EXPLANATORY MEMORANDUM TO THE

PUBLIC AUDIT (WALES) ACT 2004 (TRANSFER OF PROPERTY, RIGHTS AND LIABILITIES OF THE COMPTROLLER AND AUDITOR GENERAL) ORDER 2005

2005 No. 552

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 Comptroller and Auditor General.

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 specified in the Article and in respect of personal or other moveable property, whether or not it is in or on the premises, if it is for use by National Audit Office staff in the pursuance of their employment within Wales. Rights and liabilities in respect of contracts for the supply, use or maintenance of information technology programmes do not transfer. The Auditor General will enter into any such contracts as he considers necessary outside the scope of the Order.

The Article also 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-assignable lease). That provision is made under paragraph 1(2)(a) of Schedule 3 to the Act.

Article 3 provides for the transfer to the Auditor General for Wales of all rights and liabilities of the Comptroller and Auditor General under any contract of employment made between him and members of National Audit Office staff who are to transfer. Occupational pension rights do not need to be dealt with in the Order, as National Audit Office staff transferring are currently, and will after the transfer continue to be, in the Principal Civil Service Pension Scheme.

Article 4 makes provision for the payment by the Comptroller and Auditor General to the Auditor General for Wales of unpaid bonus payments due to staff relating to the period 1 April 2004 to 31 March 2005. This provision is made under paragraph 1(3)(c) of Schedule 3 to the Act.

Article 5 creates an interest for the Auditor General in intellectual property created by or for the Comptroller and Auditor General prior to 1 April 2005. The interest created cannot be assigned by the Auditor General to a third party.
The Order does not make any provision for the apportionment of fees and charges or an accumulated cash reserve because both the Comptroller and Auditor General and the Auditor

General for Wales are largely Exchequer funded. The former is funded by Parliament; the latter by the National Assembly for Wales. What fees and charges they receive are paid to them direct.

Article 6 transfers to the Auditor General for Wales all documents in possession or control of the Comptroller and Auditor General relating wholly to the property, rights and liabilities and contracts of employment transferring under the Order. Article 6 also creates a right of access for the Auditor General for Wales to all documents in possession or control of the Comptroller and Auditor General which relate partly to such property, rights and liabilities and contracts of employment. That provision is made under paragraph 1(3)(b) of Schedule 3 to the Act.

A more detailed summary of the Transfer Scheme Order provisions is set out in the annex to this Memorandum.

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 Audit Commission for Local Authorities and the National Health Service in England and Wales 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; and, as appropriate, the Comptroller and Auditor General and the Audit Commission. The Comptroller and Auditor General 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 substantive points raised by the consultees have been 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 instrument was approved by a resolution of the Assembly 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 amendment in pursuance of a resolution of either House of Parliament.

5. Extent

This 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 Comptroller and Auditor General) 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 or Y Swyddfa Archwilio Cymru.

Under current arrangements the Auditor General for Wales receives administrative, professional and technical support from National Audit Office staff employed by the Comptroller and Auditor General. The new body will comprise staff of both the National Audit Office and the Audit Commission working in Wales. It will also utilise specified property and contractual arrangements to which the Comptroller and Auditor General 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 the Comptroller and Auditor General Transfer Scheme 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 Comptroller and Auditor General) 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 in relation to premises specified in Article 2(1)(a); this includes rights and liabilities under the related facilities maintenance contract ;

- the property in and all rights and liabilities in respect of personal or other moveable property (such as information technology hardware owned by the Comptroller and Auditor General and office furniture) in or on the premises specified in Article 2(1)(a) (Article 2(1)(b));

- the property in, and all rights and liabilities in respect of personal and moveable property not in or on the premises referred to above but for the use of National Audit Office staff in the pursuance of their employment within Wales. This takes account of property in the possession of staff held at home or at a location other than the premises specified in Article 2(1)(a) (Article 2(1)(c));

Under Article 2(2) rights and liabilities of the Comptroller and Auditor General in respect of contracts for the supply, use or maintenance of information technology programmes do not transfer. Such contracts are for negotiation, through licensing or other appropriate procedures outside the scope of the draft Order.

Article 2(3) 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-assignable 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.

Article 3 : provides for the transfer of all rights and liabilities of the Comptroller and Auditor General to the Auditor General for Wales under or in connection with any

contract of employment made between him and members of his staff whose principal place of employment immediately before the transfer date was the premises specified in Article 2(1)(a). Under article 3(2) the rights and liabilities to transfer extend to agreements made by the Comptroller and Auditor General to lend money (for instance for the purchase of travel season tickets) and for the reimbursement of expenses.

Article 4: makes provision for the payment by the Comptroller and Auditor General to the Auditor General for Wales as soon as practicable on or before 30 September 2005 the amount equal to all bonuses due to staff transferring under National Audit Office performance-related pay arrangements relating to the period 1 April 2004 to 31 March 2005. Paragraph 1(3)(c) of Schedule 3 to the Act provides that a transfer scheme may create new rights and liabilities as between the Auditor General and a transferor, such as the Comptroller and Auditor General, and paragraph 1(5) enables a transfer scheme to include supplementary, incidental, transitional and consequential provision.

Article 5 : creates an interest for the Auditor General for Wales in intellectual property created by or for the Comptroller and Auditor General before the 1 April 2005 transfer date. The Comptroller and Auditor General 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 6 : 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 Comptroller and Auditor General relating wholly to property, rights and liabilities transferring to the former under Articles 2 or 3 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 paragraph 1 of Article 3. 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.