EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (ALCOHOL LICENSING AND LATE HOURS CATERING) (SCOTLAND) REGULATIONS 2018

2018 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.

2. Purpose of the instrument

2.1. The Immigration Act 2016 ("the 2016 Act") amended the Licensing Act 2003 in respect of the existing licensing regimes in England and Wales to prevent illegal working in the alcohol and late-night refreshment sectors. These Regulations make similar provision which will have effect in Scotland.

2.2. The purpose of these Regulations is to require licensing boards in Scotland to take into account an applicant's immigration status when considering applications for a premises or personal licence to sell alcohol or a licence to supply late hours catering. Applying for, and holding, a licence to sell alcohol or supply late hours catering will be conditional on not breaching UK immigration laws, including the offence of employing illegal workers. These Regulations also provide immigration officers in Scotland with a power of entry to see whether any immigration offences have been committed in connection with the sale of alcohol or provision of late hours catering.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

Other matters of interest to the House of Commons

3.2. Disregarding minor or consequential changes, the territorial application of this instrument is Scotland.

4. Legislative Context

4.1. Since 6 April 2017, section 36 of and Schedule 4 to the 2016 Act have prohibited licensing authorities in England and Wales from issuing a premises or personal alcohol licence or a premises late night refreshment licence to an individual who, if resident in the UK, is disqualified from holding a licence by reason of their immigration status. Licensing authorities discharge this duty by checking an applicant's immigration status. The 2016 Act embeds other immigration safeguards into the existing licensing regime including a provision that a licence issued to an individual with limited permission to be in the UK will lapse when their permission to be in the UK and work in a licensable activity comes to an end. The 2016 Act also provides immigration officers with a power of entry without a warrant to see whether any immigration offences have been committed in connection with the licensable activity.

4.2. Section 36 of the 2016 Act also provides that the Secretary of State may, by regulations, make provisions which have a similar effect in Scotland and Northern Ireland. This instrument is being made as part of the implementation of measures in the 2016 Act, specifically to prevent illegal working in licensed premises in Scotland. It amends the Licensing (Scotland) Act 2005 (in respect of alcohol licensing) and the Civic Government (Scotland) Act 1982 (in respect of late hours catering) so that they have similar effect to the provisions in section 36 of and Schedule 4 to the 2016 Act in England and Wales. As a consequence, minor amendments are also made to the Personal Licence (Scotland) Regulations 2007 and the Premises Licence (Scotland) Regulations 2007, in that the immigration requirements are now referenced in the application forms for premises and personal licences, and in the standard format of a personal licence once it has been granted.

4.3. The primary purpose of this measure is to prevent illegal working in licensed premises, to support effective immigration control. Consequently, it falls within the reserved competence of the UK Parliament to make these provisions.

4.4. These Regulations complete the rollout of licensing regulations for an immigration purpose in Scotland in respect of alcohol and late hours catering licences.

5. Extent and Territorial Application

5.1. The instrument extends to Scotland only. The Home Office has engaged with the Scottish Government on the Regulations as the provisions have been developed and this engagement is ongoing.

5.2. The territorial application of this instrument is Scotland only.

6. European Convention on Human Rights

6.1. The Immigration Minister, the Rt Hon Caroline Nokes MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration (Alcohol Licensing and Late Hours Catering) (Scotland) Regulations 2018 are compatible with the Convention rights."

7. Policy background

7.1. The Immigration Minister is making these Regulations because the sector in which alcohol and/or late hours catering is sold is one which is particularly vulnerable to illegal working. Illegal working is a major draw for those seeking to circumvent immigration control in the UK. It is often associated with the exploitation of workers and breaches of wider labour market regulations. The use of illegal workers also leads to compliant businesses being undercut. Immigration Enforcement frequently encounters illegal workers in this sector as part of its operational enforcement activity. It is accordingly a proportionate response to adapt the licensing regimes across the UK to embed immigration safeguards into the application process and make it explicit that immigration compliance is a condition of holding a licence. Providing a power of entry for immigration officers to see whether any immigration offence is being committed in connection with the licensable activity is consistent with this approach.

7.2. In introducing these immigration safeguards, the aim has been to work with the grain of the existing licensing regimes to ensure changes are as light-touch as possible whilst achieving the required objectives, and to ensure that, so far as possible, these new immigration related provisions fit within the existing legislative framework in

Scotland. The intention is that the effect of these provisions will be substantively the same as the provisions in England and Wales, but allowance has necessarily been made for differences in the licensing regimes between the jurisdictions.

7.3. In Scotland, except as permitted by the Licensing (Scotland) Act 2005, it is unlawful to sell alcohol by retail unless the individual holds a licence authorising him or her to do so in the course of a business carried out in a premises specified in the premises licence. These licences are granted to the owner of the business, whether an individual, a body corporate or a partnership, and is granted in respect of a specified premises. A personal licence is necessary in order to supervise or authorise the sale of alcohol. The Civic Government (Scotland) Act 1982 provides that a late hours catering licence is required for the use of a premises between 11pm and 5am the following morning for the sale to or consumption by the public of food. That is, the sale of food for consumption on as well as off the premises in which they are sold. A late hours catering licence is not required where the premises holds a licence for the supply of alcohol or a public entertainment licence.

7.4. These Regulations will come into force 21 days after they have been made to ensure an adequate period of notice between making the instrument and commencement.

7.5. These Regulations meet the policy aim of, and make provision having similar effect to, the 2016 Act in the following ways.

7.6. **Defining who is entitled to work in the UK.** Regulations 3 and 4 provide a definition of who is entitled to work in the UK. For the purposes of these Regulations, an individual who is subject to immigration control is entitled to work in the UK if that person's leave to be in the UK:- (i) is not invalid, (ii) has not come to an end by, for example, being curtailed (cut short) or having time expired, and (iii) is not subject to a condition preventing them from carrying out work in the licensable activity (sale of alcohol/provision of late hours catering). For the purposes of this definition, an individual who is on immigration bail within the meaning of Part 1 of Schedule 10 to the 2016 Act is to be treated as if they hold permission to be in the UK and are subject to the conditions of their immigration bail, temporary admission or release from detention. This may include a restriction on their permission to work in the UK.

7.7. Ensuring that alcohol licences are only granted, renewed or transferred to licence applicants who, if resident in the UK, are entitled to work in the UK. Regulations 6 (application for premises licence), 16 (application for personal licence) and 34 (late hours catering licences) provide that a licence may only be granted or renewed to an individual resident in the UK if that person is entitled to work in the UK. Regulation 11 (application for transfer of premises licence) provides for the same restriction in respect of an application to transfer a premises licence to sell alcohol. Alcohol personal licences and late hours catering licences cannot be transferred.

7.8. **Providing that a licence will cease to have effect if the holder ceases to be entitled to work in the UK.** Regulations 10 (period of effect of premises licence), 21 (period of effect of personal licence) and 35(6) (late hours catering) provide that a licence, including a licence which has been renewed after these Regulations have come into force, will cease to have effect if the licence holder ceases to be entitled to work in the UK at a time they are still resident here or if they become resident whilst not entitled to work.

7.9. Providing for notification of licence applications and reviews to the Secretary of State, and Secretary of State's representations to be taken into account. Regulations 7 and 11 (relating to the grant and transfer of premises licences, respectively) provide that in respect of applications for the grant or transfer of a premises licence to sell alcohol or the transfer of a premises licence to sell alcohol, notification of the application must also be served on the Secretary of State. Regulation 8 provides that the Secretary of State may appear and make representations at the licensing hearing and regulation 9 provides that the licensing board must take note of these representations in its determination. Regulations 17, 18, 22 (alcohol personal licences) and 35 (late hours catering) have the same effect in respect of applications for the grant or renewal of an alcohol personal licence or a late hours catering licence.

7.10. Regulation 12 and 13 (relating to reviews of premises licences) provide that on any review of a premises licence to sell alcohol, including one made on the licensing board's initiative, notice of the review must be provided to the Secretary of State who may respond if the exceptional circumstances of the case are such that she considers that the continuation of the licence would be prejudicial to the prevention of illegal working in licensed premises. Regulations 14 and 15 provide that the licensing board must take into account any representations made by the Secretary of State and notify the Secretary of State with the outcome.

7.11. **Giving a power of entry to immigration officers.** Regulation 29 (premises used for the sale of alcohol) and regulation 33 (premises used for late hours catering) provide that where an immigration officer has reason to believe that a premises is being used for the sale of alcohol (regulation 29) or the provision of late hours catering (regulation 33) the officer may enter the premises without a warrant to see whether an immigration offence is being committed in connection with the relevant licensable activity. This power of entry is accordingly linked to the Home Office's immigration functions. Its purpose is to enable an immigration officer to apprehend an immigration offender and/or to prevent illegal working in this licensable sector. This power of entry is similar to the power of entry provided for immigration officers in England and Wales by section 179 of the Licensing Act 2003 as amended by paragraph 22(2) of Schedule 4 to the 2016 Act.

7.12. **Providing for the notification of immigration-related convictions in connection with personal licence applications.** Regulation 19 (applicant's duty to notify Licensing Board of convictions) provides that an applicant for an alcohol personal licence must notify the licensing board of any immigration conviction, any foreign conviction which is similar in nature to an immigration conviction, or any immigration penalty, and the licensing board must notify the Secretary of State who, if satisfied that the granting of the licence would be prejudicial to the prevention of illegal working, must give to the licensing board an immigration objection notice. The licensing board must take into account any immigration objection notice received within the prescribed period. Regulation 23 (notification of determinations) provides that, where an immigration objection notice has been received, the licensing board must notify the Secretary of State of the licence decision. Regulations 24 and 25 (relating to notifying a Licensing Board of convictions) make similar provision about any immigration conviction, any foreign conviction which is similar in nature to an immigration conviction or any immigration penalty that occurred after the alcohol personal licence has been issued.

7.13. **Providing that a court may not consider certain immigration matters in a licensing application or appeal.** Regulation 27 (appeals) provides that in any alcohol licensing appeal, the court may not consider whether the individual should have been granted permission to be in the UK or whether the individual was granted permission to be in the UK after the licence application was decided. Regulation 35(8) makes the same provisions in respect of late hours catering licences.

7.14. **Making transitional, transitory and consequential provision.** Regulations 36 to 40 (alcohol licences) and regulations 41 to 43 (late hours catering) make transitional provision. These Regulations will not apply to a licence application made before these Regulations came into force, even if the licence is issued after these Regulations come into force. However, they will apply in respect of a renewed licence if a licence holder makes an application to renew the licence after these Regulations entered into force.

7.15. Schedule 1 to these Regulations makes transitory provision, which will last until the commencement of section 49 of the Air Weapons and Licensing (Scotland) Act 2015. The transitory provision means that section 33 of the 2005 Act is to be read as being amended in a slightly different way to the provision made by regulation 11. However, the principle is the same in both regulation 11 and in the transitory provision in Schedule 1: upon any application to transfer a premises licence to sell alcohol, notification of the application must also be served on the Secretary of State who may appear and make representations at the hearing if the exceptional circumstances of the case are such that granting the licence would be prejudicial to the prevention of illegal working in licensable premises; and an application to transfer a premises licence to sell alcohol may only be granted to an individual resident in the UK if that person is entitled to work in the UK.

7.16. Schedules 2 and 3 amend the Personal Licence (Scotland) Regulations 2007 and Schedule 4 amends the Premises Licence (Scotland) Regulations 2007 to provide for amended statutory forms in respect of alcohol licences.

Consolidation

7.17. In terms of legislative competence, alcohol and late hours catering licensing is now transferred to the Scottish Government, whereas immigration (the subject matter of this instrument) is reserved to the UK Parliament. Formal legislative consolidation does not therefore appear to be feasible. Notwithstanding that, formal consolidation would in any case be disproportionate given the brevity of the amendments made by this instrument to the amending the Licensing (Scotland) Act 2005 (in respect of alcohol licensing) and the Civic Government (Scotland) Act 1982 (in respect of late hours catering).

8. Consultation outcome

8.1. The Home Office published the text of these draft regulations for consideration by the House of Lords before the Report Stage of the 2016 Act as it passed through Parliament. They are available at:
www.gov.uk/government/uploads/system/uploads/attachment_data/file/506394/sw_he_draft_immigration_alcohol_licensing_scotland_regulations_2.pdf (alcohol regulations

and
www.gov.uk/government/uploads/system/uploads/attachment_data/file/506392/sw_2

0160304__draft_late_hours_catering_scotland_regulations__v3.pdf (late hours catering regulations). These two sets of draft Regulations have since been consolidated into one.

8.2. The Home Office has engaged with the Scottish Government on the Regulations as the provisions have been developed and this engagement is ongoing.

8.3. There has been no formal consultation on the Regulations, because the statutory scheme from which they are derived is already set out in detail in primary legislation (namely Schedule 4 to the 2016 Act). However, the Scottish Government discussed the Regulations informally with several Scottish stakeholders (local authorities and the Law Society of Scotland). The Home Office has taken account of comments made by the Scottish stakeholders in developing the Regulations, to better reflect the licensing scheme in Scotland while being substantively the same as the provisions in England and Wales.

9. Guidance

9.1. Non-statutory guidance on how to undertake immigration status checks will be made available to licensing boards in Scotland. These checks will be similar to the checks that licensing authorities in England and Wales already make under Section 36 of and Schedule 4 to the 2016 Act, in respect of alcohol licences, and similar, but not identical to, the checks that licensing boards in Scotland already make under section 37 of and Schedule 5 to the 2016 Act, in respect of applications for taxi and private hire vehicle driver licences.

10. Impact Assessment

10.1. The impact on business, charities and voluntary bodies that abide by immigration law is minimal. It is expected that the private sector may face a small additional time burden from understanding the new Regulations and from processing the additional required documentation. The public sector will also face a small time burden from additional time spent checking licence applications.

10.2. We have deliberately worked with the grain of existing licensing regimes across the UK in order to minimise the additional requirements for licensing bodies, including licensing boards in Scotland, whilst achieving the policy objective of preventing illegal working in these sectors of the economy.

10.3. The documents which are acceptable to demonstrate an individual's right to hold a licence are the same as those which are already checked by employers in the UK when establishing a person's right to work, as well as by licensing authorities in England and Wales. These checks are not intended to provide a barrier to UK nationals seeking a licence, and the list of documents has been designed to include those which are either commonly held by UK nationals or easily obtainable at minimal cost. For British citizens, they include a UK passport or the combination of a full UK birth or adoption certificate together with appropriately documented evidence of a National Insurance number. For those subject to immigration control, their right to hold a licence will generally be established through an endorsement in a current passport or their Biometric Residence Permit. The document list is set out in Schedules 3 and 4 to these Regulations and will be contained in application forms for a personal licence or to renew a personal licence and application forms for a premises licence or for a provisional premises licence. The document list will also be set out in guidance for licensing boards.

10.4. A Regulatory Triage Assessment of the alcohol and late-night refreshment measures in the Bill which led to the 2016 Act was published on 9 October 2015 and a Regulatory Policy Committee validated Impact Assessment was published on 10 March 2017. These documents did not specifically state the costs to Scotland and so a follow-up Impact Assessment looking at the costs to Scotland will be published prior to consideration of these Regulations by Parliament. All these documents will be available at www.gov.uk/government/publications/immigration-bill-part-1-labour-market-and-illegal-working.

10.5. The follow-up Impact Assessment includes a full assessment of the effect of these measures in Scotland. For Scotland, the central estimate of the total cost to business is estimated to be less than £500,000 (present value over 10 years) and the central estimate of the public-sector cost is estimated to be less than £300,000 (present value over 10 years), although there is some uncertainty within these estimates outlined in the impact assessment. As these provisions have been assessed as having a low cost to business, and given that these measures should be introduced as soon as possible to close a judicial gap in licensing provisions between Scotland and England and Wales, the Common Commencement Date has not been adopted.

11. Regulating small business

11.1. The legislation does apply to activities that are undertaken by small businesses. This measure has been designed to prevent illegal working in licensable premises. It is not appropriate for this measure to only apply to businesses of a certain size as illegal workers would simply move to those businesses which are exempt from these Regulations. This measure has accordingly been designed to apply equally to all businesses that provide alcohol and/or late hours catering in Scotland, from corner shops and take away establishments to large supermarkets and chains of licensed public houses.

12. Monitoring & review

12.1. The provisions of the Immigration Act 2016, and by extension this instrument, will be subject to the normal period of post-legislative review three to five years after Royal Assent.

13. Contact

13.1. Vincent Doran at the Home Office can answer questions regarding this instrument. Email: Vincent.Doran4@homeoffice.gsi.gov.uk.