EXPLANATORY MEMORANDUM TO

THE RAILWAYS (TRANSPORT FOR LONDON) (EXEMPTIONS) ORDER 2009

2009 No. 3336

THE RAILWAYS (EAST LONDON RAILWAY SERVICES) EXEMPTION ORDER 2009

2009 No.3335

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

It contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

2.1 The Railways (Transport for London) (Exemptions) Order 2009 ("TfL Exemptions Order") amends the Railways (London Regional Transport) (Exemptions) Order 1994 ("1994 Order") so that:

(a) the licence exemption, facility exemption and franchise exemption granted by the 1994 Order in respect of Transport for London's ("TfL's") network will apply where railway passenger services on the upgraded East London Railway ("ELR") are operated by TfL's East London Railway concessionaire ("ELR concessionaire"). (Certain parts of the upgraded ELR network will form part of the wider TfL network);

(b) the disapplication of closure provisions granted by the 1994 Order in respect of:

(i) railway passenger services will apply in circumstances where services are provided solely within Greater London by a TfL concessionaire (a "TfL concessionaire" includes an ELR concessionaire and also the North London Line concessionaire);

(ii) stations (or part stations) will apply in circumstances where that station (or part) is operated by a TfL concessionaire, only a TfL concessionaire or a TfL company (or both) provide railway passenger services from that station, and all of those services are provided solely within Greater London; and

(ii) stations (or part stations) will apply where a TfL concessionaire takes over the operation of a station (or part) from a TfL company; and

(c) railway passenger services provided by a TfL concessionaire solely within Greater London are designated such that the Mayor of London's consent is required for the discontinuance of those services.

2.2 The TfL Exemptions Order also amends the 1994 Order such that:

(a) the 1994 Order does not apply in respect of the Crossrail railway transport system except for certain specified stations which are shared by Crossrail and London Underground Ltd; and

(b) the provisions in the 1994 Order from which TfL companies currently benefit will not cease to apply as a result of the commencement of Crossrail passenger services or any construction pursuant to the Crossrail Act 2008.

2.3 The TfL Exemptions Order also amends the Railways (Provision etc. of Railway Facilities) (Exemptions) Order 2005 so that the exemption granted to TfL from a requirement to improve or develop a railway facility will apply in respect of:

(a) any station or part station on the TfL network that is controlled by a TfL concessionaire; and

(b) any station or part station (not necessarily on the TfL network) that is controlled by a TfL concessionaire, where the concessionaire has taken over the operation of a station (or part) from a TfL company.

2.4 The Railways (East London Railway Services) Exemption Order 2009 is intended to provide exemption from designation for franchising by the Secretary of State in respect of certain specified railway passenger services to be operated by the ELR concessionaire on the national railway network. The need for such an order arises because operation of railway passenger services by the ELR concessionaire outside TfL's network is beyond the scope of both the 1994 Order and the TfL Exemptions Order which is drafted to amend it.

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

3.1 None

4. Legislative Context

4.1 The Railways Act 1993 (the "1993 Act") requires:

(a) the operator of any railway asset to be licensed;
(b) the operator of any railway asset to enter into an access agreement in respect of that asset if so directed by ORR;
(c) the Secretary of State to designate railway passenger services to be provided under franchise agreements and to select the franchisees; and
(d) that certain procedures must be followed regarding proposals to discontinue railway passenger services or close railway facilities.

4.2 The 1994 Order exempts TfL and any subsidiary of theirs (a "TfL company") from these requirements in respect of any network, station or light maintenance depot used only in connection with the provision by a TfL

company of railway passenger services and in respect of railway passenger services provided by a TfL company on that network.

4.3 The 1993 Act also requires the operator of any railway facility to improve or develop that facility if so directed by ORR.

4.4 The Railways (Provision etc. of Railway Facilities) (Exemptions) Order 2005 exempts any TfL company from this requirement.

4.5 The Railways Act 2005 enables railway passenger services to be designated as services in respect of which the Mayor of London's consent is required (as opposed to the consent of the national authority, which in this case would be the Secretary of State) in order to discontinue those services. Railway passenger services operated by a TfL company are currently subject to the mayoral consent procedures, because of the combined operation of the 1994 Order and various provisions in the Railways Act 2005 and the Greater London Authority Act 1999.

4.6 The TfL Exemptions Order is being made as part of the transfer of responsibility from the Secretary of State to TfL for the franchising of certain railway passenger services. It provides that the exemptions currently enjoyed by TfL will continue to apply in circumstances where railway passenger services on the East London Railway are operated under a concession agreement.

5. Territorial Extent and Application

These instruments extend to England and Wales and apply to England.

6. European Convention on Human Rights

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why***

7.1 At the time of railway privatisation, it was government policy that operation on the national rail network, which mainly equated to British Rail's network, would be licensed and subject to regulated access. Other networks would generally be exempt from those arrangements. In respect of the network operated by Transport for London's predecessor, London Regional Transport (LRT), LRT was granted exemption from licence and facility access requirements by the 1994 Order. The Order was amended by the Greater London Authority Act 1999 to extend the benefit of the exemption to PPP companies performing LRT services. A further exemption from requirements to improve and develop stations and light maintenance depots was provided to

TfL companies by the Railways (Provision etc. of Railway Facilities) (Exemptions) Order 2005.

7.2 TfL is undertaking a major upgrade of the East London Railway (formerly part of the London Underground system). Following completion, railway passenger services will be operated by TfL's London Overground concessionaire and will run on TfL's network between Dalston Junction and New Cross Gate / New Cross and also over national rail network:

(a) between Dalston Junction and Highbury & Islington;
(b) between New Cross Gate and Crystal Palace / West Croydon;
(c) between Surrey Quays and Clapham Junction (; and
(d) on the approaches to New Cross Gate and New Cross stations.

7.3 The railway passenger services will also run on some new TfL track south of Surrey Quays.

7.4 As the London Overground concessionaire is not a TfL company, its operation of railway passenger services on the TfL network between Dalston Junction and New Cross Gate would invalidate the current exemptions enjoyed by TfL for that part of its network and possibly for its entire network. This would not be consistent with settled government policy on railway licensing and access since the time of rail privatisation, nor with devolving accountability for local rail services to TfL as set out in the 2004 White Paper 'The Future of Rail' (CM 6233) and subsequently in the Railways Act 2005. Consequently amendment of the relevant exemption orders is necessary to ensure that the current exemptions continue to apply.

- ***Consolidation***

7.5 The Department does not intend to consolidate the relevant legislation at this time.

7.6 The revised exemptions set out in the 1994 Order benefit TfL companies, and TfL's future concessionaire on the East London Railway. The revised exemptions set out in the 2005 Order benefit owners of stations controlled by a TfL concessionaire in certain circumstances. TfL has been consulted on the basis that the revisions will be made by amending legislation at this stage.

7.7 The finalisation of Crossrail policy may require further amendment to the relevant legislation. The Department intends to review the case for consolidation of the relevant legislation once Crossrail policy has been finalised.

8. Consultation outcome

8.1 The first consultation with relevant stakeholders was carried out between 22 May 2009 and 14 August 2009.

8.2 A response was received from London Travelwatch who wished to ensure that proper closure arrangements would apply at all times as services were transferred from DfT franchises to TfL concessions. This point is covered by articles 2(6) and (7) of the TfL Exemptions Order and this has been confirmed to London Travelwatch.

8.3 A comprehensive response was received from the Office of Rail Regulation and following discussions between DfT and ORR officials, the drafting of the TfL Exemptions Order has been amended to:
(i) limit the automatic application of certain exemptions to new infrastructure by restricting the application of licence and access exemptions for networks and stations to circumstances where ELR concessionaires operate on specified parts of the ELR that are currently part of the TfL network;
(ii) limit the application of TfL's station operating licence exemption to stations on the TfL network.

8.4 No other responses were received to the first consultation.

8.5 A further consultation with relevant stakeholders was carried out between 10 and 27 November 2009, drawing stakeholders' attention to the proposal to include exemptions for certain stations in central London ("shared stations") which will, in the future, be served by LUL and Crossrail trains.

8.6 A response was received from Network Rail, who wished to confirm that stations on Network Rail's network will not become unregulated as a result of the TfL Exemptions Order. This point is covered by articles 3(b) and 4(b) of the TfL Exemptions Order (which limit the relevant exemptions to stations on the TfL network) and this has been confirmed to Network Rail.

8.7 A response was also received from BAA, who wished to establish that the TfL Exemptions Order would not prevent them from using the provisions of the Railways Infrastructure (Access & Management) Regulations 2005 to pursue an application for access to use the Crossrail "shared stations". This has been confirmed to BAA.

8.8 No other responses were received to the further consultation.

9. Guidance

9.1 No formal guidance will be issued as TfL has been involved in the drafting of this instrument and is fully aware of its contents.

10. Impact

10.1 The impact on business, the public sector, third sector organisations, regulators and consumers is nil.

10.2 These instruments enable current arrangements to continue in respect of TfL's network and avoid the significant increase in TfL's regulatory burden that would otherwise occur.

10.3 An Impact Assessment has not been prepared for these instruments.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The instrument will be reviewed by the Department for Transport on an ad hoc basis to ensure that it remains fit for purpose when changes to the scope of operations potentially affected by it are proposed. This will include a specific review when the operational arrangements for Crossrail have been finalised.

13. Contact

Geoff Appleby at the Department for Transport Tel: 0207 944 5551 or e-mail: geoff.appleby@dft.gsi.gov.uk can answer any queries regarding the instruments.