EXPLANATORY MEMORANDUM TO

THE NATIONAL SECURITY AND INVESTMENT ACT 2021 (MONETARY PENALTIES) (TURNOVER OF A BUSINESS) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes regulations under section 41(8) and (9) of the National Security and Investment Act 2021[1] ("the Act").

2.2 This instrument specifies for the purpose of calculating monetary penalties on businesses under the Act that a business includes a sole trader; how turnover is to be assessed; and when a business is deemed to be controlled by another business for the calculation of turnover.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 Parliamentary Under Secretary of State, Lord Callanan, has made the following statement regarding Human Rights:

"In my view the provisions of the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 The Act creates a number of offences for non-compliance with the regime. These offences include completing a notifiable acquisition without approval (section 32) and failing to comply with an interim order or final order (section 33).

6.2 The Secretary of State is able to impose a monetary penalty on a person if the Secretary of State is satisfied beyond reasonable doubt that the person has committed one of these offences (section 40(1)).

[1] 2021 c.25

6.3 The maximum fixed penalty that can be imposed on a business for an offence under section 32 or section 33 is the higher of 5% of the total value of the turnover of the business (both in and outside the United Kingdom and including any business owned or controlled by the business) and £10 million (section 41(1)).

6.4 The maximum amounts per day for a daily rate penalty that can be imposed on a business for an offence under section 33 is the higher of 0.1% of the total turnover of the business (both in and outside the United Kingdom and including any business owned or controlled by the business) and £200,000 (section 41(2)).

6.5 This instrument specifies, for the purposes of calculating penalties, that a business includes a sole trader (regulation 2), when a business is to be treated as controlled by another business (regulation 3) and how the turnover of a business is to be determined (regulation 4 and the Schedule).

6.6 This is one of two Statutory Instruments laid on 6 September 2021 as part of the implementation of the Act. The other is the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021.

6.7 The instrument will come into force on 4 January 2022.

7. Policy background

What is being done and why?

7.1 The UK economy thrives as a result of foreign direct investment. Over the last 10 years, over 665,000 new jobs have been created as a result of over 18,000 foreign direct investment projects. An open approach to investment must also include appropriate safeguards to protect our national security and the safety of our citizens. The UK and its allies face continued and broad-ranging hostile activity from foreign intelligence agencies and others, who seek to compromise our national security.

7.2 Until the commencement of the Act, the current powers in this area largely dated from 2002. Technological, economic and geopolitical changes mean that reforms to the Government's powers to scrutinise investment on national security grounds are required.

7.3 The Government announced its intention to update the investment screening powers in 2016 and consulted in a Green Paper in 2017. Further proposals were put forward in a White Paper in 2018.

7.4 The Act provides the Government with updated powers to scrutinise acquisitions and intervene through imposing orders on investments and other acquisitions of control to protect national security, as well as to provide businesses and investors with the certainty and transparency they need to do business in the UK.

7.5 As part of this, the new powers will require acquirers to notify and receive clearance from the Secretary of State in advance of certain acquisitions (called notifiable acquisitions) in the 17 sectors provided for in the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 laid alongside this instrument.

7.6 Acquisitions that do not meet the criteria for being notifiable acquisitions may still be voluntarily notified to the Secretary of State and, whether notified or not, may still be called in by the Secretary of State where necessary.

7.7 To ensure compliance, there must be an effective deterrent against completing notifiable acquisitions without prior approval and against breaching orders. It is therefore important that the Secretary of State can issue fines against businesses that commit these offences that are substantial and linked to the size of the business. These offences therefore carry maximum penalties linked to turnover (or a fixed amount, whichever is the higher).

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 These are the first regulations made under section 41 and so consolidation is not applicable.

10. Consultation outcome

10.1 No public consultation was undertaken for the formulation of this instrument, as the Act itself sets out the maximum penalties allowed by reference to the percentage of turnover of a business and any business owned or controlled by the business, and these regulations set out how the Secretary of State will calculate those statutorily defined limits.

11. Guidance

11.1 No guidance is needed on this instrument, as it specifies how the Secretary of State is to calculate turnover for the purpose of imposing a monetary penalty on a business and is self-explanatory. The Government will however issue guidance for businesses on the operation of the Act. This will be placed on the gov.uk website in due course.

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 A full Impact Assessment has not been prepared for this instrument because these regulations set out a technical procedural issue, which in and of itself will have no impact on compliant businesses. Estimates of the impact of the entire regime are set out in the Impact Assessment for the Act. The Assessment assumes full compliance with the regime, as is the standard assumption, and any penalties would be the result of non-compliance. Specifying precisely how particular maximum permitted penalties are to be calculated is not expected to have an impact on compliant businesses.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that the proposed measures are proportionate given national security risks. To provide clarity and minimise the impact on small businesses the Government will issue guidance across the new regime.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that this instrument will be reviewed in the normal course of business and may be updated in response to changing operational requirements.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Parliamentary Under Secretary of State, Lord Callanan, has made the following statement:

"The impact of The National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 is not expected to exceed £5m. The impact and effectiveness of the SI will be monitored in the ordinary course of business, and so it would be disproportionate to include a formal review clause."

15. Contact

15.1 Ben Harris at the Department for Business, Energy and Industrial Strategy, email: benjamin.harris@beis.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Jacqui Ward, Director for National Security and International at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Callanan at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.