EXPLANATORY MEMORANDUM TO THE

PUBLIC AUDIT (WALES) ACT 2004 (TRANSFER OF PROPERTY, RIGHTS AND LIABILITIES OF THE AUDIT COMMISSION FOR LOCAL AUTHORITIES AND THE NATIONAL HEALTH SERVICE IN ENGLAND AND WALES) ORDER 2005

2005 No. 550

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. **Description**

This instrument makes provision in exercise of powers conferred on the Secretary of State for Wales by section 68 of, and paragraphs 1 and 2 of Schedule 3 to the Public Audit (Wales) Act 2004 ("the Act") for the preparation of a scheme to transfer to the Auditor General for Wales defined property, rights and liabilities of the Audit Commission for Local Government and the National Health Service in England and Wales ("the Audit Commission") .

Article 1 provides for the citation of the Order and specifies the transfer date as 1 April 2005.

Article 2 provides for the transfer of all property, rights and liabilities in relation to the premises identified in Schedule 1 to the Order to which the Audit Commission was entitled or subject immediately before the transfer date, subject to certain exceptions set out in Article 4 (1) and (2).

Article 3 provides for the transfer of the property in and all rights and liabilities in respect of personal or other moveable property whether or not in or on the premises transferring, if it is for use by Audit Commission staff in pursuance of their employment in Wales. Article 3(b)(ii) and Schedule 2 to the Order refer to an employee of the Audit Commission who normally works from his home, which is in England, although his work relates to Audit Commission operations in Wales.

Article 4 makes common provisions in respect of the property, rights and liabilities to transfer under Articles 2 and 3. Article 4(1) excludes the transfer of rights and liabilities in respect of contracts for the supply, use or maintenance of information technology programmes. The Auditor General for Wales will enter into such contracts, if he considers it necessary, outside the terms of the order. Article 4(2) and (3) makes provision for the payment and reimbursement of liabilities which relate to periods either side of the transfer date. Article 4(2) and (3) reflect the fact that the Audit Commission is primarily funded by fees and charges paid by local government bodies and NHS bodies whereas the Auditor General for Wales is primarily funded by the Exchequer. These provisions are made under paragraph 1(3)(c) of Schedule 3 to the Act. Article 4(4) also ensures that no existing contractual provision can be used to frustrate or prevent the transfer of property rights and liabilities that would otherwise would not be capable of transfer (for instance, a non-assignable lease). It is made under paragraph 1(2)(a) of Schedule 3 to the Act.

Article 5 makes provision for the transfer from the Audit Commission to the Auditor General for Wales of the proportion of fees and charges paid to the former before the transfer date of 1

April 2005 that corresponds to audit and inspection work that has not been done on 1 April 2005. It is made under paragraph 1(3)(c) of Schedule 3 to the Act.

Article 6 provides for the transfer of a sum of cash reserves held by the Commission as at the transfer date that can be attributed to work undertaken in Wales. It is made under paragraph 1(3)(c) of Schedule 3 to the Act.

Article 7 provides for the transfer to the Auditor General for Wales of all rights and liabilities of the Audit Commission under any contract of employment made between the Commission and members of its staff who are to transfer. The provisions of the article mirror those of the Transfer of Undertakings (Protection of Employment) Regulations 1981, in that rights and liabilities to transfer do not extend to provisions within the person's contract of employment relating to an occupational pension scheme unless they are provisions that do not relate to benefits for old age; invalidity or survivors (so, for example, rights in respect of redundancy or industrial injury compensation that may be written into a occupational pension scheme will transfer).

Article 8 makes provision for the payment by the Audit Commission to the Auditor General of unpaid bonus payments due to staff relating to the period 1 October 2004 to 31 March 2005 (bonuses for the period 1 April to 30 September have already been paid to staff by the Commission). This provision is made under paragraph 1(3)(c) of Schedule 3 to the Act.

Article 9 creates an interest for the Auditor General in intellectual property created by or for the Audit Commission prior to 1 April 2005.

Article 10 transfers to the Auditor General for Wales all documents in possession or control of the Audit Commission relating wholly to the property, rights and liabilities and contracts of employment transferring under the Order . The Audit Commission is given a right of access to such documents and a right to have copies of them. This was considered necessary in the light of the new liabilities imposed by the Order on the Audit Commission. Article 10 also creates a right of access for the Auditor General for Wales to all documents in possession or control of the Audit Commission relating partly to such property, rights and liabilities and contracts of employment. The provisions of the Article are made under paragraph 1(3)(a) and (b), and 1(6)(a), of Schedule 3 to the Act.

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

None.

4. Legislative Background

This instrument is one of two made under Section 68 and paragraphs 1 and 2 of Schedule 3 to the Public Audit (Wales) Act 2004. The other order relates to the transfer of property, rights and liabilities of the Comptroller and Auditor General to the Auditor General for Wales.

Paragraph 2 to Schedule 3 of the Act requires that before making an order the Secretary of State must consult the Auditor General for Wales; the Audit Commission and the Comptroller and Auditor General as appropriate. The Audit Commission and the Auditor General for Wales have been formally consulted on the terms of the Order. Formal consultation began on 18 January and ended on 4 February 2005. It was preceded by a period of informal

consultation on the detail of the Order. All the substantive comments made by the consultees are reflected in the Order as made.
Paragraph 1(1) to Schedule 3 requires that the Secretary of State obtain the consent of the National Assembly for Wales before making the transfer scheme. The draft of this Order was approved by a resolution of the National Assembly for Wales on 1 March 2005.

Paragraph 1(9) to Schedule 3 requires that the power to make a transfer scheme in an order is exercisable by a statutory instrument that is subject to annulment in pursuance of a resolution of either House of Parliament.

5. Extent

This statutory instrument extends to England and Wales.

6. European Convention on Human Rights

The Secretary of State for Wales has made the following statement under Section 19(1)(a) of the Human Rights Act 1998:

> "In my view the provisions of the Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Audit Commission for Local Authorities and the National Health Service in England and Wales) Order 2005 are compatible with the Convention rights."

7. Policy Background

The Public Audit (Wales) Act 2004 extends the functions of the Auditor General for Wales, primarily to include the majority of the functions currently undertaken by the Audit Commission in Wales. The Act received Royal Assent on 16 September 2004. The effect of the Act is that there will be a single public audit body for Wales from 1 April 2005 to be headed by the Auditor General for Wales and to be known as the Wales Audit Office/ Y Swyddfa Archwilio Cymru.

Under current arrangements the Auditor General for Wales receives administrative, professional and technical support from National Audit Office staff. The new body will comprise staff of both the National Audit Office and the Audit Commission working in Wales, who wish to transfer to the employ of the Auditor General for Wales. It will also utilise specified property and contractual arrangements to which the Audit Commission is currently party, under the transfer scheme set out in the Order.

8. Impact

A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

Cedric Longville at the Wales Office:- Tel 020 7270 0552 or e-mail: Cedric.Longville @walesoffice.gsi.gov.uk can answer any queries regarding this instrument.

Annex

A summary of Audit Commission Transfer Scheme Order to be made under Section 68 and Paragraphs 1 and 2 of Schedule 3 to the Public Audit (Wales) Act 2004 ["the Act"]

Article 1: provides for the citation of the Order as the "Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Audit Commission for Local Authorities and the National Health Service in England and Wales) Order 2005" . It also specifies the transfer date as 1 April 2005.

Article 2 : makes provision for the transfer of all property, rights and liabilities (save for the exceptions identified in paragraphs [1] and [2] to Article 4) in relation to premises identified in Schedule 1 to the Order to which the Audit Commission was entitled or subject immediately before the transfer date – i.e. its premises in Wales. This includes rights and liabilities under facilities maintenance contracts in respect of the premises, where relevant.

Article 3: makes provision for the transfer (save for the exceptions again identified in (1) and (2) to Article 4) of:-

- the property in and all rights and liabilities in respect of personal or other moveable property (such a information technology hardware and office furniture) in or on the premises to be transferred [Article 3(a)];

- the property in, and all rights and liabilities in respect of personal and moveable property not in or on the premises to be transferred but for the use of Audit Commission staff in the pursuance of their employment within Wales. This covers property, including lease hire vehicles, in the possession of staff (including staff designated as home workers whose work essentially contributed to Audit Commission operations in Wales) held at home or at a location other than their principal place of employment [Article 3(b)];

Article 4:

Article 4(1) excludes the transfer of rights and liabilities mentioned in Articles 2 or 3 in respect of contracts for the supply, use or maintenance of information technology programmes. Such contracts are for negotiation, through licensing or other appropriate procedures outside the ambit of the draft Order [Article 4(1)];

Article 4(2) provides that liabilities mentioned in Article 2 or 3 do not include any liability (including the liability to pay a sum of money or do anything) that relates to a period before the transfer date of 1 April 2005;

Article 4(3) requires the Auditor General for Wales to reimburse the Audit Commission for any amounts it has expended before the transfer date of 1 April 2005 (when the Transfer Order would come into force) in respect of a liability mentioned in Article 2 and 3 which pertains to a period after the Transfer Order comes into force.;

Article 4(4) ensures that no existing contractual provision can be used to frustrate or prevent the transfer of property, rights and liabilities that would otherwise not be capable of transfer (for instance, a non-transferrable lease). Paragraph 1(2)(a) to Schedule 3 of the Act provides that property, rights and liabilities which may be the subject of a scheme include any that would otherwise be incapable of being transferred or assigned. Paragraph 1(5) also enables the Secretary of State to make incidental provision as to the interests, rights and liabilities of persons other than the transferor and the Auditor General for Wales in respect of the transfer scheme.

Article 5 : makes provision for the transfer from the Audit Commission to the Auditor General for Wales of a proportion of the amount of fees and charges paid to the Audit Commission in respect of audit and inspection services provided by auditors appointed by the Commission under section 3 of the Audit Commission Act 1998. The fees and charges subject to transfer are those paid prior to the transfer date in respect of audit and inspection work still to be completed as at 1 April 2005. Sections 69 and 70 of the Act make provision for appointments of auditors made by the Audit Commission for local government and NHS bodies in Wales to continue for the whole of their term. From 1 April 2005 such auditors will be regarded as having been appointed by the Auditor General for Wales. Article 5(3) requires 80 per cent of the transfer sum to be paid on 19 April 2005 with the balance of the sum due (after audit) being paid on or before 30 June 2005.

Sections 69(5) - (6) and 70 (3) - (4) of the Act makes provision for studies under sections 33 and 34 of the Audit Commission Act 1998 undertaken or promoted by the Audit Commission before 1 April 2005 to be completed by the Commission. For this reason fees and charges that relate to the funding of these studies will not transfer.

Article 6 : provides for the transfer of £758,000 of cash reserves held by the Audit Commission as at the transfer date. The sum, agreed between the Audit Commission and the Auditor General for Wales, represents balances held by the Commission that can be attributed to work undertaken in Wales. It is to be paid on or before 31 December 2005.

Article 7: provides for the transfer to the Auditor General for Wales of all rights and liabilities of the Audit Commission under or in connection with any contract of employment in force immediately before the transfer date, made between the Commission and members of its staff whose principal place of employment is at one of the premises specified in Schedule 1 of the draft Order, or the homeworker, working on Welsh operations but living in England, listed in Schedule 2.

Under Article 7(2) the rights and liabilities to transfer extend to agreements made by the Commission to lend money (for instance for the purchase of travel season tickets) and for the reimbursement of expenses. It also extends to agreements to lend or advance monies to a third party on behalf of a member of staff.

Article 7(3) requires the Audit Commission to indemnify the Auditor General for Wales against any liability arising from Article 7(I) and 7(2), if the liability relates to a period before the transfer date of 1 April 2005.

Articles 7(4) and (5) require the Auditor General to reimburse the Audit Commission the proportion of amounts lent or advanced under Article 7(2) not repaid under the terms of an agreement before the transfer date.

Under Article 7(6) and 7(7) the rights and liabilities to transfer do not extend to provisions within the person's contract of employment relating to an occupational pension scheme, unless they are provisions that do not relate to benefits for old age; invalidity or survivors (for example, rights in respect of redundancy or industrial injury compensation that may be written into a occupational pension scheme will transfer). Paragraph 3(3) to Schedule 3 of the Act provides that the terms and conditions of a member of staff transferring to the employ of the Auditor General for Wales must not, taken as a whole, be less favourable to the individual than the terms and conditions on which he or she was employed immediately before the transfer. In practice members of Audit Commission staff transferring to the employ of the Auditor General for Wales will be eligible to join the Principal Civil Service Pension Scheme. In doing so,they can opt to transfer their rights accrued in the Audit Commission scheme, or freeze those rights under the terms of that scheme. They can also choose not to join the Principal Civil Service Pension Scheme and make alternative arrangements.

Article 8: makes provision for the payment by the Audit Commission to the Auditor General for Wales on or before 30 September 2005 the amount equal to all bonuses due to staff transferring under Audit Commission performance-related pay arrangements relating to the period 1 October 2004 to 31 March 2005. The level of bonuses is determined by the Audit Commission. Bonuses for the period 1 April to 30 September 2004 have already been paid. Paragraph 1(5) to Schedule 3 of the Act enables a transfer scheme to include supplementary, incidental, transitional or consequential provision.

Article 9 : creates an interest for the Auditor General for Wales in intellectual property created by or for the Audit Commission before the 1 April 2005 transfer date. The Audit Commission and the Auditor General for Wales are to enter into a separate agreement outside of the Order for intellectual property development that has not been completed by the transfer date. The interest created cannot be assigned by the Auditor General to a third party.

Article 10: creates a right, under paragraph 1(3)(c) of Schedule 3 of the Act, for the Auditor General for Wales in all documents in possession or control of the Audit Commission and relating wholly to property, rights and liabilities transferring to him under Articles 2, 3 or 7 of the Order or any person who is a party to a contract of employment for which the Auditor General for Wales assumes all rights and liabilities

under Article 7, paragraph 1. The Article also creates a right of access for the Auditor General for Wales to all documents in possession or control of the Commission relating partly to such property, rights and liabilities and contracts of employment.