EXPLANATORY MEMORANDUM TO

THE EARLY YEARS FOUNDATION STAGE (EXEMPTION FROM LEARNING AND DEVELOPMENT REQUIREMENTS) AND CHILDCARE (EXEMPTION FROM REGISTRATION) (AMENDMENT) REGULATIONS 2020

2020 No. 700

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments and the Select Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument enables the Secretary of State to direct primary and infant schools who have elected to take part in the Early Years Foundation Stage (EYFS) Reform Early Adopter Scheme to deliver new learning and development requirements and Early Years Foundation Stage Profile (EYFSP) assessment arrangements that are due to become statutory from September 2021 one year early. These reforms are set out in the Government response to the *EYFS consultation*[1] published on 1st July 2020. This will also exempt, for one academic year, those primary and infant schools from being required to deliver the current learning and development requirements and EYFSP assessment arrangements. These current requirements are set out in the *Statutory Framework* for the EYFS.[2]

2.2 This instrument also amends article 6(2)(a) of the Childcare (Exemptions from Registration) Order 2008 (2008 No.979) (the "2008 Order") in order to clarify when the circumstances in this article are not met, and that activity-based provision would be required to register with Ofsted.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments and the Select Committee on Statutory Instruments

EYFS Reform Early Adopter Scheme Year

3.1 The making of these Regulations is outside the normal practice of providing schools with at least one full term's notice for legislative changes. As a result of the outbreak of coronavirus (COVID-19) schools were instructed to remain open only for vulnerable children and the children of key workers. This made it difficult to correspond with schools as some had closed completely whilst others had only skeleton staff on site. This also delayed the publication of the Government's response

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896872/EYFS_reforms_consultation_-_government_response.pdf

[2] https://www.gov.uk/government/publications/early-years-foundation-stage-framework--2

A hard copy of these documents can be obtained from Henna.Jawaid@education.gov.uk

to the EYFS reforms consultation and of the statutory framework for early adopter schools which was necessary for the statutory instrument to be laid.

3.2 Although not giving a full term's notice is outside of normal practice this delay was due to circumstances beyond our control and there is no obligation for schools to take part if they feel they have not had sufficient warning of the change. Since the outbreak there have been over 300 enquires to the Early Adopter mailbox from schools still keen to take part in the voluntary early adopter year and requesting the Department confirm their position. This level of interest suggests many schools would still value the opportunity to take part in the early adopter year. The Department has, therefore, has taken the decision to continue to give schools the option to participate.

3.3 We are writing out again to early adopter schools following wider re-opening to give them a further opportunity to opt out from the scheme.

2008 Order Amendment

3.4 It was recently brought to the Department's attention that article 6(2)(a) of the 2008 Order was drafted in a way that was ambiguous and could be confusing in terms of how the legislation might be interpreted. Article 6(2) sets out the circumstances (in this article) where the exemption from registration as an early years or later years provider would not be met, including if the child attends the "activity" for longer than four hours per day. However, the policy intention behind article 6(2)(a) is that the exemption from registration should not apply if the child has not attained the age of five and attends provision that provides the "activity" for longer than four hours per day, even if the "activity" itself lasts for less than four hours. This interpretation is supported by a number of documents – including the government's 'exemption from Ofsted childcare registration' consultation[3] (paragraph 3.5) and its consultation response[4] (paragraph 12), which informed the sector of the Department's plans to make this change in 2008. Therefore, this instrument amends the 2008 Order to clarify the policy intention to avoid any further ambiguity in the future.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.5 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England only.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

[3] http://dera.ioe.ac.uk/6960/1/Exemption%20from%20Ofsted%20%20consultationDocument.doc
[4] http://dera.ioe.ac.uk/6960/4/Exemptions%20Government%20ResponseFINAL0807.doc

6. Legislative Context

EYFS Reform Early Adopter Scheme Year

6.1 Section 46 of the Childcare Act 2006 (2006 c.21) ("the 2006 Act") grants the Secretary of State the power to make regulations to direct the exemption in certain circumstances of early years providers from delivering all or parts of the learning and development requirements set out in the EYFS. Such a direction may also include conditions and specify modifications to the learning and development requirements that apply.

6.2 These regulations will enable the Secretary of State to direct that schools that confirm they would like to deliver the revised EYFS learning and development requirements and EYFSP assessment arrangements one year early from September 2020 are exempt from existing requirements. The revised requirements will be statutory for all early years providers from September 2021.

6.3 The schools involved will instead be required by the Secretary of State to deliver the revised EYFS and EYFSP for one academic year before this becomes statutory for all early years providers.

2008 Order Amendment

6.4 The Secretary of State has the power in sections 33 and 34 of the 2006 Act to exempt childcare providers from the requirement to register their provision. This instrument also amends article 6(2)(a) of the 2008 Order in order to clarify when the circumstances in this article are not met, and that activity-based provision would be required to register. The 2008 Order sets out the circumstances when activity-based provision is exempt from compulsory registration and when the circumstances in this article would not be met.

7. Policy background

EYFS Reform Early Adopter Scheme

7.1 The current EYFS became effective in April 2017. Its framework sets the standards for learning, development and care of children from birth to five. This framework is mandatory for all early years' providers in England.

7.2 The EYFS is a statutory requirement for over 16,000 primary and infant schools (maintained which receive their funding directly from local authorities, independent which charge fees rather than being funded by the government, non-maintained and academies which are independent from the local authority), 24,000 group-based providers and 39,000 childminders.

7.3 Section 1 of the EYFS sets out what providers must do to promote the learning and development requirements of children from birth to age five in their care. This includes educational programmes for the seven areas of learning and development, including the three prime areas of learning, which are communication and language, physical development and personal, social and emotional development as well as the four specific areas of learning, which are literacy, mathematics, understanding the world and expressive arts and design. Section 1 also includes the seventeen early learning goals which summarise the knowledge and understanding children should have gained by the end of the reception year. Section 2 details the assessments

practitioners should be undertaking for children in their care, including the progress check at age 2 and the assessment at the end of the EYFS, the EYFS Profile, which assesses children's development against the seventeen early learning goals. Section 3 details the safeguarding and welfare requirements including the necessary steps providers must take to ensure children are kept safe and well such as appropriate staff to children ratios.

7.4 In March 2017, the Secretary of State for Education launched the *Primary Assessment Consultation*[5], which sought views on how the EYFSP and Early Learning Goal (ELG) content set out in the EYFS could be improved to better assess child development and school readiness. In September 2017, the Secretary of State published the government's response to the Primary Assessment Consultation[6] which set out proposals to improve the EYFSP. The proposals included revising the ELGs to ensure that they are clear, better aligned with the year 1 curriculum, with a focus on strengthening the communication and language, literacy and mathematics ELGs and reviewing the EYFSP assessment arrangements to reduce burdens on teachers.

7.5 Following extensive consultation with early years experts, practitioners and academics, in July 2018 the Department for Education published a draft revised *EYFS framework*[7] with revised educational programme summaries and ELGs and a revised approach to EYFSP assessment and moderation. This was piloted in 23 randomly selected primary schools across England in the academic year 2018-19, who were made exempt from some of the learning and development and assessment requirements in the EYFS statutory framework by *regulations*[8]. One school chose to opt out of the pilot due to a member of staff leaving, meaning that the school did not have capacity to deliver the pilot. The pilot was run by the Education Endowment Foundation, who appointed NatCen Social Research to conduct an *independent evaluation*, published in October 2019[9].

7.6 The evaluation of the pilot informed the final policy proposals, which were published in the EYFS reforms *consultation document* on 24 October 2019[10]. The Department for Education confirmed that any subsequent changes to the EYFS would become statutory from September 2021. However, primary schools would be able to implement the reforms one year early on a voluntary basis from September 2020. The consultation closed on 31 January 2020 and the Department for Education published government's official *response* on 1st July 2020[11]. There was a delay in publication of the response due to the outbreak of coronavirus (COVID-19).

7.7 The final policy changes include:

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[5] https://consult.education.gov.uk/assessment-policy-and-development/primary-assessment/supporting_documents/Primary%20assessment%20in%20England.pdf

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644871/Primary_assessment_consultation_response.pdf

[7] https://www.foundationyears.org.uk/wp-content/uploads/2018/06/EYFSP-Pilot-Framework-2018.pdf

[8] http://www.legislation.gov.uk/uksi/2018/383/made

[9] https://educationendowmentfoundation.org.uk/public/files/Projects/Evaluation_Reports/Early_Years_Foundation_Stage_Profile_(EYFSP)_Reforms.pdf

[10] https://consult.education.gov.uk/early-years-quality-outcomes/early-years-foundation-stage-reforms/supporting_documents/EYFS%20reforms%20consultation.pdf

[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896872/EYFS_reforms_consultation_-_government_response.pdf

- Revised educational programmes across the seven areas of learning, to add greater detail to the sorts of activities practitioner and teachers must carry out in supporting children's learning and development;
- Revised seventeen early learning goals which set out the expected level of development that children need to demonstrate by the end of reception year. with greater specificity and focus on early language outcomes.
- The removal of the 'exceeding' EYFSP assessment judgement band to encourage greater focus on more children attaining 'expected' levels of attainment and reduce teacher workload.
- The removal of the statutory duty on local authorities to moderate the EYFSP judgements of 25% of schools every year, to enable teachers to focus time in the classroom on rich curriculum interactions with children and help to reduce teacher workload.

7.8 Schools were invited to sign up as early adopters in January 2020. Approximately 3,500 schools signed up but following the outbreak of coronavirus (COVID-19) we have written out again to early adopters to confirm whether they still wish to participate.

2008 Order Amendment

7.9 Childcare providers must register with Ofsted on either its Early Years Register (EYR) or General Childcare Register (GCR) before they can provide childcare (unless an exemption applies). Providing childcare without being registered or exempt is a criminal offence. Article 6 of the 2008 Order sets out an exemption for activity-based provision where the provision is made for a child who has attained the age of 3; the person making the provision is providing to the child an activity[12] listed in article 6(3); and the provision of childcare is incidental to the activity. Article 6(2) of the 2008 Order is clear that the circumstances in this article are not met if: the child has not attained the age of 5 and attends the activity for longer than 4 hours per day; or the person making the provision offers more than 2 types of activity listed in article 6(3). The policy intention behind article 6(2)(a) is that the exemption from registration should not apply if the child has not attained the age of five and attends the provision that included the activity for longer than four hours per day, even if the activity itself lasts for less than four hours, and this amendment clarifies that intent. This amendment will come into force on 1 October 2020 to ensure that providers have sufficient notice of the policy clarification.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate legislation.

[12] The types of activity are: school study support or homework support; sport; performing arts; arts and crafts; religious, cultural or language study.

10. Consultation outcome

EYFS Reform Early Adopter Scheme Year

10.1 The Primary Assessment Consultation[13] asked for views on whether government should revise some of the learning and development and EYFSP assessment requirements in the EYFS, which led to the EYFSP pilot being undertaken. Following the completion of the pilot a full public consultation was undertaken on the policy proposals that were finalised following the pilot, which has informed the final learning and development requirements and EYFSP assessment arrangements that will become statutory for all early years providers in September 2021. This consultation was launched in October 2019 and closed in January 2020. The consultation received 2,452 responses, the majority were from school reception teachers or leaders. There was a clear view from respondents that the revised educational programmes support children's overall learning and development and new early learning goals contribute to a well-rounded assessment of a child's development at the end of reception year. The findings of the consultation were published in July 202014. These consultations were not statutory however were carried out to meet the expectation of stakeholders, as the Department has consulted where similar changes had been proposed in the past. Ofsted were also consulted as required by section 42 of the 2006 Childcare act.

2008 Order Amendment

10.2 This amendment clarifies an existing policy, specifically when activity-based provision would be required to register with Ofsted. This was included as part of a 2007 consultation[15] (para 3.5) and the government's consultation response (para 12).[16]

11. Guidance

11.1 The schools who are exempted from the current requirements will be provided with copies of the revised learning and development requirements, EYFSP assessment arrangements and related guidance.

11.2 As the amendment to the 2008 Order clarifies an existing requirement – as set out on Ofsted's website – no further changes to guidance will be required.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is limited to the primary schools who confirm that they would like to deliver the new requirements one year early from September 2020.

12.3 An Impact Assessment has not been prepared for this instrument.

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[13] https://consult.education.gov.uk/assessment-policy-and-development/primary-assessment/supporting_documents/Primary%20assessment%20in%20England.pdf

[14]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896872/EYFS_reforms_consultation_-_government_response.pdf

[15] http://dera.ioe.ac.uk/6960/1/Exemption%20from%20Ofsted%20%20consultationDocument.doc

[16] http://dera.ioe.ac.uk/6960/4/Exemptions%20Government%20ResponseFINAL0807.doc

A hard copy ocan be obtained from John.Trakos@education.gov.uk

13. Regulating small business

13.1 The amendment to the 2008 Order will apply to some small businesses – namely activity-based providers. The regulatory change will clarify when the circumstances in Article 6 of the 2008 Order are not met and that activity-based provision would be required to register with Ofsted. No further or specific action is proposed as a result.

14. Monitoring & review

14.1 Due to the time limited nature of the exemption provisions and the fact that the amendment to the 2008 Order is simply a clarification of the existing regulatory requirements, no review clause is required.

15. Contact

15.1 Anna Mercy at the Department for Education, Telephone: 07384456617 or email: Anna.Mercy@education.gov.uk can be contacted with any queries regarding the instrument.

15.2 John Trakos at the Department for Education Telephone 020 7340 7050 or email: John.trakos@education.gov.uk can be contacted with any queries regarding the amendment to the 2008 Order in the instrument.

15.3 Susie Owen, Deputy Director for Early Years Quality and Outcomes, at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.

15.4 Minister Nick Gibb, Minister of State for School Standards at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.