EXPLANATORY MEMORANDUM TO

THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002 (AUTHORITY TO CARRY) REGULATIONS 2012

2012 No. [XXXX]

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 This instrument creates a civil penalty regime authorising the Secretary of State to require a carrier to pay a penalty if the carrier breaches the Security and Travel Bans Authority to Carry Scheme (the "Scheme"), a draft of which is annexed to this Memorandum. The purpose of the Scheme is to prevent people who pose a terrorist threat from flying to the UK and to reduce the probability of a terrorist attack on an aircraft bound for the UK. A penalty will be payable where a carrier was required to seek authority to carry a passenger in accordance with the Scheme and failed to do so, or where the carrier brought a passenger to the UK having been refused authority under the Scheme.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 This instrument is being made to deliver a Government commitment to better identify people who pose a terrorist threat and prevent them flying to or from the UK.

4.2 The Regulations will be made under s.124 of the Nationality, Immigration and Asylum Act 2002 and would represent the first exercise of this power. The Regulations allow the Secretary of State to impose a penalty on carriers who (i) are required to seek authority to carry any of their passengers to the UK in accordance with the Scheme and fail to do so, or (ii) carry someone to the UK in respect of whom they were denied authority to carry.

4.3 Powers are already available to refuse entrance or admission to the UK to passengers of all nationalities (with the exception of UK nationals), to exclude or deport certain individuals from the UK and to refuse a visa to visa nationals. However, the purpose of the Scheme is to prevent certain individuals who pose a terrorist threat from travelling to the UK in the first place.

4.4 Section 124 of the Nationality, Immigration and Asylum Act 2002 was discussed in Parliament on 5 occasions in 2002 (16 May, 17 June, 17 July, 10 October, 31 October) during the passage of the Nationality, Immigration and Asylum Bill:

- Members were supportive of the clause if it would improve UK security and border controls, or reduce queues on arrival: Regulations under section 124 are being introduced now to reduce the risk of terrorist attacks.
- It was agreed that consultation with industry would be necessary: A 12-week public consultation exercise has been carried out, in 2011, together with additional significant engagement with the airline industry.
- Members asked that passengers whom the airline is denied Authority to Carry should be able to make enquiries and have avenues for redress: Passengers will be provided with information, including on any available rights of appeal, and official avenues for enquiry with the UK Border Agency.
- It was suggested that a cost-benefit analysis should be performed: A full Impact Assessment including this analysis has been agreed by the Home Office Chief Economist, the Regulatory Policy Committee and the Reducing Regulation Committee.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Home Secretary has made the following statement regarding Human Rights:

> In my view the provisions of the Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012 are compatible with the Convention rights.

7. Policy background

7.1 International terrorism affecting the UK or its interests is identified as a Tier One Priority Risk in the National Security Strategy. As one of the highest priorities for UK national security, the Government is committed to addressing the threat from terrorism and protecting the UK and its interests at home, at our border and internationally.

7.2 In response to the attempted terrorist attack over Detroit in December 2009, a range of work has been undertaken to consider the effectiveness of aviation and border security. This included a review of the UK's counter-terrorism watchlisting arrangements. Work was commissioned to consider how these arrangements could be used to prevent those who pose a threat from travelling to the UK. This is a key priority for the Government: it is the first responsibility of any administration to protect the safety and security of its citizens.

7.3 The Strategic Defence and Security Review (CM 7948, October 2010) included a commitment that changes will be made to pre-departure checks to better identify people who pose a terrorist threat and prevent them flying to or from the UK.

7.4 The additional powers provided by the Scheme and these Regulations will form part of the multi-layered approach to aviation security which includes a range of watchlisting checks and other measures such as robust airport security screening.

7.5 The Scheme will apply to all passenger air carriers operating to the UK that have been issued with an IS72 form. IS72 is the form issued by an Immigration Officer under paragraphs 27 and 27B of Schedule 2 to the Immigration Act 1971 which acts as the written notice requiring submission of passenger data to e-Borders. The Scheme will not apply to international flights from the UK – separate arrangements will manage the terrorist threat on these routes.

7.6 The Scheme will apply to the following passengers travelling on flights to the UK:

(i) third country nationals;

(ii) EEA nationals and accompanying/joining third country national family members of EEA nationals who are the subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security; and

(iii) Individuals who are the subject of a UN or an EU (AQ list) Travel Ban.

7.7 The Scheme will not apply to British nationals as there is no power to refuse such persons entry at the UK border. The persons in respect of whom authority to carry will be denied are set out in paragraph 15 of the Scheme.

7.8 Consideration has been given to non-legislative options to deliver the policy. Legislation is necessary to ensure that carriers participate within the Scheme as the legislation provides for available sanctions.

8. Consultation outcome

8.1 Following a considerable amount of engagement with the airline industry at the pre-consultation stage, a 12-week public consultation exercise ended in December 2011.

8.2 The majority of respondents strongly supported the purpose of the Scheme and agreed that a manual process between the Home Office and carriers to convey decisions where authority to carry a passenger is denied would be feasible in the short term for the numbers envisaged. The majority of airlines (80%) and all the airline representative bodies that responded to the consultation supported or strongly supported the development of a semi-automated process as a more suitable and effective long-term solution that also has the further potential to deliver immigration benefits. Some airlines provided suggestions

of how the Scheme could work best in practice, which has been considered in the preparation of the final Scheme, and provided estimates of the costs and benefits, which have been incorporated in the Final Impact Assessment. A response was received from a member of the public who was very supportive of the Scheme and advocated its application on other grounds such as crime and other areas of immigration. This will be considered in the development of policy. A response was received from a civil liberties group which was supportive of the purpose and general application of the Scheme, and raised queries aimed at ensuring it better achieved its intended effect without impacting negatively upon genuine passengers.

8.3 The Government response to the consultation exercise is available on the Home Office website, and has been distributed to those who participated.

8.4 There was no media interest in this consultation. However, there has been widespread press attention on the perceived need for improved border security checks. The media was supportive of the UK Government's decision in October 2011 to issue a direction under the Aviation Security Act 1982 to airlines, not to carry a specified passenger believed to pose a terrorist threat to aircraft. On 4 November 2011, the Daily Mirror carried a front page piece and there was lesser reporting in the Sun and the Daily Telegraph, all of which was supportive of the measure to protect aircraft from terrorist attacks. The Scheme and the Regulations will bring the Government additional protective powers to prevent such an individual being able to attempt to attack aircraft.

8.5 Since the airline industry is well aware of the Government's intention to introduce an Authority to Carry Scheme in advance of the Olympic Games, the Regulations will come into force one week after they are signed.

9. Guidance

9.1 Full guidance will be provided to the airline industry on the operation of the Scheme. We will continue to engage with industry as they begin implementation.

9.2 Records of the Guidance will be provided to libraries of Both Houses.

10. Impact

10.1 A Final Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

10.2 In summary, the main costs of operating the Scheme manually are operational and training costs to carriers when notification is made by the Home Office to deny authority to carry a passenger within the scope of the Scheme. There will be additional costs in operating the Scheme in a semi-automated way. The main benefit is in reducing the probability of a terrorist attack on a UK-bound aircraft, by prohibiting individuals who are known to pose a terrorist risk to the UK from flying.

10.3 Impacts on the public sector will be delivered from within existing resource allocations.

11. Regulating small business

11.1 As the Scheme applies to airlines flying to the UK, it is believed that no small businesses will be affected by the regulation.

12. Monitoring & review

12.1 Management Information will be collected by the Home Office to inform future Impact Assessments that review this policy. A formal review will take place 12 months after these Regulations come into force.

13. Contact

13.1 Alex Wilkie at the Home Office (tel: 0207 035 1031 or email: Alex.Wilkie@homeoffice.x.gsi.gov.uk) can answer queries regarding the instrument.

Annex

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THE SECURITY AND TRAVEL BANS AUTHORITY TO CARRY SCHEME 2012

Presented to Parliament pursuant to section 124(5)(b) of the Nationality, Immigration and Asylum Act 2002

THE SECURITY AND TRAVEL BANS AUTHORITY TO CARRY SCHEME 2012

Context

1. International terrorism affecting the UK and its interests is identified as a Tier One Priority Risk in the National Security Strategy. As one of the highest priorities for UK national security, the Government is committed to addressing the threat from terrorism and protecting the UK and its interests at home, at our border and internationally.

2. The Strategic Defence and Security Review 2010 included a commitment to make changes to pre-departure checks to better identify people who pose a terrorist threat and prevent them flying to or from the UK[1]. Powers are already available to refuse entrance or admission to the UK to passengers of all nationalities, with the exception of UK nationals – though the circumstances in which entrance or admission can be refused will vary according to the power in question.

3. The Home Secretary has the power to exclude or deport individuals from the UK. For EEA nationals, the power to exclude or deport on the grounds of public security is set out in the Immigration (European Economic Area) Regulations 2006; for third country nationals, the relevant power to exclude or deport is contained in the Immigration Act 1971 and the immigration rules.

4. The visa regime, applicable to those who need a visa to travel to the UK, can be used as a means of preventing the travel of those who pose a terrorist threat. Visa nationals who do not have a visa and are therefore inadequately documented for travel to the UK would be prevented from travelling by a carrier under the Carrier's Liability arrangements set out in sections 40 to 40B of the Immigration and Asylum Act 1999.

5. However, the visa regime is only applicable to those who require a visa to travel to the UK, and despite the existence of an order excluding or deporting a person from the UK or the existence of an UN or EU travel ban, an individual who does not require a visa for the UK and who poses a terrorist threat may still be able to travel. Carriers will not always be aware of an exclusion or deportation order or travel ban and so would not be in a position to deny boarding.

[1] Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review (Cm 7498, October 2010, p.54)

6. Primary legislation[2] has been passed to allow the Secretary of State to introduce an Authority to Carry (ATC) Scheme, which would confer a power to refuse a carrier authority to bring certain passengers to the UK, in accordance with the terms of an ATC Scheme. Where a scheme is in place, carriers are required to seek authority to carry all passengers who fall within the scope of the scheme. If the carrier does not seek such authority, or if the carrier brings to the UK a passenger in respect of whom authority has been denied, the carrier will be liable to a financial penalty.

7. This Scheme is the first scheme to be made under section 124 of the Nationality, Immigration and Asylum Act 2002. The financial penalty regime for failure to comply with the Scheme is set out in the Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012.

Threat

8. The current UK National Threat level is SUBSTANTIAL, meaning a terrorist attack is a strong possibility.

Purpose

9. The purpose of this Scheme is to prevent certain individuals who would be refused entrance or admission at the UK border from travelling to the UK.

Class of carrier to which the Scheme applies

10. This Scheme applies to all passenger air carriers operating to the UK that have been issued with an IS72 form. IS72 is a form issued by an Immigration Officer under paragraphs 27 and 27B of Schedule 2 to the Immigration Act 1971 which acts as the written notice requiring submission of passenger data to e-Borders.

11. Where a carrier has been issued with an IS72 form in respect of some of its routes only, this Scheme will only apply to that carrier in respect of those routes.

Class of passenger to which the Scheme applies

12. This Scheme applies to the following passengers travelling on flights to the UK[3]:

    (i) third country nationals;
    (ii) EEA nationals and accompanying/joining third country national family members of EEA nationals who are the subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security; and

[2] Section 124 of the Nationality, Immigration and Asylum Act 2002
[3] The Scheme does not apply on any routes from the UK.

(iii) individuals who are the subject of a UN or an EU (AQ list) Travel Ban.[4]

13. In compliance with EU law on the free movement of persons, a carrier is only required to seek authority to carry EEA nationals and their accompanying/joining third country national family members travelling to the UK where they fall within paragraph 12(ii) or (iii). All other EEA nationals and their accompanying/joining third country national family members do not fall within the scope of this Scheme.

14. This Scheme does not apply to British nationals[5].

Persons in respect of whom authority to carry will be refused

15. Authority to carry will be refused in respect of the following persons, who would be refused leave to enter at the border:

(i) EEA nationals and accompanying/joining third country national family members of EEA nationals who are the subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security;
(ii) Third country nationals who have been excluded from the UK by the Secretary of State under rule 320(6) of the immigration rules on grounds of national security;
(iii) Third country nationals whom the Secretary of State is in the process of excluding under rule 320(6) of the immigration rules on grounds of national security;
(iv) Individuals who are the subject of a UN or EU (AQ list) Travel Ban;
(v) Third country nationals who are the subject of a deportation order on grounds of national security.
(vi) Third country nationals who have been or would be refused a visa because of national security.

16. The operation of the Scheme is without prejudice to any in-country right of appeal an individual may have and separate arrangements would be made enabling such an individual to travel to the UK.

Process

17. Where a carrier has been served with an IS72 form, the carrier will be required to provide passenger data to e-Borders at least 30 minutes before departure. The submission of this information will constitute a request by the carrier for authority to carry all the passengers on the flight who come within the scope of the Scheme as set out in paragraph 12.

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[4] UN Security Council Resolution 1267 (1999) and EU: Council Common Position 2002/402/CFSP of 27 May 2002 and Council Decision 2011/487/CFSP of 1 August 2011

[5] Directions may be given under the Aviation Security Act 1982 in circumstances where a British national assessed to pose a direct threat to aviation security seeks to fly to the UK.

18. Carriers will be informed by the Home Office if they do not have authority to carry any of those passengers. Those passengers should not be brought to the UK.

19. Carriers will be refused authority to carry any of the following passengers:

    (i) EEA nationals and accompanying/joining third country national family members of EEA nationals who are the subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security;
    (ii) Third country nationals who have been excluded from the UK by the Secretary of State under rule 320(6) of the immigration rules on grounds of national security;
    (iii) Third country nationals whom the Secretary of State is in the process of excluding under rule 320(6) of the immigration rules on grounds of national security;
    (iv) Individuals who are the subject of a UN or EU (AQ list) travel ban;
    (v) Third country nationals who are the subject of a deportation order on grounds of national security;
    (vi) Third country nationals who have been or would be refused a visa because of national security.

20. The carrier will be notified by the Home Office via telephone of the details of any individual whom they do not have authority to carry to the UK. The initial phone message will be relayed in English and be followed up with an email in English confirming details of the denial of authority to carry the passenger to the UK. Carriers are responsible for providing contact details and ensuring that they are kept up to date.

21. If no notification is received by 15 minutes before scheduled time of departure, carriers will automatically have authority to carry all persons on the flight who come within the scope of the Scheme as set out in paragraph 12.

22. If, due to technical failure, the carrier is unable to send the data required by the IS72, and all other options for providing the data have been exhausted, the carrier should decide if it wishes to carry passengers who have not been subject to pre-departure checks. The Home Office will liaise with the carrier to discuss appropriate next steps should the carrier have boarded an individual whom they would have been denied authority to carry. The carrier should be aware though that if it does not seek authority to carry in accordance with this Scheme, it will be liable to a financial penalty – unless the carrier can establish that it has a reasonable excuse for avoiding liability.

23. Any passenger in respect of whom the carrier is denied authority to carry will be informed of that decision by the carrier. The passenger will be

referred to the UK Border Agency website or, where appropriate, to Home Office staff working locally as is normal procedure following a decision overseas.

Liability

24. A carrier is liable to a civil penalty if it brings to the UK a passenger in respect of whom either (i) it was required to seek authority to carry under the terms of this Scheme but failed to do so; or (ii) it was denied authority to carry. The level of such a penalty will be an amount not exceeding £10,000. The full details of this financial penalty regime are set out in the Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012.

25. A Code of Practice has been produced which sets out the factors that may be considered when determining the level of penalty to be imposed in each case.

26. A carrier will have a defence to the payment of a penalty where the carrier shows that it has a reasonable excuse for any liability for a penalty under the Regulations.

27. This Scheme does not affect any other obligations of carriers. Carriers will continue to be responsible for any detention and removal costs should any of their passengers outside the scope of this Scheme be refused leave to enter the UK. Carriers will also be liable to a financial penalty under carriers' liability legislation where a passenger who is inadequately documented[6] is carried to the UK.

Secretary of State for the Home Department
[Date] 2012

[6] Section 40 of the Immigration & Asylum Act 1999 provides for a charge to be imposed on the owner of a ship or aircraft where a person requiring leave to enter arrives in the UK and fails to produce a valid "immigration document" which satisfactorily establishes identity and nationality or citizenship, and if the individual requires a visa, a visa of the required kind. Legislation on detention and removal costs is contained in Paragraphs 8(1) and 19(1) in Schedule 2 of the 1971 Immigration Act.