on 15 October 2008.

The OFT found that the sale and rent back market is not working well for consumers, and recommended that the Government should introduce specific statutory regulation of the market by the Financial Services Authority (FSA). In response to this recommendation, the Government announced that HM Treasury would consult on extending the scope of FSA regulation to cover the sale and rent back market.

This Impact Assessment estimates the potential costs of market failure in the sale and rent back market, which will inform the Government's policy decisions in relation to this market.

The Government seeks views on three policy options, with the objective of ensuring the effective regulation of the sale and rent back market. These options are:

- Option 1 – Maintain existing framework – This option would involve the Government continuing to enforce existing regulatory regimes where applicable, and taking no further action to improve consumer protection;
- Option 2 – Self-regulation – This option would involve the Government encouraging the development by industry of one or more voluntary codes of self-regulation; and
- Option 3 – FSA regulation – This option would require the Government to bring forward legislation to extend the scope of FSA regulation to cover the sale and rent back market.

This Impact Assessment presents the estimated costs and benefit of these policy options, and will inform the Government's decision on the most appropriate option to ensure the effective regulation of the sale and rent back market. HM Treasury's consultation seeks views on the information presented in this Impact Assessment.

This Impact Assessment also analyses each option against three criteria which the OFT considers relevant to the sale and rent back market functioning well, which are:

- transparency: A lack of transparency can result in consumers being misled in various areas of sale and rent back agreements (for example market value, market rent, period of tenure);
- suitability: Whether some consumers are persuaded to enter a sale and rent back agreement when it is not the most suitable option, considering their circumstances; and
- product quality: Even where a sale and rent back agreement is suitable for the consumer, a lack of product quality means that it entails high risks to the consumer (for example, the risk of eviction due to the landlord defaulting on mortgage payments).

Option 3 – FSA regulation – involves significant Government intervention, and so Specific Impacts Tests have been performed for this option.

Market failure in the sale and rent back market

There are costs to consumers from sale and rent back, in that the price they are offered for their property can be significantly below what they would be offered in a well-functioning market. This is important for sale and rent back consumers, as they are likely to have a lower income than sale and rent back providers, and therefore the net impact on social welfare of this additional foregone equity can exceed the monetary value of this transfer.

There are also risks to consumers entering into sale and rent back agreements, in terms of the lack of lack of certainty around security of tenure. Some of the potential negative outcomes resulting from this identified by the OFT are included in HM Treasury's consultation.

There are firms which offer sale and rent back in good faith and supply consumers with a service which some find valuable, as it can potentially lower their monthly outgoings and allows them to stay in their own home. However, the current model requires the consumer to bear a large amount of risk, even where they are supplied in good faith.

There is evidence of market failure, caused by an asymmetry of information. The lack of (or provision of misleading) information on the part of the sale and rent back provider may lead to poor outcomes for consumers, such as early eviction, which entails significant financial and psychological costs and therefore decreases consumer welfare.

Sale and rent back agreements and alternatives available are complex to evaluate, particularly for consumers already in stressful situations. Research conducted by the OFT suggests that consumers are not in a position to make a balanced assessment at the point of sale. There is a significant body of research which confirms that consumers have difficulty understanding and assessing risks in relation to financial products generally, even outside stressful circumstances.¹ This difficulty is often compounded by a lack of transparency in relation to the sale and rent back agreement being offered. Behavioural economic theory also suggests that consumers are likely to be myopic when considering a trade-off that involves outcomes with different time horizons – in this case between clearing debts in the short term and the long-term implications of the sale and rent back agreement.

The OFT found that the majority of negotiations relating to sale and rent back agreements were conducted by professional sales people, who in some cases may also play on the emotional or psychological aspects of a sale and rent back agreement (for example, attachment to a family home). Transactions often take place in the consumer's home, where people are typically more vulnerable to persuasion and deals can take place very quickly, as was found in relation to the OFT's study on doorstep selling.²

In addition, many consumers do not feel able to talk openly to others about their problems, placing considerable weight on informal assurances. For example, of the respondents to the OFT omnibus survey who had made enquiries about sale and rent back, over a third did not take advice from anyone, including friends and family.³

The OFT found that sale and rent back consumers are unlikely to shop around, but this may be in part due to time pressures; and some consumers may have little choice in any case. However, even in less pressured circumstances, consumers do not always shop around for financial products.⁴ Where consumers do not shop around, price competition is unlikely to be effective. Consumers may receive less for the purchase of their property, or pay more to rent it back than should be the case in a competitive market. Given the sums involved, these represent a potentially significant source of costs to consumers.

¹ FSA research shows that people often have misconceptions when it comes to financial products. For example, 40 per cent of those who own an equity ISA are not aware that its value fluctuates with stock market performance (Financial Capability in the UK: Delivering Change, *Financial Services Authority*, March 2006).

² Doorstep Selling – A report on the market study, *Office of Fair Trading*, May 2004, Annex F.

³ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Annex A.

⁴ For example, the FSA found that 33 per cent of those who purchased insurance bought their policy without comparing it to one other product (Financial Capability in the UK: Delivering Change, *Financial Services Authority*, March 2006).

Lack of shopping around also has implications for reputational effects in this market. There do appear to be some reputational effects; for example, some firms receive business through referrals from existing customers. However, many consumers prefer not to discuss their situation with others and may be reluctant to disclose when they experience problems. These factors, in combination with the extent of fragmentation in the market, reduce the scope for reputational effects. The OFT's assessment in this regard was that reputation was not sufficiently important in this market to prevent firms from renegeing on aspects of their promises on occasion or from exploiting vulnerable consumers.

Furthermore, for most consumers a sale and rent back agreement will be a one-off transaction. Consumers are unlikely to have had previous experience and may not know anyone else who has. This means that there is almost no scope for learning effects; that is, consumers cannot be expected to learn from their mistakes and avoid making the same mistakes in the future. The absence of this potential feedback channel as an additional disciplinary mechanism further hampers competitive forces in this market.

Therefore, many consumers will not be aware of, or able to assess the full costs and risks they face in sale and rent back transactions. This may result in consumers being persuaded to enter into sale and rent back arrangements when this is not a sustainable solution for them.

Cost of sale and rent back agreements

There is limited information about the sale and rent back market, which is a relatively new market that has grown rapidly in recent years. HM Treasury's consultation summarises the OFT's analysis of the market in Chapter 2. This suggests the market is highly fragmented, likely with more than 1,000 providers, comprising a very large number of small firms, and a small number of larger providers. More than 50,000 sale and rent back agreements may have taken place. Growth in the market is likely to be restricted in the near future due to current restrictions in the availability of credit, through which many sale and rent back providers finance their agreements.

Notwithstanding the limited information about this market, this Impact Assessment presents an estimate of the costs incurred by consumers when they decide to enter into a sale and rent back agreement. This uses results from a survey published in the OFT report, which gives a sample of the distribution of discounts to market value paid to sale and rent back customers. This analysis does not focus on those cases reported to advisory organisations such as Citizen's Advice (which may produce a skewed sample as these are more likely to be cases where consumers experienced poor outcomes), but on a sample of responses to an industry trade association survey.

Table A.A: Proportion of market value paid, sale and rent back provider survey

Proportion of market value paid (%)	Number of responses
0 – 49	1
50 – 59	0
60 – 69	2
70 – 79	59
80 – 89	93
90 – 100	11

Source: Sale and rent back – An OFT market study, Office of Fair Trading, October 2008, Chapter 3.

The OFT estimated that most properties involved in this kind of transaction are seldom valued at more than £200,000, due to the fact that industry reported typical clients to be someone who had exercised a "right to buy" their property from their local authority (even in areas of high value property, such as the home counties). An analysis of case studies submitted to the OFT by Citizens Advice, Shelter and National Debtline was consistent with this assessment, with the average price paid for the property being around £158,000. For the purposes of estimating costs to consumers, the lower bound was set at an average market value of £100,000, set deliberately low to give an indication of the effect of lower average house prices.

The counterfactual is that all consumers receive what could be considered a 'fair' price of 85 per cent of the market value for their property (to represent the conditions of a well-functioning sale and rent back market).⁵ This would occur through the elimination of sale and rent back providers that offer low prices (anecdotal evidence suggests some are below 50 per cent) and increased risk burden for all sale and rent back providers, which would reduce prices offered, including those currently in excess of 85 per cent.

Overall, these calculations suggest that, if findings from the survey mentioned above are extrapolated to the estimated 50,000 sale and rent back transactions that may have been undertaken to date, the overall costs to consumers so far in terms of equity forgone in sale and rent back transactions as a result of not being able to receive a 'fair' price is -£69.3 million to £837.4 million. This range suggests that some consumers could currently be getting a good price, and that the market may have provided a net benefit to consumers of £69.3 million. However, the greater part of the range indicates that the market may have resulted in a net cost to consumers, potentially as great as £837.4 million.

This range does not account for any other costs to the consumer, such as the fact that they might have to pay a rental price above the market rate. In addition, it does not consider any other costs, such as those resulting from early eviction.

Since any remedial action is unlikely to be retrospective in nature, this above figure represents a cost to the economy that cannot be regained through any of the options under consideration. However, such costs can potentially be avoided in future.

Even if, as discussed in Chapter 2 of HM Treasury's consultation, the sale and rent back market contracts in the future as a result of deteriorating economic circumstances, the number of agreements entered into is likely to remain significant. Estimating the likely costs of 5,000 sale and rent back transactions per year, using the same methodology as above and extrapolating survey findings to consider 5,000 transactions per year (a conservative estimate, since stakeholders have suggested to Government that there may be as many as 20,000 transactions per year), the cost to consumers in terms of foregone equity would be -£6.9 million to £83.7 million per year.

Although this foregone equity represents only a transfer of wealth from sale and rent back consumers to sale and rent back providers, this can have a significant impact on the relative welfare of the two parties to this transaction once distributional considerations are taken into account.

In its report, the OFT identified some common traits of consumers most likely to be involved in sale and rent back transactions, namely that the majority are:

- aged between 50-60;
- unemployed or in low paid jobs;
- in debt, with the perception that their financial situation is out of control; and
- unlikely to take financial advice.

It is therefore likely that the value placed on the foregone equity by the sale and rent back consumer is greater than the value placed on the foregone equity by the sale and rent back provider. In this way, a transfer between economic actors can have a significant net impact, in this case negatively, on social welfare. On the basis of the evidence available, it is not possible to precisely quantify the scale of this net impact on consumers. However, it seems likely that significant costs are being incurred by large numbers of consumers.

These calculations do not take into account a number of other potential sources of costs; for example, costs through stress and its impact on health or family relationships.

In addition, the above calculation focuses only on one element of the sale and rent back transaction: the property sale. Sale and rent back customers appear to experience their most significant costs due to the tenancy agreement element of the transaction; for example, instances whereby the consumer is evicted

⁵ Given the general lack of evidence in this area, it is very difficult to make an assessment of what a 'fair' price is. For the purpose of the above calculation only, 85 per cent is used as an approximation, derived as an average of the proportion of market value paid in the survey above. The OFT found evidence to suggest that most sale and rent back providers pay between 70 and 90 per cent of the market value of the property (Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Chapter 3).

from rented accommodation after the expiration of a tenancy agreement, where rent is suddenly and significantly increased, or situations in which consumers may pay above market rents. Case study analysis conducted by the OFT indicates that 31 per cent of consumers who had proceeded with a sale and rent back agreement had been evicted or were threatened with eviction (even though the majority of these were not reported as having difficulties with affording the rent). Around half of these were facing eviction because their landlord had defaulted on the mortgage.⁶ Therefore, the cost estimate presented above is likely to underestimate the true extent of costs to consumers associated with sale and rent back transactions.

Option 1 – Maintain existing framework

This option would involve continuing to enforce the existing regulatory regimes where applicable, and taking no further action to improve consumer protection. This option represents a baseline against which the impact of the two alternative policy options will be measured, and it is therefore appropriate to address the existing framework of consumer protection legislation.

Consumer protection legislation

There is potentially a range of existing regulations and legislation that have some relevance in this market. The OFT's report highlighted that the Consumer Protection Regulations (CPRs), Consumer Credit Act 1974 (CCA) and Estate Agents Act 1979 (EAA) all have some application to the sale and rent back market.

However, the CCA and EAA provide limited protection, as they only apply to a subset of sale and rent back providers and transactions (for example, the CCA only applies to those sale and rent back providers that offer debt adjusting or debt counselling; EAA only covers those sale and rent back providers engaged in estate agency). Analysis by the OFT suggests that these two pieces of legislation would only cover a small part of the total sale and rent back market; for example, of 149 sale and rent back providers checked against the OFT's database of credit licences (required for activities under CCA) only 17 matches were found. A summary of existing consumer protection legislation and what they cover regarding the sale and rent back market is appended to this Impact Assessment.

The CPRs, which introduce a general prohibition on businesses treating consumers unfairly, cover the whole industry, and are designed to address some of the conduct which has been identified as a concern in this sector, such as pressure selling and misleading statements on security of tenure. There is potential for enforcement action to send a clear signal about unacceptable practices and to have a deterrent effect on such conduct. This deterrence could also be achieved merely through the existence of the CPRs, although the apparently recurrent nature of problems in the sale and rent back market would suggest that the CPRs are not, by themselves, deterring the kind of behaviour that is leading to costs to consumers.

As one of the relevant enforcement bodies for the CPRs (along with Local Authority Trading Standards Services and the FSA), the OFT believes that the deterrent effect of a successful enforcement action would not be sufficient to prevent potentially extensive costs to consumers in the sale and rent back market. The fragmentation of the industry limits the effectiveness of ex-post enforcement action as a deterrent. Other concerns identified by the OFT, such as the suitability of the product and the level of risk it poses to consumers, are not covered by the CPRs. Furthermore, even where firms have breached the CPRs, the regime as yet offers no direct redress to consumers, who may have suffered significant costs.

The only possibility for redress under these regulations at present would appear to be for individual consumers to pursue action retrospectively through the courts. However, it seems unlikely that sale and rent back consumers would be in a position to undertake such action, given the time and financial resources involved. In addition, this can only occur after any costs have already been incurred, after the consumer has experienced problems. Furthermore, it is probably likely that sale and rent back consumers are unaware of such provisions that would allow them to do this.

⁶ Sale and rent back – An OFT market study, *Office of Fair Trading*, October 2008, Annex C.

Therefore, the risk of costs to consumers associated with sale and rent back would not appear to be addressed by action under general consumer protection law (through the CPRs) or action under the CCA or EAA.

Costs

The costs of this option are those incurred by sale and rent back consumers. As calculated above, the estimated potential costs to consumers of foregone equity as a result of entering into a sale and rent back agreement are -£6.9 million to £83.7 million per year. The scale of other potential costs to consumers arising from sale and rent back agreements is unknown, but is likely to be significant.

Benefits

There are no tangible benefits for this option.

Assessment against OFT criteria

- **Transparency:** Under the current framework it would be difficult to drive up transparency. The CPRs may potentially protect the consumer after the agreement has already been entered into, but the costs to consumers will have already been incurred
- **Suitability:** Without further action, it is likely that consumers would still undertake sale and rent back deals which might not be the most suitable option for their needs
- **Product quality:** Without further action, product quality is unlikely to increase, while the risk to the consumer would remain at the same level

Option 2 – Self-regulation

A number of self-regulatory initiatives have emerged. A number of sale and rent back trade associations are gaining membership and developing voluntary codes of conduct for their members. The self-regulation option would involve the Government encouraging the development and adoption by the sale and rent back industry of one or more of these codes.

Reputational effects are an important consideration in evaluating the likely efficacy of a self-regulatory solution. Where consumers are taking a planned decision (as happens when entering into a mortgage), reputational effects can be powerful and self-regulation may achieve a high rate of coverage and impose a strong discipline on the sector. However, where consumers are taking decisions in pressured circumstances (as with many sale and rent back agreements), reputational effects may be weaker.

Given the lack of shopping around and the pressure under which decisions are taken, it is likely that many prospective sale and rent back consumers will not look for a badge of quality, such as membership of a reputable industry association.

This means that sale and rent back providers are less likely to join such an association, and those that do may have a weaker incentive to abide by their rules, as both the cost of being expelled and the benefits from being a member are low. In particular, for providers that are potentially those imposing the highest costs on consumers there appears to be little incentive to sign up.

Incentives to abide by trade association rules will be further weakened as it is hard to police such rules in a fragmented industry, where many transactions are conducted face-to-face.

Therefore, it seems unlikely that self-regulation will have wide coverage and a strong disciplinary effect on the sector. In addition, emerging initiatives do not appear to adequately address the risks to consumers. For example, 'lifeboat' schemes do not seem to be workable in all circumstances (for example, due to the difficulties in selling on properties where sale and rent back tenants are paying rent at below-market rates), and evolving self-regulation schemes do not require member firms to pre-fund redress of compensation arrangements to any significant degree.⁷

⁷ For example, by posting a bond as a condition of joining a scheme that would then contribute towards any potential future claims made against fellow scheme members.

In summary, nascent self-regulatory efforts in the sale and rent back industry may play a role in developing industry-led solutions to some of the problems identified by the OFT. However, it seems unlikely that the extent of coverage and the degree of discipline imposed by voluntary self-regulation will be sufficient to address the costs to consumers arising from sale and rent back.

Costs

Unknown. Self-regulation may have some effect on the costs to consumers of foregone equity as a result of entering into a sale and rent back agreement, and therefore this value is unknown. The value of other potential costs to consumers arising from sale and rent back agreements may also be affected by self-regulation. Given the probable extent of coverage and degree of discipline imposed by self-regulation, and the lack of compensation and redress, the costs for consumers are likely to be significant.

Self-regulation may also impose costs on sale and rent back providers, in particular compliance costs. These are likely to be lower than those imposed by statutory regulation, and given the probable extent of coverage, not all providers would incur compliance costs. Providers that have not signed up to self-regulatory initiatives may incur costs caused by reputational effects. Given that reputational effects in the sale and rent back market are likely to be weak, the value of these costs is likely to be small. Therefore the value of costs for providers (caused by compliance and reputational effects) is likely to be small.

Benefits

Unknown. Self-regulation may have some effect on the costs to consumers of foregone equity as a result of entering into a sale and rent back agreement, and therefore this value is unknown. The value of other potential costs to consumers arising from sale and rent back agreements may also be affected by self-regulation. Given the probable extent of coverage and degree of discipline imposed by self-regulation, and the lack of compensation and redress, the benefits for consumers are likely to be small.

Self-regulation may lead to benefits for sale and rent back providers, by improving the reputation of both specific providers and the market as a whole. Given that reputational effects in the sale and rent back market are likely to be weak, the value of these benefits is likely to be small.

Assessment against OFT criteria

- **Transparency:** This may be increased, for example, by developing minimum standards for documentation but this depends on the form of self-regulation. Some of the emerging self-regulatory initiatives have already developed documentation along these lines.
- **Suitability:** It is not clear if self-regulation will ensure consumers do not take up the product when it is not suitable for their needs
- **Product quality:** Self-regulation has the potential to raise product quality, but the extent to which this occurs will depend on coverage and discipline in adhering to agreed rules. It is not clear that current self-regulatory initiatives will achieve this.

Option 3 – FSA regulation

In parallel with HM Treasury's consultation, the FSA is consulting on its proposals for an interim regulatory regime for the sale and rent back market, should the Government proceed with extending the scope of FSA regulation following consultation. The details of the FSA's interim regime are subject to consultation. This Impact Assessment considers the costs and benefits of the full regulatory regime. For this purpose, the regulatory regime for home reversion plans (which are regulated by the FSA) is assumed to be the most suitable comparison, as there are some structural similarities between sale and rent back agreements and home reversion plans.

Costs

As acknowledged by the OFT in its report, a requirement which shifts some of the risks currently borne by consumers back onto sale and rent back providers could increase the costs of providing the arrangement in some cases, perhaps significantly. These increased costs faced by providers are likely to be passed on to consumers, at least in part, which could result in a reduction in the number of arrangements.

Sale and rent back providers will incur costs of compliance. In estimating these costs, this Impact Assessment draws on the FSA's assessment of the costs associated with regulation of home reversion, on the basis that these products are the most suitable comparison for sale and rent back agreements.

For the purpose of this Impact Assessment the Government expects regulation of the sale and rent back market would likely involve the following sources of costs for compliant firms:

- registration / authorisation of firm;
- compliance with high level principles (which apply to all FSA firms) including on fair treatment of customers;
- disclosure / transparency requirements, including risk warnings as appropriate;
- requirements on advice standards (where advice is given);
- advertising requirements;
- standards for firms, including capital requirements and competence standards; and
- access to redress.

The FSA originally estimated that the incremental costs associated with regulating home reversion plans would be fairly significant. Bearing in mind the size and structure of the sale and rent back market is different to that for home reversion plans, the costs of regulation for sale and rent back agreements are likely to be lower than those described in the FSA report looking at regulation of home reversion plans.⁸ Depending on the type of firm, estimates of the one-off costs ranged from £8,000 to £115,000 per firm, while annual ongoing costs ranged from £2,000 to £13,000 per firm.

Converting these per-firm costs to an industry-wide aggregate cost requires information about the market. This calculation requires making assumptions about the number of firms in the market (1,000), classifying suppliers by the number of properties they hold (those with less than 50 properties as equivalent to 'non-regulated intermediaries'; those with more than 50 properties as equivalent to 'providers') and estimating the likelihood of firm exit (in the base case it is assumed that those with less than ten properties exit). In conducting sensitivity analysis, these assumptions are varied slightly to produce a range for the aggregate costs. This results in estimates for potential costs to sale and rent back providers of compliance with regulation, with one-off costs of £26 million to £35 million and ongoing costs of £7 million to £12 million per year.

An additional cost to sale and rent back providers would be any reduction in the discount paid to sale and rent back consumers that could result from increased competition in the sale and rent back market, which might occur due to regulation. That discount could also be used to subsidise sale and rent back consumer rental payments. This may result in some of the transfer being transferred back to consumers in the form of lower rents as a result of regulation.

Regulation may result in all of the transferred equity transferring back to consumers in the form of increased security of tenure and lower rental rates. This would then impose an additional ongoing cost to firms of -£6.9 million to £83.7 million.

There will also be direct costs of regulation incurred by the Government to introduce and implement proposals for regulating the sale and rent back market. The cost of introducing and implementing such regulation may not be significantly different to those for regulating home reversion plans. However due to the specific characteristics that differentiate these products the costs of initial implementation are likely to be closer to the higher bound anticipated for home reversion regulation at around £80,000 per year.

Another potential indirect cost to Government may be through impact on the burden of work for advice centres that are funded by Government (for example, Citizens Advice). Were regulation to be implemented, there may be a reduction in the number of customers requiring advice when they get into difficulty with sale and rent back agreements. However, there is likely to be an increase in the need for advice upon entering such an arrangement. Overall it is anticipated that the cost impact on advisory centres is likely to remain stable.

Benefits

⁸ http://www.fsa.gov.uk/pages/Library/Policy/CP/2006/06_08.shtml.

The OFT argued in its report that regulation could:

- provide some direct protection for consumers – for example by providing access to redress, although this may not be taken up by sale and rent back customers;
- raise standards across the industry – for example by vetting suppliers, setting minimum standards; and
- have a positive reputational impact, which would give both consumers and other businesses more confidence in dealing with sector.

There may be positive effects on competition arising from regulation. These are discussed in the Specific Impact Test below.

In addition to the positive impact resulting from increased competition, it is possible that regulation could have a positive impact on the price received by sale and rent back customers in a different way, as those sale and rent back providers which offer the lowest prices (with the highest discount to actual market value) will most likely no longer operate in the sale and rent back market if regulation is implemented. Therefore, the lowest end of prices offered to consumers will be eliminated, which might raise prices offered to sale and rent back consumers.

The OFT identified three groups of consumers who are likely to be affected by the recommendations:

- those consumers for whom sale and rent back is the most suitable way of releasing equity from their home will benefit from a high quality product;
- some consumers for whom sale and rent back is not suitable will be diverted towards more suitable alternatives; and
- some consumers who were previously dissuaded from sale and rent back because of concerns surrounding the products may now proceed with the transaction.

The first two of these groups are addressed as part of the estimate of overall benefits to consumers by reducing foregone equity below, but the last of these groups are not included. Given the choices made by these consumers not to enter into sale and rent back agreements, it could be that such consumers are well-informed and proactive and would therefore drive competition very effectively. This is then an additional source of potential benefit that could be provided by regulation.

In terms of assessing the value of this benefit, this Impact Assessment uses the inverse of the costs to consumers of result of foregone equity. Assuming that sale and rent back providers are wealthier than sale and rent back consumers, distributional implications are accounted for by attaching weights. Annex 5 of the Green Book⁹ suggests that the relative marginal utility of an additional pound on net income to the lowest quintile can be up to double that of someone with an average income. On that basis, the benefits for sale and rent back consumers may be multiplied by a factor of one (for a lower bound) and two (for an upper bound), giving a range for annual benefits to consumers of -£6.9 million to £167.4 million.

Although there is little evidence to suggest that wronged sale and rent back customers are pursuing legal action (and those that are probably represent a very small minority in any case), it is possible that regulatory certainty and clarity about sale and rent back agreements may also have an indirect impact on reducing legal costs, as there may be a lower incidence of sale and rent back cases being brought to court as a result of litigation.

Assessment against OFT criteria

- **Transparency:** Disclosure will facilitate transparency in the sale and rent back sector, raising standards of professional conduct, on the basis that some providers will be less attracted to operating in a regulated sector.
- **Suitability:** If consumers are able to compare products more easily and accurately assess the risks and uncertainties associated with sale and rent back transaction, there should be less people undertaking sale and rent back when it is not in their best interests to do so.

⁹ http://www.hm-treasury.gov.uk/data_greenbook_index.htm.

- Product quality: Product quality should increase through regulation.

Specific Impact Tests

Small Firms Impact Test

Although details on the form of regulation are yet to be determined, it is likely that there will be at least some fixed costs associated with regulation and these fixed costs may impact disproportionately on small firms. It is therefore possible that there will be some restructuring and consolidation of the market in response to regulation. Some sale and rent back providers may exit, and these are most likely to be private landlords and those who only undertake a small amount of sale and rent back business. Others might merge, or perhaps join a franchise group or other network.

There are a great number of small firms operating in the sale and rent back market: it is estimated that around 40 per cent of all sale and rent back suppliers have less than ten properties in their portfolio (this Impact Assessment provisionally assumes that all these firms are likely to exit under the statutory regulation option); also, research suggests that 5 per cent of landlords hold at least one sale and rent back property in their portfolio, which suggests that there could be as many as 37,500 sale and rent back providers in the UK. Therefore there is potentially a large and disproportionate cost to small firms.

Competition Assessment

As noted above in relation to the impact on small firms, regulation may have a significant impact on the structure of the sale and rent back market, which may have conflicting effects on competition.

For example, a potentially significant number of (likely smaller) providers may leave the market. This may be due to the associated costs of regulation, or possibly that sanctions under regulation represent such a significant deterrent for some providers that they leave the market. This would have the effect of increasing concentration in the market and result in a potentially negative impact on competition. In their report, OFT also note that some consolidation and/or development of more extensive franchise or network operations is likely.

However, there may also be positive effects on competition arising from regulation. As noted by the OFT in its report, regulation may make entry from other potential providers (previously deterred by negative reputational effects of involvement in sale and rent back) more likely. Also, there will be potential benefits to competition of new consumers entering the sale and rent back market, that were previously dissuaded from doing so due to the degree of risk associated with the sale and rent back agreement.

Also, OFT's analysis of the sale and rent back sector suggests that price competition is not currently very strong. Improved disclosure and increased information provided to consumers may improve this and allow consumers to shop around more freely and easily.

Given these conflicting forces, it is therefore difficult to estimate the net impact on competition of regulation in the sale and rent back sector. However, the Government does not anticipate a significant reduction to competition under this scheme.

Gender Equality Impact Test

This has been considered and it is not thought that there will be any possibility of consumer being excluded from benefiting from any potential changes on the ground of their gender.

Disability Equality Impact Test

This has been considered and it is not thought that there will be any possibility of consumer being excluded from benefiting from any potential changes on the ground of any disability.

Race Equality Impact Test

This has been considered and it is not thought that there will be any possibility of consumer being excluded from benefiting from any potential changes on the ground of their ethnicity.

Specific Impact Tests: Checklist

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Summary of relevant consumer protection legislation

Regulation	When does it apply?	Application to sale and rent back	What does it provide for?
Consumer Credit Act 1974 ('CCA')	Sale and rent back transactions fall outside the scope of the CCA except insofar as the sale and rent back provider may be carrying out an 'ancillary credit business' such as debt-adjusting or debt-counselling.	Will apply to sale and rent back where debt advice on loans (other than first charge mortgage) is given.	Debt-adjusting or debt-counselling requires a licence. To gain a licence, the firm must satisfy fitness requirements. The OFT can revoke the licence. Agreements made without a licence are likely to be unenforceable but there is no direct form of redress under the CCA in relation to losses incurred (except under the general law, for example breach of contract or misrepresentation).
Estate Agents Act 1979 ('EEA')	Applies to those engaged in 'estate agency work', essentially those who receive instructions to introduce buyers and sellers of a property in order to secure its sale.	Will apply to sale and rent back providers that sell property on.	The OFT can prohibit sale and rent back providers from carrying out estate agency work if they are satisfied that the person is unfit. From 1 October 2008, estate agents have been required to belong to a redress scheme.
Consumer Protection from Unfair Trading Regulations 2008 ('CPRs')	Applies to unfair commercial practices by traders, including those which are misleading (by action or omission) or aggressive and which cause the consumer to take a transactional decision he would not otherwise have taken, or which are included in a list of specific commercial practices which are unfair in all circumstances and prohibited.	Will apply to sale and rent back firms that provide false or deceptive information, or engage in pressure selling or in a prohibited practice, such as falsely claiming to be a signatory to a code of conduct.	A range of enforcement action, including criminal and civil proceedings, may be taken against those who breach the CPRs. Consumers may not seek redress themselves under the CPRs but may seek compensation under the general law (for example breach of contract or misrepresentation).
Advertising Regulations	Complaints about misleading advertising can be made to Advertising Standards Authority (ASA) under voluntary codes, before action is taken under CPRs.	Will apply to sale and rent back firms that provide false or deceptive marketing communications.	Provider to amend/withdraw unlawful marketing communications. If they fail to do so, sanctions are applied. Non-complying parties may be subject to enforcement action, for example under the CPRs (see above).
Unfair Terms in Consumer Contracts Regulations ('UTCCRs') 1999	A contractual term is unfair if it has not been individually negotiated and if, contrary to the requirement of good faith, it causes a significant imbalance in the parties'	Will apply to sale and rent back where contract is not individually negotiated. Additionally, the price payable and rent charged or length of the agreement may form the main subject	An unfair term of a supplier is not binding on the consumer.

	rights and obligations under the contract, to the detriment of the consumer. It does not apply to terms which define the main subject matter of the contract which are expressed in plain intelligible language.	matter of contract and therefore not subject to the unfairness test.	
--	--	--	--

B

Draft statutory instrument

2009 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.?) Order 2009

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

In the opinion of the Treasury, one of the effects of the following Order is that an activity which is not a regulated activity (within the meaning of the Financial Services and Markets Act 2000(a)) will become a regulated activity;

The Treasury make the following Order in exercise of the powers conferred on them by sections 22(1) and (5), 426, 427 and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000:

PART 1
GENERAL

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.?) Order 2009.

(2) This Order comes into force—

- (a) other than for the purposes of enabling applications to be made for a Part IV permission, or a variation of a Part IV permission, in relation to activities of the kind specified by articles 25E, 53D or 63J or, so far as relevant to any such activity, article 64 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(b) on **[earliest date]**; and
- (b) for the purposes of enabling applications to be made for a Part IV permission, or a variation of a Part IV permission, in relation to activities of the kind specified by articles 25E, 53D or 63J or, so far as relevant to any such activity, article 64 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, on **[later date when full authorisation regime is up and running]**.

(a) 2000 c.8. A relevant amendment was made by the Regulation of Financial Services (Land Transactions) Act 2005 (c.24), which inserts paragraph 23A of Schedule 2 to the 2000 Act.
(b) S.I. 2001/544, to which there are amendments not relevant to this Order.

(3) In this Order, “the Act” means the Financial Services and Markets Act 2000 and “the Principal Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

PART 2

AMENDMENTS OF THE REGULATED ACTIVITIES ORDER

Amendment of the Principal Order

2.—The Principal Order is amended as follows.

Definitions

3.—(1) In article 3(1) (interpretation) —

(a) after the definition of “the Act” insert—

““agreement provider” has the meaning given by article 63J(3);

“agreement seller” has the meaning given by article 63J(3);”;

(b) after the definition of “regulated mortgage contract” insert—

““regulated sale and rent back agreement” has the meaning given by article 63J(3);”;

(c) in paragraph (a) of the definition of “overseas person”—

(i) after “25D” insert “25E,”;

(ii) after “53C” insert “53D,”; and

(iii) for “and 63F” insert “, 63F and 63J”.

(2) In article 3(2) for “or 25C(1)” insert “, 25C(1) or 25E(1)”.

Arranging sale and rent back agreements

4. After article 25D (operating a multilateral trading facility) insert—

“Arranging regulated sale and rent back agreements

25E.—(1) Making arrangements—

(a) for another person to enter into a regulated sale and rent back agreement as an agreement seller or as an agreement provider; or

(b) for another person (“A”) to vary the terms of a regulated sale and rent back agreement, entered into on or after **[the earliest commencement date]** by A as agreement seller or agreement provider, in such a way so as to vary A’s obligations under that agreement,

is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements entering into a regulated sale and rent back agreement as agreement seller or agreement provider is also a specified kind of activity.”.

Exclusion of arrangements not causing a deal

5. In article 26 (arrangements not causing a deal) for “and 25C(1)” substitute “, 25C(1) and 25E(1)”.

Exclusion where a person provides a means of communication between parties

6. In article 27 (enabling parties to communicate) for “or 25C(2)” substitute “, 25C(2) or 25E(2)”.

Exclusion where the arranger is a party to the contract, plan or agreement

7.—(1) In the title of article 28A (arranging contracts or plans to which the arranger is a party) for “or plans” substitute “, plans or agreements”.

(2) In article 28A—

- (a) in paragraph (1)—
 - (i) for “and 25C(1)” substitute “, 25C(1) and 25E(1)”;
 - (ii) for “or plan” in both places substitute “, plan or agreement”;
- (b) in paragraph (2)—
 - (i) for “and 25C(2)” substitute “, 25C(2) and 25E(2)”;
 - (ii) for “or plans” substitute “, plans or agreements”.

Exclusion of arrangements where transaction is with or through authorised persons

8. In article 29(1) (arranging deals with or through authorised persons)—

- (a) for “and 25C(1) and (2)” substitute “, 25C(1) and (2) and 25E(1) and (2)”;
- (b) in sub-paragraph (b) for “investor, borrower, reversion seller, plan provider or (as the case may be) home purchaser” substitute “investor, borrower, reversion seller, plan provider, home purchaser, agreement provider or (as the case may be) agreement seller”.

Exclusion made in the course of administration by authorised person

9. In article 29A (arrangements made in the course of administration by authorised person) after paragraph (3) insert—

“(4) A person who is not an authorised person (“A”) does not carry on an activity of the kind specified by article 25E(1)(b) as a result of—

- (a) anything done by an authorised person (“B”) in relation to a regulated sale and rent back agreement which B is administering pursuant to an arrangement of the kind mentioned in article 63K(a); or
- (b) anything A does in connection with the administration of a regulated sale and rent back agreement in circumstances falling within article 63K(b).”.

Exclusion of arrangements which consist of introduction to an authorised person etc. for independent advice

10. In article 33 (introducing)—

- (a) for “and 25C(2)” substitute “, 25C(2) and 25E(2)”;
- (b) in paragraph (b) (iii)—
 - (i) after “25C,” insert “25E,”;
 - (ii) for “and 53C” substitute “, 53C and 53D”.

Exclusion of certain other arrangements consisting of an introduction to an authorised person etc.

11. In article 33A (introducing to authorised persons etc.)—

- (a) after paragraph (1B) insert—

“1C. There are excluded from article 25E(2) arrangements where—

- (a) they are arrangements under which a client is introduced to a person (“N”) who is—
 - (i) an authorised person who has permission to carry on a regulated activity of the kind specified by any of articles 25E, 53D and 63J(1),
 - (ii) an appointed representative who may carry on a regulated activity of the kind specified by either of articles 25E or 53D without contravening the general prohibition, or
 - (iii) an overseas person who carries on activities specified by any of articles 25E, 53D and 63J(1); and
- (b) the conditions mentioned in paragraph (2) are satisfied.”;
- (b) after paragraph 4(c) insert—
 - “;
 - (d) for the purposes of paragraph (1C), an agreement provider, an agreement seller or a person who is or may be contemplating entering into a regulated sale and rent back agreement as an agreement provider or agreement seller.”

Other exclusions: arranging

12. In article 36(2) (other exclusions) for “and 25C” substitute “, 25C and 25E”.

Advising on regulated sale and rent back agreements

13. After article 53C (advising on regulated home purchase plans) insert—

“Advising on regulated sale and rent back agreements

53D. Advising a person is a specified kind of activity if the advice—

- (a) is given to the person (“A”) in A’s capacity as—
 - (i) an agreement seller or potential agreement seller, or
 - (ii) an agreement provider or potential agreement provider; and
- (b) is advice on the merits of A doing either of the following—
 - (i) entering into a particular regulated sale and rent back agreement; or
 - (ii) varying the terms of a regulated sale and rent back agreement entered into on or after **[the earliest commencement date]** by A as agreement seller or agreement provider, in such a way so as to vary A’s obligations under that agreement.”.

Exclusion of advice given in newspapers etc.

14. In article 54 (advice given in newspapers etc.)—

- (a) in paragraph (1) for “and 53C” substitute “, 53C and 53D”;
- (b) in sub-paragraph (a) for “or 53C,” substitute “, 53C or 53D,”;
- (c) after sub-paragraph b(iv) insert—
 - “;
 - (iv) to enter as agreement seller or agreement provider into regulated sale and rent back agreements, or vary the terms of regulated sale and rent back agreements entered into by them as agreement seller or agreement provider”;
- (d) in paragraph (2) for “and 53C” substitute “, 53C and 53D”.

Exclusion of advice given in the course of administration by authorised person

15. In article 54A (advice given in the course of administration by authorised person) after paragraph (3) insert—

- (4) A person who is not an authorised person (“A”) does not carry on an activity of the kind specified by article 53D by reason of
 - (a) anything done by an authorised person (“B”) in relation to a regulated sale and rent back agreement which B is administering pursuant to arrangements of the kind mentioned in article 63K(a); or
 - (b) anything A does in connection with the administration of a regulated sale and rent back agreement in circumstances falling within article 63K(b).”.

Other exclusions: advising

16. In article 55(2) (other exclusions) for “and 53C” substitute “, 53C and 53D”.

Entering into and administering regulated sale and rent back agreements

17. After article 63I (other exclusions) insert—

“CHAPTER 15C

REGULATED SALE AND RENT BACK AGREEMENTS

The activities

Entering into and administering regulated sale and rent back agreements

63J.—(1) Entering into a regulated sale and rent back agreement as an agreement provider is a specified kind of activity.

(2) Administering a regulated sale and rent back agreement is also a specified kind of activity when the agreement was entered into on or after **[the earliest commencement date]**.

(3) In this Chapter—

- (a) a “regulated sale and rent back agreement” is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into—
 - (i) the arrangement is one under which a person (the “agreement provider”) buys all or part of the qualifying interest in land (other than timeshare accommodation) in the United Kingdom from an individual or trustees (the “agreement seller ”); and
 - (ii) the agreement seller (if the agreement seller is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so;but such an arrangement is not a regulated sale and rent back agreement if it is a regulated home reversion plan;
- (b) “administering” a regulated sale and rent back agreement means any of—
 - (i) notifying the agreement seller of changes in payments due under the agreement, or of other matters of which the agreement requires the agreement seller to be notified;
 - (ii) taking any necessary steps for the purpose of making payments to the agreement seller under the agreement; and

(iii) taking any necessary steps for the purposes of collecting or recovering payments due under the agreement from the agreement seller, but a person is not to be treated as administering a regulated sale and rent back agreement because that person has, or exercises, a right to take action for the purposes of enforcing the agreement (or to require that such action is or is not taken).

(4) For the purposes of paragraph (3)—

- (a) the reference to a “qualifying interest” in land—
 - (i) in relation to land in England and Wales, is to an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity;
 - (ii) in relation to land in Scotland, is to the interest of an owner in land or the tenant’s right over or interest in a property subject to a lease;
 - (iii) in relation to land in Northern Ireland, is to any freehold estate or any leasehold estate, whether subsisting at law or in equity;
- (b) “timeshare accommodation” has the meaning given by section 1 of the Timeshare Act 1992(a); and
- (c) “related person” in relation to the agreement seller or, where the agreement seller is a trustee, a beneficiary of the trust, means—
 - (i) that person’s spouse or civil partner;
 - (ii) a person (whether or not of the opposite sex) whose relationship with that person has the characteristic of the relationship between husband and wife;
 - (iii) that person’s parent, brother, sister, child, grandparent or grandchild.

(5) For the purposes of paragraph (3)(a)(ii), the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.

(6) In this Order—

- (a) references to entering into a regulated sale and rent back agreement as agreement provider include acquiring any obligations or rights of the agreement provider, including the agreement provider’s interest in land or interests under one or more of the instruments or agreements referred to in paragraph (3)(a); but
- (b) in relation to a person who acquires any such obligations or rights, an activity is a specified kind of activity for the purposes of articles 25E(1)(b) and 53D(b)(ii) and paragraph (2) only if the agreement was entered into by the agreement provider (rather than the obligations or rights acquired) on or after **[the earliest commencement date]**.

(7) Accordingly, references in this Order to an agreement provider, other than in paragraph (6), include a person who acquires any such obligations or rights.

Exclusions

Arranging administration by authorised person

63K. A person who is not an authorised person does not carry on an activity of the kind specified by article 63J(2) in relation to a regulated sale and rent back agreement where that person—

- (a) arranges for another person, being an authorised person with permission to carry on an activity of that kind, to administer the agreement; or
- (b) administers the agreement during a period of not more than one month beginning with the day on which any such arrangement comes to an end.

(a) 1992 c.35

Administration pursuant to arrangement with authorised person

63L. A person who is not an authorised person does not carry on an activity of the kind specified by article 63J(2) in relation to a regulated sale and rent back agreement where that person administers the agreement pursuant to an agreement with an authorised person who has permission to carry on activity of that kind.

Other exclusions

63M. Article 63J is also subject to the exclusions in article 66 (trustees etc.), 72 (overseas persons) and 72A (information society services).”

Exclusion of trustees, nominees and personal representatives

18. In article 66 (trustees, nominees and personal representatives)—

- (a) in paragraph (2) for “and 25C(1) and (2)” substitute “, 25C(1) and (2) and 25E (1) and (2)”;
- (b) in paragraph (6) for “and 53C” substitute “, 53C and 53D”;
- (c) after paragraph (6C) insert—

“(6D) Subject to paragraph (7), a person acting as a trustee or personal representative does not carry on an activity of the kind specified by article 63J(1) or (2) where the agreement seller under the regulated sale and rent back agreement is a beneficiary under the trust, will or intestacy.”;
- (d) in paragraph (7) for “and (6C)” substitute “, (6C) and (6D)”.

Exclusion of activities carried on in the course of a profession or non-investment business

19. In article 67(1) (activities carried on in the course of a profession or non-investment business)—

- (a) after “25C,” insert “25E,”; and
- (b) for “and 53C” substitute “, 53C and 53D”.

Overseas persons

20. In article 72 (overseas persons)—

- (a) in paragraph (5A) for “or 25C(1)(a)” substitute “, 25C(1)(a) or 25E(1)(a)”;
- (b) in paragraph (5B) for “and 25C(1)(b)” substitute “, 25C(1)(b) and 25E(1)(b)”;
- (c) in paragraph (5C) for “and 25C(2)” substitute “, 25C(2) and 25E(2)”;
- (d) in paragraph (5D) for “or 63F(1)” substitute “, 63F(1) or 63J(1)”;
- (e) in paragraph (5E) for “or 63F(2)” substitute “, 63F(2) or 63J(2)”;
- (f) in paragraph (5F) after sub-paragraph (b) (iii) insert—

“(iv) in relation to articles 25E and 63J, a regulated sale and rent back agreement where the agreement seller (or each agreement seller) is non-resident when the agreement seller enters into it;”
- (g) in paragraph (5F) after sub-paragraph (c) (iii) insert—

“(iv) in the case of a regulated sale and rent back agreement, as agreement seller or agreement provider;”
- (h) in paragraph (5F) after sub-paragraph (d) (iii) insert—

“;

(iv) in relation to article 25E, a regulated sale and rent back agreement”.

Specified investments

21. After article 88B (regulated home reversion plans) insert—

“Regulated sale and rent back agreements

88C. Rights under a regulated sale and rent back agreement.”.

Rights to or interests in investments

22. In article 89(1) (rights to or interests in investments) for “88A or 88B” substitute “88A, 88B or 88C”.

PART 3

AMENDMENTS OF PRIMARY LEGISLATION

Amendments of the Companies Act 1985

23. In section 262(1) of the Companies Act 1985(a) (minor definitions) in the definition of “regulated activity”—

(a) after paragraph (ab) insert—

“(ac) article 25E (arranging regulated sale and rent back agreements);” and

(b) after paragraph (cb) insert—

“(cc) article 53D (advising on regulated sale and rent back agreements);”.

Amendments of the Law of Property (Miscellaneous Provisions) Act 1989

24. In section 2 of the Law of Property (Miscellaneous Provisions) Act 1989(b) (contracts for sale etc. of land to be made by signed writing)—

(a) in subsection (5)(c) for “, a regulated home reversion plan or a regulated home purchase plan” substitute “a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement”; and

(b) in subsection (6) for “ and “regulated home purchase plan”” substitute “, “regulated home purchase plan” and “regulated sale and rent back agreement””.

Amendment of the Financial Services and Markets Act 2000

25. In section 49(2A)(b) of the Financial Services and Markets Act 2000(c) (persons connected with an applicant)—

(a) in paragraph (b) of subsection (2A) for “or a regulated home purchase plan” substitute “, a regulated home purchase plan or a regulated sale and rent back agreement”; and

(b) after subsection (3) insert—

“4. In subsection (2A)(b) “regulated mortgage contract”, “regulated home reversion plan”, “regulated home purchase plan” and “regulated sale and rent back agreement” shall be construed in accordance with—

(a) section 22;

(b) any relevant order under that section; and

(a) 1985 c.6; the definition of regulated activity was inserted by S.I. 2005/2280 and amended by S.I. 2006/2383.

(b) 1989 c.34; section 2 was amended by S.I. 2001/3649 and S.I. 2006/2383.

(c) 2000 c.8; section 49(2A) was inserted by S.I. 2001/544 and amended by S.I. 2004/1610 and S.I. 2006/2383.

- (c) Schedule 2.”

Amendments of the Companies Act 2006

26. In section 474(1) of the Companies Act 2006(a) (accounts and reports: minor definitions) in the definition of “regulated activity”—

- (a) after paragraph (c) insert—
“(ca) article 25E (arranging regulated sale and rent back agreements),”; and
- (b) after paragraph (g) insert—
“(ga) article 53D (advising on regulated sale and rent back agreements),”.

PART 4

AMENDMENTS OF OTHER SECONDARY LEGISLATION

Amendments of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001

27. In the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001(b) after article 3C (arranging and advising on regulated home purchase plans) insert—

“Arranging and advising on regulated sale and rent back agreements

3D. A person is not to be regarded as carrying on by way of business an activity specified by—

- (a) article 25E of the Regulated Activities Order (arranging regulated sale and rent back agreements);
- (b) article 53D of that Order (advising on regulated sale and rent back agreements); or
- (c) article 64 of that Order (agreeing), so far as relevant to either of the articles mentioned in sub-paragraphs (a) and (b),

unless that person carries on the business of engaging in that activity.”.

Amendments of the Financial Services and Markets Act 2000 (Exemption) Order 2001

28. In the Financial Services and Markets Act 2000 (Exemption) Order 2001(c), Part 4 of the Schedule (persons exempt in respect of particular regulated activities) is amended as follows—

- (a) in paragraph 47 (local authorities)—
- (i) delete “or” at the end of sub-paragraph (c);
- (ii) after sub-paragraph (d) insert—
“; or
- (e) article 25E, 53D or 63J of that Order (arranging, advising on, entering into or administering a regulated sale and rent back agreement)”;
- (b) in paragraph 48 (social housing)—
- (i) delete “or” at the end of sub-paragraph (c);

(a) 2006 c.46

(b) S.I. 2001/1177; article 3A was inserted by S.I. 2003/1475 and articles 3B and 3C were inserted by S.I. 2006/2383.

(c) S.I. 2001/1201; paragraphs 47 and 48 of the Schedule were substituted by S.I. 2003/1675 and amended by S.I. 2006/2383.

(ii) after sub-paragraph (d) insert—

“;

(e) article 25E, 53D or 63J of that Order (arranging, advising on, entering into or administering a regulated sale and rent back agreement)”.

Amendments of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001

29.—(1) The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001(a) are amended as follows.

(2) In regulation 1(2) (interpretation)—

(a) before the definition of “buy” insert—

““agreement provider” has the meaning given by paragraph (3) of article 63J of the Regulated Activities Order, read with paragraphs (6) and (7) of that article;

“agreement seller” has the meaning given by article 63J(3) of the Regulated Activities Order”;

after the definition of “regulated mortgage contract”(b) insert—

““regulated sale and rent back agreement” has the meaning given by article 63J(3) of the Regulated Activities Order”.

(3) In regulation 2(1) (descriptions of business for which appointed representatives are exempt)—

(a) after sub-paragraph (abb) insert—

“(abc) an activity of the kind specified by article 25E of that Order (arranging regulated sale and rent back agreements);”

(b) at the end of sub-paragraph (cc) delete “or”;

(c) after sub-paragraph (cc) insert—

“(cd) an activity of the kind specified by article 53D of that Order (advising on regulated sale and rent back agreements); or”

(d) in sub-paragraph (d) for “(b), (c), (ca), (cb) or (cc)” substitute “(abc), (b), (c), (ca), (cb), (cc) or (cd)”.

(4) After paragraph (3B) of regulation 3(3) (requirements applying to contracts between authorised persons and appointed representatives) insert—

“(3C) A representative is also to be treated as representing other counterparties for the purposes of paragraph (1) where the representative—

(a) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by article 25E of that Order)—

(i) for a person to enter (or with a view to a person entering) as agreement seller or agreement provider into a regulated sale and rent back agreement with other counterparties, or

(ii) for a person to vary a regulated sale and rent back agreement entered into on or after **[the earliest commencement date]** by that person as agreement seller or agreement provider with other counterparties; or

(b) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by article 53D of that Order) on the merits of—

(i) a person entering as agreement seller or agreement provider into a regulated sale and rent back agreement with other counterparties, or

(a) S.I. 2001/1217; relevant amending instruments are S.I. 2003/1475, S.I. 2003 1476 and S.I. 2006/2383.

(b) The definition of “regulated mortgage contract” was inserted by S.I. 2006/2383.

- (ii) a person varying a regulated sale and rent back agreement entered into on or after **[the earliest commencement date]** by that person as agreement seller or agreement provider with other counterparties.”

Amendments of the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001

30.—(1) The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001(a) is amended as follows.

(2) In article 2(1) (interpretation)—

(a) after the definition of “the Act” insert—

““agreement provider” has the meaning given by paragraph (3) of article 63J of the Regulated Activities Order, read with paragraphs (6) and (7) of that article;

“agreement seller” has the meaning given by article 63J(3) of the Regulated Activities Order”;

(b) the definition of “regulated mortgage contract” insert—

““regulated sale and rent back agreement” has the meaning given by article 63J(3) of the Regulated Activities Order”.

(3) After article 6F (activities to which exemption from the general prohibition does not apply: regulated home purchase plans) insert—

“6G.—(1) An activity of the kind specified by article 53D of the Regulated Activities Order (advising on regulated sale and rent back agreements) where the advice in question falls within paragraph (2).

(2) Subject to paragraph (3), advice falls within this paragraph in so far as—

(a) it consists of a recommendation, given to an individual to enter as agreement seller or agreement provider into a regulated sale and rent back agreement with a particular person; and

(b) in entering into a regulated sale and rent back agreement that person would be carrying on an activity of the kind specified by article 63J(1) of the Regulated Activities Order (regulated sale and rent back agreements).

(3) Advice does not fall within paragraph (2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by article 53D of the Regulated Activities Order or a person who is an exempt person in relation to an activity of that kind.

6H.—(1) An activity of the kind specified by article 63J(1) or (2) of the Regulated Activities Order (regulated sale and rent back agreements).

(2) Paragraph (1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the agreement seller under the regulated sale and rent back agreement in question is a beneficiary under the trust, will or intestacy.”

Amendments of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005

31.—(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005(b) is amended as follows.

(2) In article 28B(1)(a) for “10G or 10H” substitute “10G, 10H, 10I, 10J or 10K”.

(3) In article 73(2) (advice centres)—

(a) delete “or” at the end of sub-paragraph (d);

(a) S.I. 2001/1227; relevant amending instruments are S.I. 2001/3650, S.I. 2003/1475 and 2006/2383.

(b) S.I. 2005/1529, amended by S.I. 2006/2383; there are other amending instruments but none are relevant.

- (b) after sub-paragraph (e) insert—
 - “ ; or
 - (f) a regulated sale and rent back agreement”.

(4) In Schedule 1 Part 1 (controlled activities)—

- (a) after paragraph 10H (advising on a regulated home purchase plan) insert—

“Providing a regulated sale and rent back agreement

10I. Entering into a regulated sale and rent back agreement as agreement provider is a controlled activity.

Arranging a regulated sale and rent back agreement

10J. Making arrangements—

- (a) for another person to enter as agreement seller or agreement provider into a regulated sale and rent back agreement; or
- (b) for an agreement seller or an agreement provider under a regulated sale and rent back agreement, entered into on or after **[the earlier commencement date]**, to vary the terms of that plan in such a way as to vary the obligations of the agreement seller or the agreement provider under that plan,
is a controlled activity.

Advising on a regulated sale and rent back agreement

10K. Advising a person (“A”) is a controlled activity if the advice is—

- (a) given to A in A’s capacity as agreement seller, potential agreement seller, agreement provider or potential agreement provider; and
- (b) advice on the merits of A doing either of the following—
 - (i) entering into a regulated sale and rent back agreement, or
 - (ii) varying the terms of a regulated sale and rent back agreement, entered into on or after **[the earlier commencement date]** by A, in such a way as to vary A’s obligations under that agreement.”

(5) In Schedule 1 Part 2 (controlled investments)—

- (a) after paragraph 26B (regulated home purchase plans) insert—

“Regulated sale and rent back agreement

26C. Rights under a regulated sale and rent back agreement.”

- (b) in paragraph 27(1) (rights to or interests in investments) for “26A or 26B” substitute “26A, 26B or 26C”;
- (c) in paragraph 28 (interpretation)—
 - (i) before the definition of “buying” insert—
 - ““agreement provider” has the meaning given in paragraph (3) of article 63J of the Regulated Activities Order, read with paragraphs (6) and (7) of that article;
 - “agreement seller” has the meaning given in article 63J(3) of the Regulated Activities Order”;
 - (ii) after the definition of “regulated home reversion plan” and “reversion seller” insert—

““regulated sale and rent back agreement” has the meaning given in article 63J(3) of the Regulated Activities Order;”.

Amendments of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008

32. In section 474(1) of the Companies Act 2006, as applied to limited liability partnerships by regulation 32 of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008(a) (minor definition) in the definition of “regulated activity”—

- (a) after paragraph (c) insert —
“(ca) article 25E (arranging regulated sale and rent back agreements),”; and
- (b) after paragraph (g) insert —
“(ga) article 53D (advising on regulated sale and rent back agreements),”.

PART 5

TRANSITIONAL PROVISIONS

Interim permission and interim variation of permission

33.—(1) This article applies where—

- (a) a person (“A”) has submitted to the Authority a completed request to carry on activity of the kind specified by any of the following articles of the Principal Order (as amended by this Order)—
 - (i) article 25E (arranging regulated sale and rent back agreements);
 - (ii) article 53D (advising on regulated sale and rent back agreements);
 - (iii) article 63J (entering into and administering regulated sale and rent back agreements);
or
 - (iv) article 64 (agreeing to carry on specified kinds of activity), so far as relevant to any of the above activities;
- (b) A —
 - (i) has carried on such activity before **[the earliest commencement date]** and the Authority has received the request on or before the **[one month after the earliest commencement date]**; or
 - (ii) is an authorised person with a Part IV permission.

(2) A is to be treated as having, on **[the earliest commencement date]**, a Part IV permission to carry on the activity to which the request relates.

(3) A permission which A is to be treated as having is referred to in this Order as an “interim permission”.

(4) A variation of permission which A is to be treated as having is referred to in this Order as an “interim variation of permission”.

(5) Section 51 (applications under this part) of the Act shall apply to a request made under this article; and for that purpose—

- (a) a reference to an application for a Part IV permission, an application for the variation of a Part IV permission, an application under this Part and an application is taken to be a reference to a request under this article;

(a) S.I. 2008/1911

- (b) a reference to a Part IV permission is taken to be a reference to interim permission under this article
- (c) a reference to the variation of a Part IV permission is taken to be a reference to interim variation of permission under this article; and
- (d) section 51 is to be read with any other necessary modifications.

(6) A request made in accordance with this Article must be determined by the Authority before the end of the period of 3 months beginning with the date on which it received the completed request.

(7) The Authority may give interim permission or interim variation of permission for A to carry out the regulated activity or regulated activities to which the request relates or such of them as may be specified in the permission if it has ensured that A will satisfy, and continue to satisfy, the threshold conditions set out in Schedule 6 to the Act in relation to all such activities.

(8) Should A be aggrieved by the determination of a request made under this article, A may apply to the Authority in writing for a review of the determination provided that the application for a review is made before the end of the period of 21 days beginning with the date on which the decision notice is given.

(9) Should A's request not be considered on the basis that it was received by the Authority after the date set out in paragraph (1)(b)(i), A may apply to the Authority in writing for a review of the refusal provided that the application for a review is made before the end of the period of 21 days beginning with the date on which the decision notice is given.

(10) The decision on review shall be made by a person of appropriate seniority who was not involved in the original decision and shall be determined before the end of the period of 28 days beginning with the date on which the application for a review was received.

(11) On an application for a review, any evidence relating to the subject matter of the review may be considered, whether or not it was available to the Authority at the material time.

(12) The person determining the review may give interim permission or interim variation of permission for A to carry out the regulated activity or regulated activities to which the request relates or such of them as may be specified in the permission if that person has ensured that A will satisfy, and continue to satisfy, the threshold conditions set out in Schedule 6 to the Act in relation to all such activities.

(13) On determining a request or an application for a review made in accordance with this article, the Authority must give A a decision notice setting out the reasons for the determination.

(14) Without prejudice to the exercise by the Authority of its powers under Part IV of the Act, an interim permission lapses—

- (a) on the date that the Authority gives A a decision notice refusing a request for interim permission or interim variation of permission made in accordance with this article;
- (b) on the date that the Authority, in accordance with paragraph (17), consents to the withdrawal of the request;
- (c) when an application for Part IV permission or a variation of a Part IV permission to carry on such activity to which the interim permission relates has been finally decided; or
- (d) at the beginning of **[an end date ie 6 months after the later commencement date]**;

whichever is the earlier.

(15) In this article, “refusing a request” means where the Authority has refused a request and —

- (a) A does not apply for a review, when the time for applying for a review has expired; or
- (b) A applies for a review, when the review has been determined in accordance with paragraphs (10) to (12).

(16) In this article, “finally decided” means—

- (a) subject to paragraphs (17) and (18), when the application is withdrawn;

- (b) when the Authority grants permission under section 42 of the Act (giving permission) to carry on the activity in question;
- (c) when the Authority varies a permission under section 44 of the Act (variation etc. at request of authorised person) to add the activity in question;
- (d) where the Authority has refused an application and the matter is not referred to the Tribunal, when the time for referring the matter to the Tribunal has expired;
- (e) where the Authority has refused an application and the matter is referred to the Tribunal, when—
 - (i) if the reference is determined by the Tribunal (including a determination following remission back to the Tribunal for rehearing in accordance with section 137(3) (a) of the Act (appeal on a point of law)), the time for bringing an appeal has expired; or
 - (ii) on an appeal from a determination of the Tribunal on a point of law, the Court itself determines the application in accordance with section 137 of the Act.

(17) Should A make a request for interim permission or interim variation of permission, the application may not be withdrawn without A first having obtained the consent of the Authority.

(18) Should A hold an interim permission or interim variation of permission and make an application for Part IV permission or a variation of a Part IV permission in relation to an activity to which the interim permission or interim variation of permission relates, the application may not be withdrawn without A first having obtained the consent of the Authority.

(19) Where—

- (a) the Authority exercises its powers under section 45 of the Act (variation etc. on the Authority’s own initiative) in relation to an authorised person who holds an interim permission; and
- (b) as a result of the variation there are no longer any regulated activities for which the authorised person has permission,

the Authority must, once it is satisfied that it is no longer necessary to keep the interim permission in force, cancel it.

Application of the Authority’s rules etc. to persons with an interim permission or interim variation of permission

34.—(1) The Authority may direct in writing that any relevant provision which would otherwise apply to a person by virtue of his interim permission or interim variation of permission is not to apply or is to apply as modified in the way specified in the direction.

(2) Where the Authority makes a rule, gives guidance or issues a statement or code which applies only to persons with an interim permission or interim variation of permission (or only to a class of such persons), section 65 (statements and codes: procedure), 155 (consultation) and 157(3) (guidance) of the Act do not apply to that rule, guidance, statement or code.

(3) For the purposes of paragraph (1), a “relevant provision” is any provision made as a result of the exercise by the Authority of any of its legislative functions mentioned in paragraph 1(2) of Schedule 1 to the Act (the Financial Services Authority).

Application of the Act etc.

35. The Schedule modifies the application of the Act and the Principal Order in relation to persons with an interim permission and interim variation of permission.

Date

xxx xxxxx
yy yyyyy
Two of the Lords Commissioners
of Her Majesty’s Treasury

APPLICATION OF THE ACT AND THE PRINCIPAL ORDER TO PERSONS WITH AN INTERIM PERMISSION

1. Paragraphs 2 and 3 apply to every person with an interim permission
2. For the purposes of section 20 (authorised persons acting without permission), a person's interim permission is treated as having been given under Part IV of the Act.
3. A person's interim permission is to be disregarded for the purposes of—
 - (a) section 38(2) (exemption orders);
 - (b) section 40(2) (application for permission);
 - (c) subject to paragraph 7, section 42 (giving permission);
 - (d) section 43 (imposition of requirements);
 - (e) section 44(1), (4) and (5) (variation etc at request of authorised person);
 - (f) section 45(1)(b) (variation etc on the Authority's own initiative);
 - (g) section 52 (determination of applications);
 - (h) section 53 (exercise of own-initiative power: procedure);
 - (i) section 54 (cancellation of the Part IV permission: procedure);
 - (j) section 55 (right to refer matters to the Tribunal);
 - (k) section 59 (approval for particular arrangements);
 - (l) section 60 (applications for approval);
 - (m) section 61 (determination of applications);
 - (n) section 62 (applications for approval: procedure and right to refer to a Tribunal) and
 - (o) section 63 (withdrawal of approval).
4. Paragraphs 5 to 10 apply to a person who falls within section 31(1) (authorised persons) by virtue only of having an interim permission.
5. A person with an interim permission is to be treated on or after **[earliest commencement date]** as an authorised person for the purposes of the Act (and any provision made under the Act), unless otherwise expressly provided for by this Schedule.
6. For the purposes of section 21(2) (restrictions on financial promotion), a person with an interim permission is not to be treated as an authorised person for the purposes of communicating or approving the content of a communication except where the communication invites or induces a person to enter into (or offer to enter into) an agreement the making or performance of which constitutes a controlled activity which corresponds to a regulated activity which is covered by his interim permission.
7. A person with an interim permission may still be an appointed representative within the meaning of section 39(2) (exemption of appointed representatives) (and hence may be treated as exempt from the general prohibition as a result of section 39(1) for the purposes of section 42(3)(a) (giving permission)).
8. Subsection (3)(a) of section 213 (the compensation scheme) does not apply to—
 - (a) a person who is a relevant person, within the meaning of that section, by virtue only of having an interim permission; or
 - (b) an appointed representative of such person.

9. In article 29 of the Principal Order (arranging deals with or through authorised persons), with the exception of the first reference, the references to an “authorised person” do not include a person with an interim permission.

10. In sub-paragraph (a) of paragraph (4) of article 29A of the Principal Order (arrangements made in the course of administration by authorised person), the references to an “authorised person” do not include a person with an interim permission.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the “Principal Order”) so as to specify new regulated activities. The Principal Order specifies kinds of activities and investments for the purposes of the Financial Services and Markets Act 2000 (c.8) (“the Act”). When an activity of a specified kind is carried on by way of business in relation to an investment of a specified kind, it is a “regulated activity” for the purposes of the Act. Section 19 of the Act prohibits persons who are not authorised or exempt from carrying on any regulated activity in the United Kingdom. Contravention of that prohibition is a criminal offence. A person who has permission under Part IV of the Act to carry on one or more regulated activities is authorised.

The matters with respect to which regulated activities may be specified include finance arrangements in connection with the acquisition or disposal of land (paragraph 23A of Schedule 2 to the Act, inserted by the Regulation of Financial Services (Land Transactions) Act 2005 (c. 24)). This Order specifies the activities of entering into, administering, arranging and advising on regulated sale and rent back agreements.

The activities will become regulated activities for the purposes of the interim regime on **[earliest commencement date]** and for the purposes of making applications for Part IV permission or variation of Part IV permission on the **[latest commencement date]**. In order to ensure that the business of those persons who are currently lawfully carrying on the activity which will be regulated for the first time under the Act is not disrupted, a person who requests interim permission before **[a month after the earliest commencement date]** will receive an interim permission to enable him to continue to carry on that activity. Persons who are already authorised to carry out another regulated activity may request interim variation of permission. The interim permission (or interim variation of permission) will take effect from **[the earliest commencement date]**. The interim permission (or interim variation of permission) lapses at the time when the request is withdrawn or refused, is superseded by the determination of an application for Part IV permission or **[6 months after the later commencement date]**.

Article 3 inserts new definitions and makes a consequential amendment to the definition of “overseas person” in the Principal Order.

Article 4 inserts a new article into the Principal Order to specify the new regulated activity of arranging regulated sale and rent back agreements. Articles 5 to 11 amend articles 26 to 33A of the Principal Order, so as to apply the exclusions specified in those articles to arranging sale and rent back agreements. Those exclusions relate, for example, to arrangements not causing a deal, the provision of the means of communication between the parties to a transaction, arrangements to which the arranger is a party and arrangements where the transaction is with or through an authorised person.

Article 13 inserts a new article into the Principal Order to specify the new regulated activity of advising on regulated sale and rent back agreements. Articles 14 and 15 amend respectively articles 54 and 54A of the Principal Order so as to apply the exclusion specified in those articles to advising on regulated sale and rent back agreements. Those exclusions relate to advice given in the media and advice given in the course of administration by an authorised person.

Article 17 inserts a new article into the Principal Order to specify the new regulated activity of entering into and administering regulated sale and rent back agreements and to apply exclusions relating to arranging administration by an authorised person and administration pursuant to an agreement with an authorised person.

Articles 18, 19 and 20 amend respectively articles 66, 67 and 72 of the Principal Order so as to extend certain other exclusions to entering into, arranging and advising on regulated sale and rent back agreements.

Article 22 inserts a new article into the Principal Order to specify rights under regulated sale and rent back agreements as specified investments and exclude such rights from the scope of article 89 of the Principal Order.

Articles 23 to 26 make consequential amendments to the Companies Act 1985 (c. 6), the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34), the Act and the Companies Act 2006 (c.46).

Articles 27 to 32 make consequential amendments to other secondary legislation including other instruments made under the Act.

Article 33 confers an interim permission (or interim variation of permission) to enter into, administer, arrange or advise on regulated sale and rent back agreements on persons who have submitted a request for interim permission and are either already conducting the activities to which their request relates or already authorised under Part IV of the Act to carry on other regulated activities.

Article 34 enables the Financial Services Authority to modify, amongst other things, its rules in their application to persons with an interim permission or interim variation of permission.

Article 35 and the Schedule provide for the application of provisions in the Act and the Principal Order to persons with an interim permission or interim variation of permission, indicating where such provisions are to be treated as including or not including such persons.

An Impact Assessment of the effect of this instrument on the costs of business has been prepared and is available on HM Treasury's website (www.hm-treasury.gov.uk) or from the Payments, Credit and Inclusion team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website (www.opsi.gov.uk).

ISBN 978-1-84532-558-9



9 781845 325589