EXPLANATORY MEMORANDUM TO

THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2013

2013 No. [XXXX]

1. This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs ("HMRC") and is laid before the House of Commons by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument gives legislative effect to extra-statutory concessions ("ESCs"). The House of Lords' decision in *R v HM Commissioners of Inland Revenue ex p Wilkinson* [2005] UKHL 30 ("the *Wilkinson* case") clarified the scope of HMRC's administrative discretion to make concessions that depart from the strict statutory position.

2.2 The Enactment of Extra-Statutory Concessions Order 2013 preserves the full tax effect of three ESCs which have already been partially legislated in previous Orders.

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

3.1 This Order is the fifth exercise of the power conferred by section 160 of the Finance Act 2008 (c. 9) ("FA 2008"). The last Order made under that power was the Enactment of Extra-Statutory Concessions Order 2012 SI 2012/266[1]. Further orders are planned. The definition of "existing HMRC concession" at section 160(3) FA 2008 refers to a statement made by the Commissioners for HMRC. This includes a statement made by either the Commissioners of Inland Revenue or the Commissioners of Customs and Excise in exercise of their respective functions before the passing of the Commissioners for Revenue and Customs Act 2005 (see section 5 of that Act), provided that statement continued to have effect at the passing of FA 2008.

4. Legislative Context

4.1 Section 160 of FA 2008[2] provides an enabling power which allows the tax treatment afforded by existing concessions to be legislated by Treasury order. This Order adds to or amends legislation already made under these powers to ensure the effect of three ESCs are fully preserved as intended, and in one case takes the opportunity to close a loophole that may have inadvertently been created.

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[1] http://www.legislation.gov.uk/uksi/2012/266/introduction/made
[2] http://www.legislation.gov.uk/ukpga/2008/9/section/160

4.2 Details of the individual ESCs and explanations can be found in the HMRC consultation document referred to in paragraph 8.1. Details of the legislative changes that are being made by this instrument can be found in the explanatory note.

5. Territorial Extent and Application

5.1 These instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

6.1 David Gauke, the Exchequer Secretary to the Treasury has made the following statement regarding Human Rights:

"*In my view the provisions of the Enactment of Extra-Statutory Concessions Order 2013 are compatible with the Convention rights*."

7. Policy background

- ***What is being done and why***

7.1 ESCs have been a feature of the UK's tax system for decades and will continue to be made and withdrawn as necessary. For this purpose the term "ESC" refers to any statement made by the Commissioners of HMRC made before the passing of the FA 2008 on 21 July 2008, and having effect at that time, that they will treat persons as if they were entitled to a reduction to tax or duty, or any other concession relating to tax or duty to which they are not, or may not be, entitled in accordance with the law. Such statements might comprise ESCs described as such in the former Inland Revenue booklet IR1[3] and the former HM Customs and Excise booklet Notice 48[4], or otherwise as a statement of practice, press release or a statement made in any other way.

7.2 The House of Lords' decision in the *Wilkinson* case clarified the scope of HMRC's administrative discretion to make concessions that depart from the strict statutory position.

7.3 In light of that decision, HMRC is reviewing each of its published concessions. The indications are that most ESCs will be able to continue in their current form as they are within the scope of HMRC's administrative discretion. However, where an existing ESC exceeds the scope of that discretion, where it is appropriate to do so, its effect will be maintained by putting it on to a legislative basis. While the aim is to retain as many ESCs as possible, some may be withdrawn either because they are no longer required or because they do not fall within HMRC's administrative discretion and it is not possible to legislate for their effect.

[3] http://www.hmrc.gov.uk/specialist/esc.pdf
[4] Public Notice 48

- **Consolidation**

Not applicable.

8. Consultation outcome

8.1 The legislation in this Order has been, with one exception which is explained below, subject to consultation. A consultation document, entitled *'Extra statutory concessions: fifth technical consultation on draft legislation'*[5] was published on 6 December 2011, and covered the legislation at Articles 3 – 9 of this Order. Draft legislation for ESC D26 was originally published for consultation in the document entitled *'Extra statutory concessions; second technical consultation on draft legislation*[6]*'* on 15 July 2009, and was originally legislated in the Enactment of Extra-Statutory Concessions Order 2010 (S.I. 2010/157[7]). Article 2 of this Order is additional legislation required to fully enact the effects of ESC D26 by correcting an inadvertent error in article 8 of S.I. 2010/157. In line with the exception for revenue protection measures under the *Tax Consultation Framework*[8], article 2 has not been exposed for consultation.

8.2 The purpose of the consultations was to seek views on whether the legislation accurately translated the effect of the ESCs concerned. These amendments ensure the effects of the concessions are fully preserved.

9. Guidance

9.1 Appropriate amendments will be made to existing guidance but as this Order in most cases simply confirms existing treatment only minor changes are required.

10. Impact

10.1 In line with government commitments, a Tax Information and Impact Note has not been prepared for this Order as there has been no change in policy. This instrument simply puts a number of existing ESCs on a statutory footing and there is no change to the tax, administrative or other impacts.

11. Regulating small business

11.1 The legislation may apply to small business but a Small Firms Impact Test has not been undertaken on this Order because the legislation does not alter the existing tax effect.

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[5] Extra statutory concessions - fifth technical consultation on draft legislation

[6] Extra statutory concessions

[7] http://www.legislation.gov.uk/uksi/2010/157/contents/made

[8] Tax Consultation Framework

12. Monitoring & review

12.1 The legislation contained within this Order will be monitored and reviewed as appropriate within the context of the wider legislative schemes relating to the relevant tax regimes.

13. Contact

13.1 Stephanie Allistone at HMRC, telephone 020 7147 2394 or email: tap@hmrc.gsi.gov.uk can answer any queries regarding the instrument.