EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (TECHNICAL CAPABILITY) 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 These Regulations set out the obligations which may be contained in a technical capability notice given by the Secretary of State to a telecommunications or postal operator. A technical capability notice imposes obligations on such an operator to ensure that the operator is capable of providing assistance in giving effect to an interception warrant, equipment interference warrant, or a warrant or authorisation for obtaining communications data issued under the Investigatory Powers Act 2016 ("the Act").

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 253(3) of the Act.

4.2 Similar obligations in relation to interception warrants under the Regulation Investigatory Powers Act 2000 are currently contained in the Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002 (S.I. 2002/1931).

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 (Technical Capability) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Act provides an updated framework for the use by the security and intelligence agencies, law enforcement and other public authorities of investigatory powers to obtain communications and communications data. These powers include the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data.

7.2 The Act provides that the Secretary of State may give a technical capability notice to a telecommunications or postal operator, imposing obligations and requiring steps to be taken to ensure that the operator is capable of providing assistance in giving effect to a warrant under the Act. A notice does not itself authorise the obtaining of communications. These Regulations set out the obligations which may be contained in a technical capability notice.

7.3 The Regulations set out the obligations which may be contained in a notice relating to a bulk or targeted interception warrant, a bulk or targeted equipment interference warrant, or a warrant or authorisation for obtaining communications data. The Schedules to the Regulations set out the obligations which may be imposed on a telecommunications or postal operator in respect of the different types of warrant or authorisation.

7.4 The obligations include, for example, the ability to comply with a warrant within a specified timeframe, to ensure that only the communications or data the obtaining of which is authorised by a warrant or authorisation are disclosed, and to ensure that technology complies with industry standards. The Regulations also include an obligation to ensure that electronic protection applied by the operator to communications can be removed, where reasonably practicable.

7.5 The policy intention is to ensure that when an operator is required to provide assistance in giving effect to a warrant under the Act, the operator has the technical means to do so. In practice, technical capability notices are likely to be given to operators that are required to provide assistance in giving effect to warrants on a regular basis, to ensure they maintain the capabilities to do so quickly and securely.

8. Consultation outcome

8.1 A targeted consultation was carried out on the Regulations. Telecommunications operators likely to receive a technical capability notice, bodies representing such operators, oversight bodies with statutory functions in relation to such operators (including the Investigatory Powers Commissioner and Information Commissioner) and the Technical Advisory Board established under section 13 of the Regulation of Investigatory Powers Act 2000 were consulted on the draft regulations, over a period of 6 weeks.

8.2 Eleven substantive written responses were received and feedback was also received at meetings held with telecommunications operators and the Technical Advisory Board. The responses that we received to the consultation provided useful and constructive feedback on the Regulations. Some recurring issues that were raised related to: certain obligations not being limited to the targeting of UK persons; provisions to require the removal of encryption; and the requirement for operators to consider the impact on

their obligations when developing new services or systems. A number of amendments were made to the Regulations in response to the consultation responses.

8.3 The Regulations were also notified to the European Commission, in accordance with the Technical Standards Directive (Directive 2015/1535/EU).

9. Guidance

9.1 The obligations imposed in the Regulations can only be imposed on a postal or telecommunications operator if they are contained in a technical capability notice given to the operator by the Secretary of State. Before giving a notice, the Act requires the Secretary of State to consult the person to whom it is to be given. The Secretary of State must also take into account a number of matters including the technical feasibility of complying with the notice, the likely cost of complying with the notice, and any other effect of the notice on the operator. Accordingly, the operator will be made aware of the particular obligations to be imposed on them and will have the opportunity to consider and explain to the Secretary of State the implications for their business.

9.2 Guidance on technical capability notices will be contained in the relevant codes of practice to be issued under Schedule 7 to the Act. The codes have been consulted on and, subject to approval by Parliament, are expected to come into force in February 2018.

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 Act and a full Impact Assessment was prepared for that legislation.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses. The regulations in and of themselves do not impose requirements on small businesses, rather they set out the obligations that could be imposed on a postal or telecommunications operator through a technical capability notice. To minimise the impact of the requirements on small businesses (employing up to 50 people), there are stringent safeguards regulating the use of technical capability notices in the Act, including that the notice must be necessary, proportionate and approved by a Judicial Commissioner.

11.2 Before giving a technical capability notice to a relevant operator, the Secretary of State must consult that operator. In addition, the Secretary of State must consider a number of factors before deciding to give a notice. Those factors include: the likely benefits of the notice; the technical feasibility of complying with the notice; and the likely number of users of any service to which the notice relates.

11.3 The Act also makes clear, at section 249, that the Secretary of State must ensure that arrangements are in force for securing that relevant operators receive an appropriate contribution in respect of such of their costs incurred in complying with the Act as the Secretary of State deems appropriate. Such costs would include those incurred in relation to complying with a technical capability notice.

11.4 In addition, the Act includes clear provisions enabling an operator to seek a review of the notice given by the Secretary of State and need not comply with the requirements of such a notice until the review is completed. Any such review would include an assessment by the Technical Advisory Board of the technical feasibility and financial consequences of the notice.

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.