EXPLANATORY MEMORANDUM TO

THE RAILWAYS (PROVISION ETC. OF RAILWAY FACILITIES) (EXEMPTIONS) ORDER 2005

2005 NO. 2628

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

2. Description

2.1. The instrument exempts certain railway operators and facilities from the power of the Office of Rail Regulation (ORR) to direct that an operator must provide a new railway facility or that the owner of an existing railway facility must make improvements to it.

Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Background

4.1. The instrument is made under section 16B of the Railways Act 1993 ("the1993 Act"). This authorises the Secretary of State to grant exemptions from sections 16A(1) and (2). Section 16A(1) enables the ORR to direct a railway operator to provide a new facility. Section 16A(2) enables the ORR to direct the owner of an existing railway facility to make improvements to it. This is the first order made under the s16B power.

4.2. Sections 16A-I were inserted into the Act by section 223 of the Transport Act 2000. Sections 16A-I have yet to be brought into force, pending the making of this order. It is intended that these provisions will be brought into force on October 15th by commencement order at the same time as the exemptions. This Order is being made under s16B in anticipation of that section being brought into force, in accordance with section 13 of the Interpretation Act 1978, as it is expedient that the exemptions to section 16A should come into force on the same date as the provision itself comes into force.

4.3. Schedule 1, paragraph 11 of the Railways Act 2005 amends section 16A-I to reflect the new role for the Scottish Ministers in relation to railways in Scotland generally. In particular it gives the Scottish Ministers the power to make exemption orders in relation to facilities located within Scotland. Schedule 1, paragraph 11(6) provides for any existing order made by the Secretary of State to apply in relation to facilities in Scotland as if it were made by the Scottish Ministers. These provisions of the 2005 Act are not yet in force, and will be brought into force on October 15th 2005. The Secretary of State and the Scottish Ministers have agreed on this approach, preferring to make a single exemptions order now rather than two separate orders when the Scottish Ministers' powers under the Railways Act 2005 come into force. This recognises the fact that this instrument was originally prepared before the Railways Act 2005, and had been consulted on as a single order.

5. Extent

5.1. This instrument applies to Great Britain.

6. European Convention on Human Rights

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

7. Policy background

7.1. The policy objective of sections 16A-I of the 1993 Act is to enable the ORR to act to ensure that an improvement is made to a railway facility in the public interest irrespective of whether the relevant operator would otherwise choose to make that improvement. Whenever it proposes to make a direction the ORR must be satisfied that the person directed is the right person to provide or improve the facility, and it must first consult the person in question and others as it sees fit, following a procedure set out in the Act. The ORR may not give a direction unless the application comes from, or is approved by, the appropriate facilities authority (the Secretary of State or, in relation to facilities in Scotland, the Scottish Ministers) and unless it is satisfied that the person directed will be adequately rewarded for the work undertaken. The ORR must determine what constitutes adequate reward. The Act specifies certain considerations that it must take into account when making that determination. The ORR is required to publish a Code of Practice to supplement the provisions about making directions set out in the Act.

7.2. The policy objective in making the exemptions is to exempt operators and facilities where the power of the ORR to give a direction would be likely to deter private investors (e.g. in the case of the Channel Tunnel network, Heathrow Express, the London Underground public private partnership and rail freight) or be inappropriate because of the nature of a service (e.g. light railways and heritage railways).

7.3. In certain cases existing facilities are subject to pre-existing exemptions from the requirements of the railway access regime. This regime is provided for in sections 17, 18 and 22A of the 1993 Act and enables the ORR to require the owner of a facility to grant another person access, or in the case of section 22A, extended access to it. It is under this access regime that Network Rail is required to grant train operating companies access to track and stations. A number of exemptions from the access regime were made at the time of railway privatisation, in order to encourage private sector investment in certain major facilities or where a facility was not considered to be of strategic importance to the operation of the national rail network. Where such exemptions remain in force there would be little benefit in directing the facility owner to improve the facility, as ORR would not be able to ensure that other operators could be given access to that facility to benefit from the improvement. The instrument therefore exempts such facilities from the power to direct that they be improved (under section 16A(2)) where a separate exemption from the access regime remains in force.

7.4. The instrument was prepared in close consultation with the ORR and the Strategic Rail Authority (SRA). The Secretary of State was required by the 1993 Act to consult the ORR before making the exemptions. A consultation exercise on a draft instrument sought views more widely from within Government and from the railway industry. The consultation document was also placed on the Department's website. Fourteen responses were received. The responses demonstrated broad support for the policy, except in relation to a proposal for limited exemptions for freight operators. On further consideration, the Department accepted that there should be wider exemptions for freight, reflecting the fact that the freight industry

operates in a competitive commercial environment with limited financial support from Government. The Department agreed that wider exemptions than had originally been proposed were appropriate in order to avoid the risk of deterring private sector investors. The instrument therefore provides for wide exemptions for freight operators and existing freight facilities.

7.5. The Transport Act 2000 gave the role of making applications to the ORR for a direction, or approving such an application by another person, to the SRA. The Railways Act 2005 transfers the SRA's function in this regard to the Secretary of State where facilities are located in England and Wales, and to the Scottish Ministers where facilities are located in Scotland. Those provisions of the 2005 Act are scheduled to come into force on October 16th 2005.

7.6. "Railway facility" is defined in section 83 of the 1993 Act as "track, station or light maintenance depot".

8. Impact

8.1. A Regulatory Impact Assessment was not necessary as the instrument will have no impact on the voluntary sector and should have a neutral impact on the private sector railway operators. There should be no public sector impact directly as a result of the exemptions. Additional public sector costs may arise in future if a direction is given to an operator which is not exempt and this involves the provision of additional funding by the appropriate facilities authority (or another public sector body), for example if it was necessary to direct Network Rail to provide a new network facility, or a station operator to improve an existing station facility etc.

9. Contact

9.1. Denise Rose at the Department for Transport - tel. 020 7944 6753 or e-mail denise.rose@dft.gsi.gov.uk - can answer any queries regarding the instrument.