REVISED EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (REVIEW OF NOTICES AND TECHNICAL ADVISORY BOARD) 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 sets out the period and circumstances in which a person given a notice under the Investigatory Powers Act 2016 ("the Act") can refer that notice to the Secretary of State for review. The instrument also sets out what the membership of the Technical Advisory Board (the TAB) must be.

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 powers under sections 90(1), 245(1) to (3), and 257(1) of the Act.

4.2 Regulation 3 concerns the membership of the TAB, the continued existence of which is provided for in section 245 of the Act. Provision regarding membership of the Technical Advisory Board provided for in the Regulation of Investigatory Powers Act 2000 ("RIPA") was made in the Regulation of Investigatory Powers (Technical Advisory Board) Order 2001.

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 (Review of Notices and Technical Advisory Board) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Act provides for the giving of:

- technical capability notices - which require telecommunications or postal operators to maintain capabilities necessary to give effect to warrants and authorisations securely and quickly;
- national security notices - which require steps to be taken by telecommunications operators in the interest of national security, for example to provide secure communications facilities to an intelligence service; and
- data retention notices - which require the retention of specified types of communications data by telecommunications or postal operators.

7.2 The Act provides the safeguard that a person given such a notice can refer the notice back to the Secretary of State for review.

7.3 This instrument provides for the time in which and the circumstances in which a referral for review can be made. Such a referral for review may be made within 28 days of the notice being given if the person (such as a telecommunications operator) to whom it was given thinks an obligation is unreasonable. Such a review may be in relation to the reasonableness of any obligation imposed by a notice. For example, a notice could be referred for review if the telecommunications operator to whom a notice has been given does not think that one of the obligations imposed by the notice is technically feasible to comply with. Given consultation will have taken place prior to a notice being given, the 28 day period in which a review may be sought is reasonable.

7.4 Before deciding the outcome of a review, the Secretary of State must consult with a Judicial Commissioner and the TAB. The TAB must consider the technical requirements and financial consequences relating to the notice and report on those conclusions to the Secretary of State. These Regulations impose requirements regarding the membership of the TAB. Section 245 of the Act provides that the Secretary of State must make such regulations.

7.5 The Regulations seek to achieve balanced representation by requiring that there be six members representing public authorities who may apply for relevant warrants and authorisations and six members representing operators who may obligations imposed on them by Technical Capability Notices, National Security Notices and Data Retention Notices. The chair must be a neutral member. The quorum provision states that there must be at least three members representing operators and three members representing public authorities present. In order that the membership of the TAB is likely effectively to represent the interests of those they are to represent, the Regulations require that the members have sufficient knowledge and experience to do so.

Consolidation

7.6 Not applicable.

8. Consultation outcome

8.1 A targeted consultation has been undertaken with operators likely to be affected, the Investigatory Powers Commissioner and the TAB. A number of written responses were received. In response to feedback from several telecommunications operators, a requirement has been added that TAB members must have sufficient knowledge and experience to be able to undertake the role effectively.

9. Guidance

9.1 Further guidance regarding National Security Notices can be found in the National Security Notice Code of Practice. Further information about Technical Capability Notices can be found in the Interception of Communications Code of Practice, the Equipment Interference Code of Practice and the Bulk Communications Data Code of Practice.

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 set out in the Act and a full impact assessment was prepared for that legislation.

10.4 There is no impact on telecommunications operators or postal operators. Section 249 of the Act requires the Secretary of State to ensure arrangements are in force for securing that operators receive appropriate contribution in respect of their relevant costs. Government policy is that the appropriate contribution is calculated on a case by case basis to ensure that an operator makes neither a gain nor a loss from complying with the Act.

11. Regulating small business

11.1 The instrument applies to activities that are undertaken by small businesses.

11.2 No specific action is proposed to minimise the regulatory burden on small businesses. This is because the instrument does not impose such a burden.

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.