EXPLANATORY MEMORANDUM TO

THE EQUALITY ACT 2010 (EQUAL PAY AUDITS) REGULATIONS 2014

2014 No. [XXXX]

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

2. Purpose of the instrument

The Equality Act 2010 (Equal Pay Audits) Regulations 2014 are made under the power in section 139A[1] of the Equality Act 2010 ("the 2010 Act") and require employment tribunals to order a respondent who has been found by the tribunal to have committed an equal pay breach to carry out an equal pay audit. The purpose of the requirement to carry out an audit is to identify action to be taken to avoid equal pay breaches from occurring or continuing. An audit will not be required to be carried out if any of four exceptions set out in the Regulations apply, or if the respondent is exempt as a micro- or new business.

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

These Regulations use the model provisions in relation to new businesses and micro-businesses used in S.I. 2012/3220, and like those regulations, do not include provision on how to determine, in a case where more than one set of related operations are being carried out, whether a particular operation counts as a single business or part of a larger business. The contents of the JCSI's 21st Report of the 2012/13 Session have been noted. However, such provision has not been included because, if the employment tribunal makes an order requiring a business to conduct an equal pay audit, and that business believes that it should be exempt as it is a micro-business or a new business, it can appeal that order in the same way that it can appeal any other order of the employment tribunal. It can also appeal against the description of persons specified by the employment tribunal in relation to whom relevant gender pay information must be given. Work on a revised template for new and micro-businesses is continuing, and an announcement is expected shortly. However, the revised template was not available for use in these Regulations.

4. Legislative Context

The Enterprise and Regulatory Reform Act 2014 inserted a new section 139A into the 2010 Act, conferring power on a Minister of the Crown to make regulations requiring an employment tribunal to order a respondent who has been found to have committed an equal pay breach to carry out an equal pay audit. An equal pay breach is defined in

[1] Section 139A was inserted into the Act by section 98 of the Enterprise and Regulatory Reform Act 2013, c. 24.

section 139A(2) of the 2010 Act as a breach of an equality clause[2] or a contravention of the sex discrimination provisions relating to pay. The 2010 Act replaced and consolidated earlier anti-discrimination legislation, including the Equal Pay Act 1970 and the Sex Discrimination Act 1975. These Regulations are the first use of the power in section 139A.

5. Territorial Extent and Application

These Regulations apply to Great Britain.

6. European Convention on Human Rights

The Rt. Hon. Sajid Javid MP, the Secretary of State for Culture Media and Sport and Minister for Equalities has made the following statement regarding human rights:

In my view the provisions of the Equality Act 2010 (Equal Pay Audits) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1 The legislation providing for equal pay between men and women has been in force since 1975, but the gender pay gap, of which unequal pay between men and women in the workplace is a contributory factor, has persisted. It is narrowing steadily over time – the overall median gap was 25% ten years ago and now stands at 19.7% (comparing men and women working full-time and part-time, but excluding overtime) according to statistics published in December 2013 by the Office for National Statistics (ONS). The Government is committed to reducing it further by addressing all the causes of the pay gap. Transparency around gender equality in the workplace is a key mechanism to drive progress on this issue. Initiatives such as Think, Act, Report, extending the right to request flexible working to all employees from 2014, and introducing a system of shared parental leave from 2015 will all help to reduce the pay gap over time.

7.2 The aim of these Regulations is to ensure that employers found by an employment tribunal to have committed an equal pay breach are required to undertake a systematic evaluation of their pay and reward systems to ensure that further breaches do not occur or that existing breaches do not continue. The audit will need to identify any differences in pay (including non-contractual pay) between men and women doing equal work in the same employment, provide reasons for any differences and set out an action plan for eliminating those differences, where they cannot be explained or justified otherwise than by reference to gender.

7.3 Employment tribunals will be required to order a respondent who has been found to have committed an equal pay breach to carry out an audit, unless one of the exceptions set out in the Regulations applies. These exceptions are where an employment tribunal considers that: an audit completed in the previous 3 years meets the requirements set out in the Regulations; it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing; the breach gives no reason to think that there

[2] This includes both a sex equality clause and a maternity equality clause, as defined in sections 66 and 73 of the 2010 Act respectively.

may be other breaches; or the disadvantages of an audit outweigh the benefits.

7.4 The requirement to carry out an equal pay audit will also not apply to a respondent whose business is a micro-business or new business, as defined in the Regulations. For the purposes of the Regulations, a micro-business is a business with fewer than 10 employees immediately before the date on which the employment tribunal issues a judgment stating that there has been an equal pay breach. A new business is a business that began carrying on activities within 12 months prior to the date on which the claim in respect of an equal pay breach is presented to an employment tribunal. Both micro-businesses and new businesses are exempt from these Regulations for a period of ten years from the date when the Regulations come into force. The word "business" is not defined in the 2010 Act or in the Regulations and is to be interpreted within the particular context.

7.5 The aim of the exceptions is twofold: firstly, to ensure that employers who have already taken action to put in place robust and compliant pay structures, by either undertaking an equal pay audit or some other exercise to ensure transparency, are not subject to a further requirement to carry out a similar exercise. Secondly, the Government believes that it is right that new and micro-businesses should not be required to undertake an equal pay audit. Micro and start-up businesses are disproportionately affected by the costs of regulation. This can act as a deterrent to growth for business and impact on the wider economy.

7.6 In order to ensure transparency, a respondent will be required to publish an audit and to provide the employment tribunal with evidence that it has done so.

7.7 Where a respondent fails to comply with an order of the employment tribunal to carry out an audit, the tribunal has the power to order the respondent to pay a penalty to the Secretary of State not exceeding £5,000. The purpose of this sanction is to encourage employers to comply with the equal pay audit order in the first instance. An employment tribunal has the power to impose further penalties of up to £5000 (repeatedly if necessary) until the order is complied with.

7.8 The Regulations are intended to complement the Government's on-going voluntary initiative for businesses, *Think, Act, Report* (TAR). The TAR initiative aims to promote greater transparency on gender employment issues in the workplace by providing a framework to help employers think about gender equality on key issues such as recruitment, retention, promotion and pay. TAR currently covers over 2 million employees in over 200 leading companies.

8. Consultation outcome

8.1 Two consultation exercises have been carried out with a wide range of stakeholders in relation to the proposal to introduce mandatory equal pay audits for an employer found to have committed an equal pay breach. The first consultation, *Modern Workplaces: Equal Pay*, (published on 16 May 2011) ran for 12 weeks. It focused on the principle of transparency in relation to gender pay gaps and how best equal pay audits could address this. There was general support for this proposal with respondents agreeing that there were problems within both public and private sector organisations. Respondents agreed that the requirement to carry out an equal pay audit is reasonable and justifiable where there has been a clear breach of equal pay law. The consultation is

available at
http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/Consultations/modern-workplaces.

8.2 There were however differing views about what the precise nature of the equal pay audit requirements should be. The Government response to the first consultation which received 116 responses (https://www.gov.uk/government/publications/modern-workplaces-consultation-government-response) therefore promised a second consultation on the detail of the proposal, including on the content of an equal pay audit and on publication and disclosure requirements.

8.3 The second consultation *Equal Pay Audits – A Further Consultation*, - https://www.gov.uk/government/consultations/equal-pay-audits-a-further-consultation was launched in May 2013 for eight weeks and focused on the detail of the proposal on equal pay audits. There were 43 responses to this consultation. The Government response to this consultation will be published in June 2014.

8.4 It is clear that some of the proposals suggested by respondents go beyond the scope of what primary legislation allows and are therefore precluded from consideration. Such responses included, for example, extending the requirement to carry out an audit to cover all the protected characteristics covered by the 2010 Act and removing or limiting the exceptions to the audit requirement set out in section 139A(5) of the 2010 Act.

8.5 On the issue of whether the regulations should outline only the minimum requirements for the content and form of an equal pay audit, and allow employment tribunals to specify detail such as timing and employees covered, (the approach taken in these Regulations), over two-thirds (31) of respondents supported this proposal, whilst six respondents disagreed and thought that the regulations should allow respondents who have been ordered to undertake an equal pay audit to determine the scope and content of the audit based on their individual and particular circumstances.

8.6 After careful consideration of the responses to this consultation, the Government has taken on board suggestions made by respondents to ensure the regulations set out the minimum requirements for the content of an equal pay audit so that employers understand what is expected of them if they are required by an employment tribunal to carry out an equal pay audit. The regulations will also give employment tribunals discretion to determine on a case by case basis, particular elements of an equal pay audit, such as the coverage and the timescale for completion, based on the evidence presented at the hearing.

8.7 A more detailed analysis of both consultation exercises is set out in the Impact Assessment, which is attached to this memorandum.

9. Guidance

9.1 The Equality and Human Rights Commission (EHRC) has already published a statutory Code of Practice[3] on the equal pay provisions of the 2010 Act and guidance on

[3] Code of Practice on Equal Pay: http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/

carrying out equal pay audits, including a toolkit to aid employers wishing to carry out such audits on a voluntary basis - http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/equal-pay/equal-pay-audit-toolkit. In March 2014 the EHRC published two new guidance documents on *Gender-Neutral Job Evaluation Schemes* (*Gender-neutral job evaluation schemes: an introduction guide and Gender-neutral job evaluation schemes: an introduction to the law)* to assist employers' understanding of the essential requirements for job evaluation schemes (which could, in certain circumstances, provide a defence to an equal pay claim under the 2010 Act). These are available at http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/equal-pay under the 'good equal pay practice' section. The EHRC will keep this guidance under review to take account of any future developments.

9.2 In addition to the EHRC guidance already cited above, there is a *Quick Start Guide to Providing Equal Pay* produced in conjunction with the British Chamber of Commerce http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/equal-pay/quick-start-guide-to-providing-equal-pay.

9.3 Additionally, the Department for Culture Media and Sport is considering engagement activity with businesses and employer groups later in 2014 to discuss and explain the effect of the Regulations.

10. Impact

10.1 An analysis of employment tribunal figures over the recent years indicate a downward trend in equal pay claims which are successful at hearing. Based on these figures, it is estimated that an average of 2 equal pay claims per year may result in the imposition of an equal pay audit order. Financial costs will only arise for those few employers who are found by an employment tribunal to have committed an equal pay breach. The impact on business and not-for-profit sector organisations will therefore be minimal.

10.2 The impact on the public sector is likely to be nil because most public sector organisations already undertake regular reviews of their pay practices to ensure that they are lawful and are therefore likely to fall within the exception for an employer who has carried out an audit in the previous 3 years. Public sector organisations which have had equal pay claims brought against them for historic pay inequalities now have in place robust processes for ensuring equal pay for men and women doing equal work.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside it on the OPSI website.

11. Regulating small business

11.1 These Regulations will apply to small businesses which are not new businesses but not to micro-businesses. (See paragraph 7.4 above for a definition of new and micro-businesses for the purposes of the Regulations).

11.2 These Regulations are not subject to the Government's Small and Micro-Business

Assessment as they qualify as a fast-track measure.[4] The Government is clear that there will be no upfront costs to small businesses (or any other kind of businesses) that comply with the requirements of the 2010 Act, as equal pay audits will only be required to be carried out by those employers who have been found to have committed an equal pay breach.

12. Monitoring & review

12.1 These regulations will be considered a success if in the longer term they result in fewer equal pay breaches and in turn, a reduction in the number of equal pay claims brought against employers.

12.2 The Department intends to carry out a non-statutory review of the operation of the Regulations five years after they come into force. There will also be periodic reviews and monitoring of the 2010 Act.

13. Contact

Yemi Atiku at the Department for Culture Media and Sport (email: yemi.atiku@geo.gsi.gov.uk; Tel: 0207 211 6967) and Matthew King, Department for Culture Media and Sport (email: matthew.king@geo.gsi.gov.uk; Tel: 0207 211 6530) can answer any queries regarding the instrument.

[4] Fast-track measures do not attract an in-depth consideration by the Regulatory Policy Committee because their annual cost to business is estimated to be less than £1m per year.