EXPLANATORY MEMORANDUM TO

THE FUNCTIONS OF THE INVESTIGATORY POWERS COMMISSIONER (OVERSIGHT OF THE DATA ACCESS AGREEMENT BETWEEN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA AND OF FUNCTIONS EXERCISABLE UNDER THE CRIME (OVERSEAS PRODUCTION ORDERS) ACT 2019) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to ensure that the requirement for a compliance review set out in Article 12(1) of the Agreement reached by the United Kingdom and the United States of America on access to electronic data for the purpose of countering serious crime dated 3rd October 2019 ("the Agreement") can be fulfilled. It does this by providing a clear statutory basis for the Investigatory Powers Commissioner ("IPC") to keep under review the compliance with the Agreement by public authorities (including by way of audit, inspection, and investigation) in relation to activity exercisable by virtue of both the Crime (Overseas Production Orders) Act 2019 ("COPO Act") and the Investigatory Powers Act 2016 ("IPA").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Home Office has been working closely with the Investigatory Powers Commissioner to ensure that the requirement for a compliance review in the Agreement is met, as well as with the drafting of this instrument. There is therefore no need to provide additional time for the Commissioner to adopt different patterns of behaviour with a delayed commencement date and so it is appropriate for the instrument to come into force on the day after the day on which it is made.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made, and the legislation being amended, cover the entire United Kingdom (see section 272(4) of the IPA) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Security, the Rt. Hon. James Brokenshire MP, has made the following statement regarding Human Rights:

"In my view the provisions of The Functions of the Investigatory Powers Commissioner (Oversight of the Data Access Agreement Between the United Kingdom and the United States of America and of functions exercisable under the Crime (Overseas Production Orders) Act 2019) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The Agreement was designated in the Overseas Production Orders and Requests for Interception (Designation of Agreement) Regulations 2020 as a relevant international agreement for the purposes of the IPA and the COPO Act.

6.2 This instrument is made to modify the functions of the IPC to ensure that Article 12(1) of the Agreement, which requires that "the Parties shall engage in a review of each Party's compliance with the terms of this Agreement", can be fulfilled by the IPC, and to ensure that there is clarity around the role of the IPC in relation to the Agreement.

6.3 The IPC is independent of Government, and their main oversight functions are set out in the IPA. Section 239 of that Act provides that the Secretary of State may modify the functions of the IPC or any other Judicial Commissioner by regulations, provided that the regulations do not modify the ability of a Judicial Commissioner to approve, quash, or cancel an authorisation, warrant, or the variation or renewal of an authorisation or warrant.

7. Policy background

What is being done and why?

7.1 The policy intention of this instrument is to ensure that Article 12(1) of the Agreement can be fulfilled, and to ensure that there is clarity around the role of the IPC in relation to the Agreement. These intentions can only be achieved by amending the IPA.

7.2 The IPA is one of the critical pieces of domestic legislation for preventing, detecting and investigating serious crime and maintaining national security. It creates the statutory basis for the use of most of the investigatory powers available to the intelligence and law enforcement agencies, using authorisations issued under the Act.

7.3 The COPO Act grants law enforcement and prosecuting authorities the power to apply for and obtain electronic data directly from service providers (those who create, process, communicate, or store electronic data), using an Overseas Production Order ("OPO"), for the purposes of criminal investigations and prosecutions. OPOs may only be used when permitted under an international co-operation arrangement between the UK and the country where the subject of the Order is located. The Agreement is the first such international co-operation arrangement.

7.4 The Agreement will allow UK public authorities to obtain data directly from US-based telecommunications operators for the purpose of preventing, detecting, investigating, and prosecuting serious crime. The Agreement has been designated as a relevant international agreement under the IPA and the COPO Act and therefore it can be used in conjunction with relevant authorisations under the IPA and the COPO Act.

7.5 Article 12(1) of the Agreement requires that "the Parties shall engage in a review of each Party's compliance with the terms of this Agreement". It has been agreed between the IPC's Office ("IPCO") and the Home Office that the IPC will provide independent oversight of UK activity under the Agreement, as they do already for many of the other investigatory powers. This oversight will provide the compliance review necessary to fulfil Article 12(1) of the Agreement. This arrangement has been agreed with the US Department of Justice.

7.6 Independent oversight of the Agreement must cover activity that is exercisable by virtue of both the IPA and the COPO Act. However, Section 229 of the IPA allows the IPC to keep under review only activities that are exercisable by virtue of a limited list of legislation. The IPA is included in this list, but the COPO Act is not, because it did not exist when the IPA was drafted. Consequently, the IPC is currently unable to keep under review any Agreement-related activity exercisable by virtue of the COPO Act, such as the use of OPOs.

7.7 While resolving this issue would mean that the IPC could provide the compliance review required by Article 12(1) of the Agreement, there is no explicit statutory basis for the IPC's role in relation to the Agreement as a whole. This is because the Agreement did not exist when the IPA was drafted. An explicit statutory basis would bring clarity to the IPC's role in relation to the Agreement.

7.8 For these reasons, this instrument amends Section 229 of the IPA to provide a statutory basis for the IPC to keep under review activity exercisable by virtue of the COPO Act, and to provide an explicit statutory basis for the IPC's role in relation to the Agreement as a whole. This will ensure that Article 12(1) of the Agreement can be fulfilled and that that there is clarity around the role of the IPC in relation to the Agreement.

7.9 As an independent body, the specific direction of IPCO's work in relation to the Agreement will be a matter for the IPC, and not the Government, to decide on. This distinction is consistent with the approach taken in the rest of the investigatory powers regime.

7.10 Significant public interest in this instrument is not anticipated.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 We have consulted with IPCO and operational partners on the instrument and they are content with this approach. The devolved administrations were made aware that the IPC would perform this oversight role for the Agreement in a letter from the Home Secretary in March 2020. No public consultation was carried out as this instrument will not have an impact on the general public.

11. Guidance

11.1 No guidance is required for this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it relates to the independent oversight of UK activity under the Agreement in which UK businesses have no role.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 Section 260 of the IPA requires the Secretary of State to report on the operation of the Act, after a period of five years and six months after Royal Assent. The report must be published and laid before Parliament. In preparing the report the Secretary of State must take into account any report on the operation of the Act produced by a Select Committee of either House of Parliament.

14.2 Section 234 of the IPA requires the IPC to make an annual report to the Prime Minister about the carrying out of the activities of the Judicial Commissioners, which must be published with a copy laid before Parliament.

15. Contact

15.1 The Investigatory Powers Unit at the Home Office email: OSCTIPU@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 James Muncie, Acting Deputy Director for the Investigatory Powers Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State for Security, The Rt. Hon. James Brokenshire MP, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.