EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (INTERCEPTION BY BUSINESSES ETC. FOR MONITORING AND RECORD-KEEPING PURPOSES) 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 instrument provides the legal basis under which a body, such as a company or public authority, may intercept communications for monitoring or record keeping purposes that are transmitted by a telecommunications system they control.

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 includes Scotland and Northern Ireland.

4. Legislative Context

4.1 This is the first use of the power under section 46(2) of the Investigatory Powers Act 2016.

4.2 Similar provisions are currently contained in the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Security, Rt Hon Ben Wallace MP, has made the following statement regarding Human Rights:

"In my view the provisions of The Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-keeping Purposes) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Investigatory Powers Act 2016 replicates existing provisions making it a criminal offence to undertake the interception of communications in the United Kingdom without lawful authority. The Act also sets out what constitutes "lawful authority" to conduct interception.

7.2 One such circumstance in which interception is lawfully authorised under the Act is where it is undertaken by businesses and other bodies for the purposes of monitoring and record-keeping. Such interception is lawful only when authorised by regulations made by the Secretary of State. These Regulations set out, and therefore limit, when such conduct is authorised.

7.3 The instrument simply maintains the existing legal position. This ensures that, where necessary in order to undertake legitimate activities, bodies such as companies and public authorities may intercept communications transiting telecommunications systems that they control.

7.4 The need for such interception spans a range of legitimate business activities. These include: establishing whether individuals, such as company staff, who are using the relevant telecommunications system are achieving the standards required by their company in the course of their duties; to detect the unauthorised use of the relevant system; to ensure the system is working effectively; and to monitor communications made to confidential counselling services, which are free and which permit users to remain anonymous if they so choose. For certain public authorities, which are authorised to undertake warranted interception under the Act, such interception may also take place in the interests of national security in order to, for example, test and assure the security of their own systems from cyber-attack.

7.5 We must ensure such conduct can lawfully be carried out. Otherwise it would not be possible, for example, for a company lawfully to undertake effective maintenance of their telecommunications systems or to identify where their system has been accessed or used without authorisation.

7.6 There is no avenue, other than through legislation, to ensure these forms of interception remain lawful.

Consolidation

7.7 Not applicable.

8. Consultation outcome

8.1 A targeted consultation has been undertaken in relation to the Regulations with industry groups that would be impacted by their provisions. Three substantive written responses were received to that consultation providing useful and constructive feedback.

9. Guidance

9.1 The instrument does not impose any obligations or requirements on industry. It simply ensures that standard and necessary business practices remain lawful.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument. However, the regulations simply give effect to provisions that are set out in the Investigatory Powers Act and a full impact assessment was prepared for that legislation.

11. Regulating small business

11.1 The instrument applies to activities that are undertaken by small businesses. However, the instrument simply maintains the existing position, is permissive and does not impose any new requirements or obligations on small businesses.

12. Monitoring & review

12.1 Section 260 of the Act requires the Secretary of State to report on the operation of the Act after a period of 5 years and 6 months starting with 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.

13. Contact

13.1 Home Office Public Enquiries; public.enquiries@homeoffice.gsi.gov.uk; 0207 035 4848.