EXPLANATORY MEMORANDUM TO

THE OFFICE OF QUALIFICATIONS AND EXAMINATIONS REGULATION (DETERMINATIONOF TURNOVER FOR MONETARY PENALTIES) ORDER 2012

2012 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this Order is to make provision for the determination of the turnover of a recognised body for the purposes of section 151B (1) of the Apprenticeships, Skills, Children and Learning Act 2009 (c.22). Section 151A of the 2009 Act provides that if it appears to the Office of Qualifications and Examinations Regulation ("Ofqual") that a recognised body has failed to comply with a condition to which its recognition is subject under section 132(2)(d) or 134 of that Act, Ofqual may impose a monetary penalty on the recognised body. The amount of the penalty may be whatever Ofqual decides is appropriate in all circumstances of the case and must not exceed 10% of the body's turnover, as determined by this Order.

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

3.1 None

4. Legislative Context

4.1 The Order is made in exercise of the powers conferred by section 151B (2) of the Apprenticeships, Skills, Children and Learning Act 2009, which was inserted by section 23 of the Education Act 2011. By virtue of an amendment to section 262 of the 2009 Act, the Order is subject to the affirmative resolution procedure. This is the first exercise of that power.

4.2 During debate, Ministers made a commitment to limit turnover to that derived from regulated activity. This has proved problematic as there is a small group of awarding organisations that have no turnover from regulated activity and who therefore could operate without threat of the sanction. To deal with this the SI bases turnover on income from all ordinary activities. Ofqual's policy will take account of income from regulated activity as part of its deliberation on how much to fine an awarding organisation that breaches a recognition condition.

5. Territorial Extent and Application

5.1 This instrument applies to England and Northern Ireland.

6. European Convention on Human Rights

6.1 Nick Gibb has made the following statement regarding Human Rights:

In my view the provisions of the Office of Qualifications and Examinations Regulation (Determination of Turnover for Monetary Penalties) Order 2012 are compatible with the convention rights.

7. Policy background

7.1 Following errors in the summer 2011 exam papers, the Government decided to give Ofqual new powers to impose monetary penalties on awarding organisations which commit breaches of their conditions of recognition (imposed by Ofqual under section 132(2) (d) or 134 of the 2009 Act. This addresses a gap in the sanctions available to Ofqual if a condition of their recognition is not being met. At present, the only alternatives are for Ofqual to direct an awarding organisation to do or not do something, or for it to use the ultimate sanction of withdrawing the awarding organisation's recognition. Ofqual does not, therefore, have the flexibility to act proportionately to deter poor practice without introducing undue risk for schools, colleges, students and awarding organisations.

7.2 Amendments to the Apprenticeships, Skills, Children and Learning Act 2009 introduced by the Education Act 2011 give Ofqual the power to impose a monetary penalty on a recognised awarding organisation, if it appears to Ofqual that the awarding organisation has failed to comply with a condition to which the recognition is subject. The monetary penalty must not exceed 10% of the organisation's turnover. This is in line with the powers other regulators have. The purpose of this Order is to make provision for the determination of turnover under that power.

8. Consultation outcome

8.1 The 12-week consultation closed on 15 March 2012. The Department has taken account of the views expressed as part of the consultation in making the Order. The Department will be publishing a summary of the responses by June 2012. This summary will also set out progress in taking forward the issues raised by the consultation as well as next steps.

8.2 On the question of how best to define turnover, responses were broadly **against** the proposal to base it on turnover from all activity. Out of 33 responses, 5 (15%) were in favour and 28 (85%) were against.

8.3 However, to define 'turnover' as that related to regulated activity only would lead to a category of awarding organisations that would not be subject to a monetary penalty as they have no income from regulated activity. This would go against the basic principle of public law that, in exercising its discretion, a public authority must treat like cases alike.

8.4 To define ‘turnover’ as income related to regulated activity or the equivalent in the event an awarding body has no turnover from regulated activity would lead to a system that would be complex and burdensome for both Ofqual to administer and awarding organisations to comply with.

8.5 To adopt an approach which allows Ofqual to fine an awarding organisation using as a cap turnover based on income from regulated activity where it exists, or income from all turnover where there is no or little income from regulated activity would lead to a potentially unfair policy as it would limit the exposure of awarding organisations with income from regulated activity whilst not doing so for others.

8.6 Respondents to the consultation overwhelmingly were in favour of consistency of approach between Ofqual and the Welsh regulator. Welsh Ministers have already agreed to base turnover on income from all activity. This is in line with our recommendation.

8.7 Finally, many of the risks and issues raised by the awarding organisations can be addressed by Ofqual’s policy on imposing a monetary penalty rather than by express provision in the Order. Details of how Ofqual intend to use their powers are the subject of a separate consultation which is still underway. However, it is worth noting that their consultation makes clear that in setting the fine Ofqual will take account of a range of issues including the severity of the breach, whether this was a first/one-off offence or the repeat of a previous offence and the extent to which awarding qualifications and related activity is the main purpose of the organisation. The policy is due for publication in May 2012. In addition, to address directly the concerns raised by respondents in the consultation, we have agreed with Ofqual that their policy will be revised to convey, more explicitly, that a lower monetary penalty may be appropriate if a high proportion of turnover comes from unregulated activity.

9. Guidance

9.1 The Department does not plan to produce guidance. However, Ofqual is currently consulting on its policy towards its use of its regulatory powers with a view to revising it to reflect its new power to impose monetary penalties. Ofqual will publish guidance on its revised framework in May 2012.

10. Impact

10.1 An impact assessment has not been produced for this instrument as making provision to determine turnover has no impact on business, the public or civil sectors. An impact assessment of Ofqual’s enforcement powers, including the impact of giving Ofqual the power to impose a monetary penalty, was prepared for the Education Bill. It will be annexed to this Explanatory Memorandum.

10.2 There is no impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There will be post-legislative scrutiny of the 2009 Act and the review of this policy will be included in that review. In addition, Ofqual is committed to reviewing its policy to ensure that it is operating as intended.

13. Contact

13.1 Naledi Hinds at the Department for Education Tel: 0207 783 8615 or email: Naledi.Hinds@education.gsi.gov.uk can answer any queries regarding the instrument.