EXPLANATORY MEMORANDUM TO

THE REGULATION OF INVESTIGATORY POWERS (COMMUNICATIONS DATA) (AMENDMENT) ORDER 2015

2015 No. 228

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

2. Purpose of the instrument

2.1 This Order will remove powers to access communications data under Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000 ('RIPA') from certain public authorities. It will also add a new statutory purpose to RIPA to allow for the Financial Conduct Authority ('FCA') and Prudential Regulation Authority ('PRA') to access communications data under RIPA for the purpose of non-criminal enforcement of financial services regulation.

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

3.1 None.

4. Legislative Context

4.1 Chapter 2 of Part 1 of RIPA ("Acquisition and Disclosure of Communications Data") provides a statutory framework governing the acquisition of communications data by "relevant public authorities", and its disclosure by postal or telecommunications operators, consistent with the Human Rights Act 1998. RIPA provides for the list of "relevant public bodies" to be amended by Order under the affirmative procedure.

4.2 The Regulation of Investigatory Powers (Communications Data) Order 2010 sets out the authorities which can access communications data under RIPA, and the purposes for which they can do so. This Order amends the 2010 Order, removing powers to access that data from 13 public authorities, and adding an additional purpose for which data may be accessed.

4.3 In July 2014 Parliament passed the Data Retention and Investigatory Powers Act ('DRIPA') and the Data Retention Regulations 2014 ("the Regulations"). The legislation ensures a sound legal basis for the retention of communications data. During the passage of that legislation the Government announced it intended to reduce the number of organisations that have access to communications data under RIPA.[1]

[1] House of Lords Hansard, 16 July 2014 (Col 664)

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 James Brokenshire MP, Minister for Immigration and Security, has made the following statement regarding Human Rights:

"In my view the provisions of the Regulation of Investigatory Powers (Communications Data) (Amendment) Order 2015 are compatible with the Convention rights."

7. Policy background

7.1 Communications data is the context not the content of a communication. It can be used to demonstrate who was communicating; when; from where; and with whom. It can include the time and duration of a communication, the number or email address of the originator and recipient, and sometimes the location of the device from which the communication was made. It does not include the content of any communication: for example the text of an email or a conversation on a telephone. It is a crucial tool in investigations into numerous offences. However, it can also be an intrusive investigatory technique. That is why access must be stringently regulated and only public authorities with the strongest possible business cases should be allowed access.

7.2 Modern technology and changes in the way people communicate continue to cause a decline in types of communications data available to relevant public authorities. The Joint Committee on the Draft Communications Data Bill ("the Joint Committee") scrutinised Government plans to legislate in this area. The Joint Committee published its report in December 2012.[2]

- **Organisations losing access to communications data**

7.3 Following the Joint Committee's recommendation that the Government reduce the number of organisations that can access communications data, the Government conducted an exercise to establish which authorities should lose their powers. 13 authorities were identified (list available at annex 1).

- **Additional RIPA purpose for the Financial Conduct Authority and Prudential Regulation Authority**

7.4 It has been Government policy since the 2010 review of Counter-Terrorism and Security Powers to ensure, as far possible, all communications data requests are made under RIPA as the access mechanism with the strongest safeguards.

[2] Joint Committee on the Draft Communications Data Bill, Session 2012-13, published on 11 December 2012, HL Paper 79, HC 479

7.5 Section 1(6) of DRIPA enacts this safeguard with respect to data retained under that legislation. This will ensure ECHR compliant safeguards are in place when retained communications data is accessed. The FCA and PRA are currently able to access communications data when investigating crime under RIPA section 22(2)(b). Provisions in the Financial Services and Markets Act 2000 (FSMA) provide access to retained data for civil enforcement purposes. Section 1(6) of DRIPA will prevent any current power under FSMA being used to access retained data, so it is necessary to make equivalent provision under RIPA.

7.6 The FCA and PRA investigate and impose penalties for regulatory contraventions, such as financial market manipulation and abuse, through their civil enforcement regime, in addition to bringing criminal prosecutions. Although some of these cases may also amount to criminal conduct, it is not always clear from the outset whether criminal or civil sanctions will apply. FSMA also transposes a number of EU laws which require the relevant authority to have investigatory powers, which include access to communications data.

7.7 The Draft Communications Data Bill included a new purpose to allow the FCA and PRA to access communications data for these reasons. The Joint Committee were content that such a purpose should be added.[3]

8. Consultation outcome

8.1 When the Draft Communications Data Bill was being considered there was substantial consultation with the authorities from which this Order removes powers. Each authority submitted a business case and Ministers were provided an opportunity to make representations on behalf of authorities under their responsibility.

8.2 HM Treasury were consulted on the additional RIPA purpose at the time of the Draft Communications Data Bill and in recent months following DRIPA.

8.3 Both the proposal to reduce the number of organisations that can access communications data and the additional purpose for the FCA and PRA are in line with the recommendations of the Joint Committee.

9. Guidance

9.1 There is a statutory code of practice made under RIPA on the acquisition and disclosure of communications data. The code is currently being revised and will undergo formal consultation shortly. A new data retention code, made under the Regulations, is also being prepared.

10. Impact

10.1 The impact on business, charities or voluntary bodies is cost neutral.

[3] Ibid, paragraph 140

10.2 The impact on the public sector is cost neutral.

10.3 An Impact Assessment has not been prepared for this instrument. Removing powers to access communications data from certain authorities will, if anything, reduce the burdens on public sector and business. The FCA and PRA are currently able to make communications data requests under RIPA and FSMA. This Order will ensure they are able to make all requests under RIPA.

11. Regulating small business

11.1 The legislation applies to small business. All communications services providers are required to comply with legal requests for data, this legislation could therefore impact small business. However, RIPA provides full cost recovery mechanism for costs incurred by CSPs in fulfilling requests.

12. Monitoring & review

12.1 Section 7 of DRIPA requires the Independent Reviewer of Terrorism Legislation carry out a review of investigatory powers, including communications data. This review, if reasonably practicable, will be completed by 1 May 2015. It is then expected that a Joint Committee will be convened in the next Parliament to conduct a second phase of the review. DRIPA also contains a sunset clause. It will be repealed on 31 December 2016. This will ensure new legislation is required in the next Parliament.

13. Contact

Lucy Montgomery-Pott, Home Office, Tel: 020 7035 6634, email: lucy.montgomery-pott@homeoffice.x.gsi.gov.uk, can answer any queries regarding the instrument.

Annex A – organisations losing access to communications data under RIPA

- Charity Commission
- Civil Nuclear Constabulary
- Department of Agriculture and Rural Development (Northern Ireland)
- Department for Business, Innovation and Skills
- Department for Environment, Food and Rural Affairs
- Department of Environment (Northern Ireland)
- Environment Agency
- Food Standards Agency
- Pensions Regulator
- Port of Dover Police
- Port of Liverpool Police
- Royal Mail
- Scottish Environment Protection Agency