EXPLANATORY MEMORANDUM TO

THE AVIATION SECURITY ACT 1982 (CIVIL PENALTIES) REGULATIONS 2015

2015 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. Under the Aviation Security Act 1982 (the "ASA82"), as amended, the Secretary of State has the power to make regulations establishing a civil penalty scheme for failure to comply with certain security directions or requests for information made under the ASA82.

2.2. This instrument creates a civil penalty scheme and specifies the circumstances under which the Secretary of State may impose a civil penalty and the process that must be followed in doing so. It also sets out the right of carriers to object, and ultimately to appeal, a decision to impose a penalty.

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

3.1. None.

4. Legislative Context

4.1. The Counter-Terrorism and Security Act 2015 (the "CTSA15") (Schedule 5, Part 2, Paragraph 11) amended the ASA82 to give the Secretary of State the power to make regulations imposing civil penalties for failure to comply with certain security directions or requests for information made under the ASA82.

4.2. Relatedly, the CTSA15 (Schedule 5, Part 2, Paragraph 9) clarified and strengthened the legal basis on which directions, particularly to inbound flights, could be made, by amending the ASA82 as follows:

4.2.1. expanding the current power of direction in order that the Secretary of State may now direct that an aircraft must not fly in or into the United Kingdom unless specified searches of persons, aircraft or property have been carried out;

4.2.2. clarifying that directions may have effect where they require operators of aircraft inbound to the UK to do or not do certain things outside the UK;

4.2.3. removing the 7-day notice period for requests for information by the Government or the Civil Aviation Authority (CAA); and

4.2.4. giving powers to make future regulations with regard to electronic service.

4.3. This instrument constitutes the first time this new power to make a civil penalties scheme has been exercised. Previously only criminal sanctions were available to the Secretary of State for non-compliance with directions under the ASA82.

5. Territorial Extent and Application

5.1. This instrument extends to all of the United Kingdom.

6. European Convention on Human Rights

6.1. The Minister, Robert Goodwill MP, has made the following statement regarding Human Rights:

6.2. In my view the provisions of the Aviation Security Act 1982 (Civil Penalties) Regulations 2015 are compatible with the Convention rights.

7. Policy Background

7.1. The threat from terrorism is serious, diverse and constantly changing. In September 2014 the independent Joint Terrorism Analysis Centre raised the UK's terrorist threat level to SEVERE. This means that an attack is highly likely. The threat to aviation from certain terrorist groups is well documented, and continues to evolve. Aviation remains an iconic target and terrorist groups continue to look for ways to defeat aviation security.

7.2. The UK already has some of the strongest aviation security arrangements in the world at our own airports. Given the threat to aviation, we need to be able to ensure that levels of security are also applied to inbound flights that are appropriate to the threat and risk involved at any particular time. We need to work closely with foreign governments and airlines, as well as UK operators, to make sure that necessary security measures are in place and being effectively implemented.

7.3. The CTSA15 has amended transport security legislation in order to strengthen and clarify existing powers under which the Secretary of State may require that certain security measures are implemented before a carrier may operate into the UK. These amendments are described in paragraph 4.2 above.

7.4. The civil sanctions scheme set out in this instrument is designed to improve the ability of the Secretary of State to enforce these powers where necessary. Under the scheme, civil penalties, namely the payment of graduated penalty fines, would be available as an alternative to existing criminal sanctions and other existing powers where a carrier has failed to comply with certain directions or requests for information, thus enabling a more flexible enforcement regime.

7.5. Although the powers in the CTSA15 allow the Secretary of State ultimately to create a civil penalty scheme for a wide variety of directions or information requests that may be made under the ASA82, this instrument applies only to directions and information requests made in respect of inbound flights to the UK. Specifically, the power to issue civil penalties would be available in circumstances where:

a. a carrier has failed to comply with a request for information under section 11 of the ASA82 (either by failing to comply or knowingly making a false statement) relating to an inbound flight,

b. a carrier has failed to comply with a Direction under section 12(1)(b) or 14 of the ASA82 (requiring certain security measures to be applied), again relating to an inbound flight.

7.6. In doing so, this instrument represents an important strengthening of the Secretary of State's ability to enforce directions or information requests that may have a direct bearing on the national security of the United Kingdom. Whereas the Government has regulatory oversight of aviation security within the United Kingdom, it has fewer direct powers over flights arriving at UK airports from overseas. As well as clarifying the legal basis on which the Secretary of State may direct carriers to have taken certain security measures as a condition of operating into the UK – which has been done through the CTSA15 – it is also necessary to be able to enforce those powers swiftly and simply.

7.7. That is the objective of this instrument, which creates a more flexible enforcement regime that increases the likelihood of compliance with important security directions or requests for information, and allows the Government to address non-compliance in a straightforward manner.

7.8. The Government does not expect these powers to be used regularly. The existing powers of direction have been used sparingly in the past and it is generally possible to achieve security aims through cooperation with carriers and foreign governments. However, given the threat to aviation from terrorism, it is important that the Secretary of State is able to take decisive action where necessary. That is why the powers to direct that certain security measures are undertaken, and to make requests for information, are a crucial part of the aviation security regime and why they need to be backed up by effective enforcement.

7.9. This instrument is drafted in such a way as to give carriers who may be subject to a civil penalty an opportunity to object and, ultimately, to appeal to the courts, if they believe that the penalty should not be applied. The Secretary of State's decision to impose a financial penalty in the first place must be taken on the balance of probabilities (as set out in regulations 3 and 4). The Secretary of State must have determined that the carrier in question has failed to comply and had no reasonable excuse for that failure.

8. Consultation outcome

8.1. A joint Department/Home Office targeted consultation exercise took place early in 2015 and closed on 16 February 2015. The consultation sought views from passenger airlines operating to and from the UK, the Civil Aviation Authority, carriers' representative organisations and (in respect of Home Office matters) international rail and maritime operators.

8.2. The consultation yielded 28 responses. There were mixed views on the introduction of a civil penalty scheme. While some thought that the proposed regime may be an additional deterrent and a way of treating all airlines equally, others felt that a civil penalty regime was unnecessary given there was a common interest in compliance with aviation security requirements, and that this was best achieved through dialogue and co-operation. In response to the proposed maximum level of penalty, although some thought the proposal was reasonable as a maximum penalty, the majority argued that this was unreasonably high, with some adding that it was unnecessary given the shared interests in compliance.

8.3. Responses also argued that civil penalties should only be issued as a last resort, and in deciding whether to impose a civil penalty, that the Secretary of State should take into account factors such as a carrier's record of co-operation, whether or not there had been a deliberate breach, the actual harm or risk caused by non-compliance and the extent to which factors affecting compliance were outside the control of the carrier in question.

9. Guidance

9.1. The Department has drafted guidance aimed both at those who may operate the civil penalty scheme in the future, and at carriers who may be subject to the scheme, to assist with interpretation and application of the instrument. In particular this guidance sets out factors that the Secretary of State may take into account when considering whether to impose a civil penalty and at what level. For example, relevant factors may include the carrier's previous record of cooperation with the Department on aviation security matters, or any reasonable steps that the carrier may have taken to comply. The guidance will be issued upon the regulations coming into force and kept under review and updated as necessary.

9.2. A copy of the draft guidance has been provided to the libraries of both Houses.

10. Impact

10.1. An Impact Assessment of the Border Security elements of the CTSA15 was prepared at the time the Bill was deposited. Historically the Department has not prepared formal Impact Assessments for specific aviation security secondary legislation given the sensitive subject matter and the difficulty in providing a meaningful quantitative assessment of what remain hypothetical situations.

10.2. In practice we expect the number of directions issued – to which civil penalties may be applied – to be small, given that we have worked successfully on a

cooperative basis with air carriers and governments to ensure the implementation of security measures where necessary and will continue to do so.

11. Regulating small business

11.1. The instrument may technically apply to small businesses insofar as directions or information requests made under the ASA82 may apply to any carrier operating in or into the UK, although in practice we do not expect this to affect small businesses given the low number both of anticipated directions and small businesses operating as carriers into the UK.

12. Monitoring & review

12.1. In recognition of the fact that this instrument establishes a new scheme, the Department will keep the effective operation of the scheme under continual review in its early stages and formally review it after 3 years in line with established practice. The instrument also includes a sunset clause and will expire after a period 7 years from the date on which it comes into force requiring that the Secretary of State will need to consider and make another scheme in the event that it is considered appropriate to do so.

12.2. The scheme is designed to provide a flexible enforcement regime that supports the effective use of ASA82 powers to issue security directions or make information requests, in respect of inbound flights. Successful implementation of the scheme will see either high levels of compliance with any directions or information requests that may be made – suggesting that the civil penalty scheme may be acting as an effective incentive to comply – or the successful issue of civil penalties where non-compliance has occurred.

13. Contact

13.1. Any inquiries in relation to this Explanatory Memorandum or the instrument should be directed to Rupert Hetherington at the Department for Transport. rupert.hetherington@dft.gsi.gov.uk, 0207 944 4078.