EXPLANATORY MEMORANDUM TO

THE PROXY PURCHASING OF TOBACCO, NICOTINE PRODUCTS ETC. (FIXED PENALTY NOTICE) (ENGLAND) REGULATIONS 2015

2015 No. 936

THE REGULATION OF INVESTIGATORY POWERS (DIRECTED SURVEILLANCE AND COVERT HUMAN INTELLIGENCE SOURCES) (AMENDMENT) ORDER 2015

2015 No. 937

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

2. Purpose of the instrument

2.1 This Explanatory Memorandum provides information on two Statutory Instruments:

- the Proxy Purchasing of Tobacco, Nicotine Products etc. (Fixed Penalty Notice) (England) Regulations 2015, referred to here as the 'Fixed Penalty Notice form regulations'
- the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2015, referred to here as the 'RIPA order regulations'

2.2 These two Statutory Instruments complete the enforcement regime for the age of sale restriction for nicotine inhaling products set out in the Nicotine Inhaling Products (Age of Sale and Proxy Purchasing) Regulations 2015 (SI 2015/895) and the offence of proxy purchasing of tobacco and nicotine inhaling products under section 91 of the Children and Families Act 2014 (as extended by SI 2015/896.

2.3 The Fixed Penalty Notice form regulations set out the fixed penalty notice form for the proxy purchase of tobacco and nicotine inhaling products in England. The RIPA order regulations add age of sale and proxy purchasing to the list of offences for which enforcement officers can carry out directed surveillance as defined in the Regulation of Investigatory Powers Act 2000 (RIPA).

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

3.1 None.

4. Legislative Context

4.1 An age of sale restriction for nicotine inhaling products, such as electronic cigarettes, and an offence of proxy purchasing of tobacco and nicotine inhaling products have been introduced and are explained in the

Explanatory Memorandum for SI 2015/895 (available here along with the regulations and accompanying documentation: http://www.legislation.gov.uk/ukdsi/2015/9780111130568/contents)

4.2 SI 2015/895 has been approved by both Houses of Parliament, and as with these regulations, its substantive provisions will come into force on 1 October 2015 (see paragraphs 3.4 and 3.5 of the Explanatory Memorandum as to why regulations 1 and 2 of that instrument will come into force the day after it is made).

4.3 Schedule 1 (4) of the Health Act requires that a penalty notice must be in a form specified in regulations made by the appropriate national authority, which is set out in the Fixed Penalty Notice form regulations. The amount of that Fixed Penalty Notice is set out in the Proxy Purchasing of Tobacco, Nicotine Products etc. (Fixed Penalty Amount) Regulations 2015 (SI 2015/896).

4.4 The Regulation of Investigatory Powers Act 2000 grants the power to authorise direct surveillance, subject to conditions set out in secondary legislation. The RIPA order regulations provide that surveillance may be authorised for the purpose of preventing or detecting conduct which is an offence in respect of the restrictions on the age of sale and proxy purchasing of nicotine inhaling products.

5. Territorial Extent and Application

5.1 The Fixed Penalty Notice form regulations apply to England only and the RIPA order regulations apply to England and Wales. The Welsh Government has the power to make equivalent provision to the Fixed Penalty Notice form regulations, and advise they intend to do so.

6. European Convention on Human Rights

The Secretary of State for Health has made the following statement regarding Human Rights:

In my view the provisions of the Proxy Purchasing of Tobacco, Nicotine Products etc. (Fixed Penalty Notice) (England) Regulations 2015 and the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2015 are compatible with the Convention rights.

7. Policy background

Age of sale for nicotine inhaling products

7.1 The market for electronic cigarettes (e-cigarettes) has developed rapidly in recent years. The use of e-cigarettes is also increasing, with an estimated 2.1 million adults in Britain currently using them. Some people are using e-cigarettes to help them cut down or stop smoking completely. Most e-cigarettes on the market are flavoured and some of these may be appealing to children, such as ice cream and bubble gum. Use by people under the age of

18 is not currently widespread in this country but international evidence suggests this may increase. Emerging evidence suggests that awareness of e-cigarettes by British children is high.

7.2 While e-cigarette use by children is currently associated with existing tobacco smoking, research provides tentative evidence that e-cigarette use may represent a new form of childhood experimentation with nicotine. Nicotine is highly addictive and research shows that adolescents are more sensitive to the rewarding effects of nicotine, which may be a reason that many people start to smoke during adolescence. More research is needed to determine whether e-cigarettes serve as a gateway into tobacco use.

7.3 While many e-cigarette manufacturers and retailers do not currently sell e-cigarettes to children, the Government is taking a precautionary approach because of concerns about the increased awareness and use of these products by children. SI 2015/895 introduces a minimum age of sale of 18 years for nicotine inhaling products such as e-cigarettes. The age of sale restrictions applies to nicotine inhaling products (defined as any device which is intended to enable nicotine to be inhaled through a mouthpiece) and certain component parts such as nicotine refill cartridges and nicotine refill substances, often called 'e-liquids'. It does not cover component parts such as batteries or charging devices and it does not apply to tobacco products because age of sale laws already exist for such products.

7.4 The regulations include exemptions for products that are licensed as medicines and so are subject to separate regulatory rules. This means that those under 18 years trying to quit smoking would still be able to access e-cigarettes as well as products such as nicotine patches or gum.

Proxy purchasing

7.6 Proxy purchasing occurs when a person over age 18 buys an age restricted product on behalf of someone underage. Young people are known to approach strangers outside shops or ask friends, neighbours or, in some cases, parents to buy tobacco for them. SI 2015/896 extends this offence to cover e-cigarettes.

Enforcement

7.7 Local authority trading standards officers will be responsible for enforcing the regulations, as they enforce much of the tobacco control laws.

7.8 The Act sets out the relevant penalties:

- a retailer guilty of selling nicotine inhaling products to someone under the age of 18 could be fined up to £2,500 on conviction
- a person making a proxy purchase may be issued with a fixed penalty notice of £90 (or could be referred to court); the adult making the purchase would be committing the offence, not the retailer.

7.9 The enforcement arrangements for e-cigarettes mirror legislation already in place to stop the sale of tobacco to young people under the age of 18 years and provide clarity and consistency for retailers and enforcement officers.

The regulations

7.10 The Fixed Penalty Notice form regulations set out the fixed penalty notice form for the proxy purchase of tobacco and nicotine inhaling products. Enforcement officers will use their discretion in deciding whether to issue warnings, fixed penalty notices or whether to refer an alleged offence directly to court.

7.11 Enforcement officers carry out test purchasing operations to enforce the age of sale for tobacco. RIPA sets out a regulatory framework for the use of covert surveillance techniques such as test purchasing by public authorities. The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 sets out the offences for which directed surveillance can be carried out, which includes the age of sale for tobacco. This Order also sets out who within a public authority may authorise such operations and the restrictions on the circumstances in which authorisations can be granted.

7.12 The RIPA order regulations add the age of sale of nicotine inhaling products to this list. They also add the proxy purchasing of tobacco, cigarette papers or a relevant nicotine product to the list as enforcement officers may need to use covert surveillance techniques to observe an adult passing such products on to someone under 18 in order to enforce this offence.

7.13 The regulations will come into force on 1 October 2015.

8. Consultation outcome

8.1 The Government held a six week consultation on the regulations to introduce a minimum age of sale for nicotine inhaling products 17 December 2014. The Government response to the consultation gives a summary of the responses received and is available on the DH web page. [1]

8.2 As SI 2015/895 has now completed its passage through Parliament, we need to make these regulations to complete the enforcement regime. The requirements for effective enforcement have been discussed with the relevant representative bodies.

9. Guidance

9.1 Guidance will be made available for enforcement officers and retailers, which will be developed with relevant bodies responsible for training enforcement officers and trade associations. It will reflect the suggestions for areas for guidance which came out of the consultation, including how to best

[1] https://www.gov.uk/government/consultations/nicotine-inhaling-products-introducing-a-minimum-age-of-sale

enforce the proxy purchase offence as trading standards have traditionally worked with retailers rather than the public.

9.2 The new offences are part of a package of tobacco measures due to come into force on 1 October and the Department of Health will publicise the new offences so members of the public aware of them.

10. Impact

10.1 The Government has considered the potential impact of the e-cigarette provisions on business, charities or voluntary bodies and the impact assessment (IA) will be published alongside SI 2015/895 on www.legislation.gov.uk.

11. Regulating small business

11.1 The IA includes a Small and Micro Business Assessment as a number of the retail outlets potentially affected the e-cigarette provisions will be small businesses. Enforcement agencies are expected to continue to take a compliance building approach with retailers. Further detail can be found in the IA.

12. Monitoring & review

12.1 The Government monitors legislation on an ongoing basis. Officials will talk to enforcement authorities as the legislation comes into force to see how enforcement is working and a formal requirement to review within 5 years is included in SI 2015/895.

13. Contact

Andrew Black at the Department of Health Tel: 020 7972 4843 or email: Andrew.black@dh.gsi.gov.uk can answer any queries regarding the instrument.