House of Lords
House of Commons

Joint Committee on Statutory Instruments

Third Report of Session 2014-15

Drawing special attention to:

Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Victoria Line 09TS Vehicles) Exemption Order 2013 **(S.I. 2013/3318)**
Housing Benefit (Habitual Residence) Amendment Regulations 2014 **(S.I. 2014/539)**
Social Security (Contributions) (Amendment No.2) Regulations 2014 **(S.I. 2014/572)**
Social Security (Miscellaneous Amendments) Regulations 2014 **(S.I. 2014/591)**
Education (Student Loans) (Repayment) (Amendment) Regulations 2014 **(S.I. 2014/651**)
Wireless Telegraphy (Limitation on Number of Licences) Order 2014 **(S.I. 2014/774)**
M275 and M27 Motorway (Speed Limit and Bus Lane) Regulations 2014 **(S.I. 2014/790)**
Insolvency (Commencement of Proceedings) and Insolvency Rules 1986 (Amendment) Rules 2014 **(S.I. 2014/817)**
Consumer Protection (Amendment) Regulations 2014 **(S.I. 2014/870)**
Energy Performance of Buildings (England and Wales) (Amendment) Regulations 2014 **(S.I. 2014/880)**
Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014 **(S.I. 2014/894)**
Childcare (Welfare and Registration Requirements) (Amendment) Regulations 2014 **(S.I. 2014/912)**
Wireless Telegraphy (Mobile Communication Services on Aircraft) (Exemption) Regulations 2014 **(S.I. 2014/953)**
Territorial Sea Act 1987 (Guernsey) Order 2014 **(S.I. 2014/1105)**
Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 **(Draft S.I.)**

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Joint Committee on Statutory Instruments

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Lord Lyell (*Conservative*)
Baroness Mallalieu *(Labour)*
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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
ii. that its parent legislation says that it cannot be challenged in the courts;
iii. that it appears to have retrospective effect without the express authority of the parent legislation;
iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
vii. that its form or meaning needs to be explained;
viii. that its drafting appears to be defective;
ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are Simon Patrick (*Acting Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Nicholas Beach, Peter Milledge and John Crane *(Lords)*.

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Contents

Report

Page

Instruments reported **3**

1 S.I. 2013/3318: Reported for failure to comply with proper legislative practice 3
2 S.I. 2014/539: Reported for requiring elucidation 4
3 S.I. 2014/572: Reported for defective drafting 5
4 S.I. 2014/591: Reported for defective drafting 6
5 S.I. 2014/651: Reported for doubtful *vires* 7
6 S.I. 2014/774: Reported for failure to comply with proper drafting practice 8
7 S.I. 2014/790: Reported for defective drafting 9
8 S.I. 2014/817: Reported for requiring elucidation 10
9 S.I. 2014/870: Reported for defective drafting 11
10 S.I. 2014/880: Reported for an unjustified breach of the 21 day rule 12
11 S.I. 2014/894: Reported for requiring elucidation 13
12 S.I. 2014/912: Reported for requiring elucidation 14
13 S.I. 2014/953: Reported for doubtful *vires* 15
14 S.I. 2014/1105: Reported for defective drafting 16
15 Draft S.I.: Reported for doubt as to *vires* 16

Instruments not reported **20**

Annex **20**

Appendix 1 **23**
S.I. 2013/3318: 23

Appendix 2 **25**
S.I. 2014/539: memorandum from the Department for Work and Pensions 25

Appendix 3 **27**
S.I. 2014/572: memorandum from Her Majesty's Revenue and Customs 27

Appendix 4 **28**
S.I. 2014/591: memorandum from the Department for Work and Pensions 28

Appendix 5 **29**
S.I. 2014/651: memorandum from Department for Business, Innovation and Skills 29

Appendix 6 **30**
S.I. 2014/774: memorandum from Ofcom 30

Appendix 7 **31**
S.I. 2014/790: memorandum from the Department for Transport 31

Appendix 8 **32**
S.I. 2014/817: memorandum from the Department for Business, Innovation and Skills32

Appendix 9 **33**

S.I. 2014/870: memorandum from the Department for Business, Innovation and Skills 33

Appendix 10 **34**

S.I. 2014/880: memorandum from the Department for Communities and Local Government 34

Appendix 11 **35**

S.I. 2014/894: memorandum from HM Treasury 35

Appendix 12 **36**

S.I. 2014/912: memorandum from the Department for Education 36

Appendix 13 **37**

S.I. 2014/953: memorandum from Ofcom 37

Appendix 14 **39**

S.I. 2014/1105: memorandum from the Foreign and Commonwealth Office 39

Appendix 15 **40**

Draft S.I.: memorandum from the Department for Business, Innovation and Skills 40

Appendix 16 **42**

Draft S.I.: voluntary memorandum from the Department for Business, Innovation and Skills 42

Instruments reported

At its meeting on 25 June 2014 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to fifteen of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2013/3318: Reported for failure to comply with proper legislative practice

Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Victoria Line 09TS Vehicles) Exemption Order 2013 (S.I. 2013/3318)

1.1 **The Committee draws this Order to the special attention of both Houses on the ground that in one respect it fails to comply with proper legislative practice.**

1.2 This Order exempts certain rail vehicles from requirements of the Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 where used on the Victoria Line.

1.3 An italic heading at the top of the Order as published records that: "This Statutory Instrument has been published in substitution of S.I. 2013/3031 to replace the incorrect version of that Statutory Instrument which was published in error. It is being issued free of charge to all known recipients of that Statutory Instrument."

1.4 The Explanatory Memorandum provided by the Department for Transport and laid before Parliament along with the Order sets out at Section 3 the details of how the error occurred. The Department has helpfully accepted that its explanation, which is printed at Appendix 1, is sufficient to avoid the need for a Committee question (see House of Commons Public Business Standing Order 151(9) as read with House of Lords Standing Order 73). The essence of what happened is that: "A version of the Order was originally laid before Parliament on 9 December 2013 … However, it has recently come to the Department's attention that the version of the Order laid in December differed in two minor respects from the Order as actually signed by the Minister of State at the Department, Baroness Kramer. … The Order as signed by the Minister included provision for one of the exemptions to expire on 31 May 2015 ("the time limit provision"). The version of the Order laid in December (and published by the Stationery Office Limited as S.I. 2013/3031) however erroneously failed to include the time limit provision." The version laid originally also cited an enabling power in its preamble that did not match the signed version.

1.5 The approach followed by the Department in addressing these errors involves treating the document originally laid as a nullity, and publishing a new instrument, which is registered with a new number, by way of substitution.

1.6 The result is that the new instrument has been laid before Parliament considerably after commencement, and the Department for Transport have therefore written to the Speaker and Lord Speaker in accordance with section 4(1) of the Statutory Instruments Act 1946 (copies of the letters being attached to the Explanatory Memorandum).

1.7 In the circumstances of this case, the Committee believes that the Department has acted reasonably and indeed commendably, doing everything that could sensibly have been done to remedy the error once it had come to light. The Explanatory Memorandum explains at paragraph 3.6 how the error occurred; and in paragraph 3.7 it explains why nobody is likely to have been prejudiced in practice.

1.8 The Committee notes, however, that the result of the error that has occurred is that an inaccurate version of a law has been the only published version for some months. The Committee is aware of no precedent for it. Although in this case the Committee accepts that it is unlikely that any practical harm or confusion has arisen, the Committee feels it right that the two Houses should be informed that this situation has arisen and that the Government should be encouraged to ensure that it does not recur.

1.9 **Accordingly the Committee reports the Order for failure to comply with proper legislative practice, acknowledged by the Department.**

2 S.I. 2014/539: Reported for requiring elucidation

Housing Benefit (Habitual Residence) Amendment Regulations 2014 (S.I. 2014/539)

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.**

2.2 These Regulations amend the Housing Benefit Regulations 2006 in relation to the definition of "person from abroad".

2.3 The preamble records that "the Secretary of State has not referred proposals in respect of these Regulations to the Social Security Advisory Committee, as it appears to him that by reason of the urgency of the matter it is inexpedient to do so", relying on section 173(1)(a) of the Social Security Administration Act 1992. The preamble also records that "the Secretary of State has not undertaken consultation with organisations appearing to him to be representative of the authorities concerned, as it appears to him that by reason of the urgency of the matter it is inexpedient to do so", relying on section 176(2)(a) of the 1992 Act.

2.4 The explanation of the legislative context of the regulations in paragraph 4 of the Explanatory Memorandum prepared by the Department for Work and Pensions and laid before Parliament to accompany the Regulations did not make the urgency of the Regulations immediately apparent. Accordingly the Committee asked the Department to explain the nature of the urgency.

2.5 In a memorandum printed at Appendix 2, the Department gives a full explanation of the timing of the handling of the draft Regulations and the reasons for it; it also explains that informal consultation was undertaken (and, incidentally, agrees that this explanation might helpfully have been included in the original Explanatory Memorandum).

2.6 The Committee is grateful for the Department's elucidation of the process which appears to account satisfactorily for the reason why the matter was thought to be too urgent to permit statutory reference and consultation.

2.7 **The Committee accordingly reports the Regulations as requiring elucidation provided by the Department's memorandum.**

3 S.I. 2014/572: Reported for defective drafting

Social Security (Contributions) (Amendment No.2) Regulations 2014 (S.I. 2014/572)

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

3.2 The Regulations make provision amending the Social Security (Contributions) Regulations 2001 (S.I. 2001/1004) for, amongst other things, applying Parts 1 to 4 of the Social Security Contributions and Benefits Act 1992 (with modifications) to workers employed on the United Kingdom continental shelf. The amendments refer at several points to an offshore installation and in the new regulation 114D inserted by regulation 2(3) there is a definition of "offshore installation" as follows—

.. " "offshore installation" means—

(a) a structure which is, is to be, or has been, put to a relevant use while in water;

(b) but a structure is not an offshore installation if—

- (i) it has permanently ceased to be put to a relevant use,
- (ii) it is not, and is not to be, put to any other relevant use, and
- (iii) since permanently ceasing to be put to a relevant use, it has been put to a use which is not a relevant use;

(c) a use is a relevant use if it is—

- (i) for the purposes of exploiting mineral resources,
- (ii) for the purposes of exploration with a view to exploiting mineral resources,
- (iii) for the storage of gas in or under the shore or the bed of any waters,
- (iv) for the recovery of gas so stored,
- (v) for the conveyance of things by means of a pipe,
- (vi) mainly for the provision of accommodation for individuals who work on or from a structure which is, is to be, or has been put to any of the above uses while in the water,
- (vii) for the purposes of decommissioning any structure which has been used for or in connection with any of the relevant uses above;

(d) a structure is put to use while in water if it is put to use while—

- (i) standing in any waters,
- (ii) stationed (by whatever means) in any waters, or
- (iii) standing on the foreshore or other land intermittently covered with water;

(e) a "structure" includes a ship or other vessel except where it is used wholly or mainly—

(i) for the transport of supplies;
(ii) as a safety vessel;
(iii) for a combination of (i) and (ii); or
(iv) for the laying of cables;”.

3.3 The Committee was concerned about the structure of the definition. Apart from paragraph (a), the paragraphs do not appear to follow on grammatically from the opening words; given the paragraphing, the “but” at the beginning of paragraph (b) should link the propositions in paragraphs (a) and (b) and not form part of the latter; paragraphs (c) to (e) appear to be discrete definitions of notions employed in paragraphs (a) and (b) (which explain the basic idea of what an offshore installation is and provide an exception); and there seems to be a word missing before “(i)” in paragraph (e)(iii). The Committee considered whether these flaws might be addressed by a correction slip but concluded that the necessary restructuring would be too extensive for it to be able to advocate that approach.

3.4 The Committee accordingly asked the Commissioners for HM Revenue and Customs to explain the structure of the definition. In a memorandum printed at Appendix 3 the Department acknowledges that paragraph (a) sets out the principal element of the definition, paragraph (b) a carve-out and paragraphs (c) to (e) clarifications of notions employed in paragraphs (a) and (b). It asserts that the structure of the definition takes the reader through the various components of the defined term, making its meaning clear. But the memorandum does not address the Committee’s concerns that, apart from paragraph (a), the elements of the definition do not follow on grammatically from its opening words, that they are not correctly linked and contain a missing word.

3.5 In the memorandum the Department alleges that the definition follows that in section 1001 of the Income Tax Act 2007. It is true that the two definitions are in substance similar (though not identical). But they are differently structured and the structure of that in the primary legislation in a way makes the Committee’s case in relation to that in the Regulations. It contains a first subsection containing the equivalent of the opening words and paragraph (a) of the definition in the Regulations, a separate second subsection (like paragraph (b) of that definition) and three further definitional subsections. It does not suffer from any of the structural infelicities identified by the Committee in the definition in the Regulations.

3.6 **The Committee accordingly reports regulation 2(3) for defective drafting.**

4 S.I. 2014/591: Reported for defective drafting

Social Security (Miscellaneous Amendments) Regulations 2014 (S.I. 2014/591)

4.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in a number of related respects.**

4.2 The Regulations make various amendments of regulations relating to social security. One set of amendments replace existing definitions of, and references to, a service user group with a definition of, and references to, a claimant participating as a service user. In the definitions of a claimant participating as a service user in provisions inserted by

regulations 2(2)(b), 4(2)(b), 7(2)(b), 8(2)(b) and 9(2)(b), sub-paragraph (a) specifies as such a claimant—

"(a) a person who is being consulted by or on behalf of—

(i) a body which has a statutory duty to provide services in the field of health, social care or social housing; or

(ii) a body which conducts research or undertakes monitoring for the purpose of planning or improving such services,

in their capacity as a user, potential user, carer of a user or person otherwise affected by the provision of those services;".

4.3 Sub-paragraph (b) of each of those provisions then goes on to specify the carer of a person consulted under sub-paragraph (a). The Committee was puzzled by the reference to the carer of a user in the text of sub-paragraph (a) of the inserted provisions in addition to sub-paragraph (b) of those provisions. It accordingly asked the Department for Work and Pensions to explain the apparent duplication.

4.4 In a memorandum printed at Appendix 4 the Department explains that sub-paragraph (a) is aimed at persons who are consulted on their views about or experience of a particular service. It explains that in relation to, say, a service provided for people with a particular disability, carers may be consulted as well as or instead of people with that disability. Sub-paragraph (b) is intended to cover not carers who are consulted but those caring for someone else who is consulted. But the Department accepts that the drafting could be made clearer, for instance so as to avoid sub-paragraph (b) covering the carer of the carer of a user (which it was not intended to do). It therefore undertakes to re-consider the drafting of the provisions with interested persons with a view to making amendments of them when an appropriate opportunity arises.

4.5 **The Committee accordingly reports regulations 2(2)(b), 4(2)(b), 7(2)(b), 8(2)(b) and 9(2)(b) for defective drafting, acknowledged by the Department.**

5 S.I. 2014/651: Reported for doubtful *vires*

Education (Student Loans) (Repayment) (Amendment) Regulations 2014 (S.I. 2014/651)

5.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is a doubt whether they are *intra vires* in one respect.**

5.2 The Regulations amend the Education (Student Loans) (Repayment) Regulations 2009, which govern the repayment of income-contingent student loans paid to students under section 22 of the Teaching and Higher Education Act 1998.

5.3 Regulation 3 amends regulation 23 of the 2009 Regulations to insert a new paragraph (2)(g) which requires the provision of "such other information about the borrower's financial position as may be required to determine whether the borrower is in receipt of any income." (Regulation 23 allows the relevant authority to serve an Information Notice on a borrower requiring the provision of information.)

5.4 The Committee asked the Department for Business, Innovation and Skills to identify the vires for new regulation 23(2)(g).

5.5 In a memorandum printed at Appendix 5, the Department identifies section 22(5)(c) of the Teaching and Higher Education Act 1998 as the vires for the new provision. Section 22(5)(c) allows regulations to provide for the imposition on borrowers of "requirements with respect to … the provision of such information, and … the keeping and production of such documents and records, relating to their income as may be prescribed". The Department asserts in relation to new regulation 23(2)(g) that the information requested "relates to the borrower's income and … therefore falls within the vires of section 22(5)(c) of the 1998 Act"; it adds that "the requirement addresses, for example, the situation where the borrower is not in the tax system and they claim that they have no income. In those circumstances the Student Loans Company would be keen to test that assertion by requiring information about the borrower's financial circumstances to determine if the borrower would be required to make repayments."

5.6 The Committee's concern centres around the use of the expression "as may be required" in the new regulation 23(2)(g). In the context, the only way in which the requirement could be expressed could be by inclusion in the Information Notice served under regulation 23. That means that the prescription of classes of information in regulation 23 ends with, in effect, a purported sub-delegation to authorities producing Information Notices to prescribe additional classes of information. Section 22 provides for the classes of information to be "prescribed" by regulation, not left to the authorities to determine to any extent. There being no express power in the Act for the regulations to sub-delegate the prescription of classes of information that may be required by Information Notice, **the Committee reports regulation 3 on the ground that there is a doubt as to whether it is *intra vires*.**

6 S.I. 2014/774: Reported for failure to comply with proper drafting practice

Wireless Telegraphy (Limitation on Number of Licences) Order 2014 (S.I. 2014/774)

6.1 **The Committee draws the special attention of both Houses to this Order on the ground that, in one respect, it fails to comply with proper drafting practice.**

6.2 The Order specifies the uses and frequencies for which the Office of Communications ("OFCOM") will grant only a limited number of wireless telegraphy licences and sets out the criteria which it will apply in determining the limit on the number of licences and the persons to whom licences will be granted. Article 6 states that "OFCOM **will** consider applications for each category of licence … and apply any [such] criteria" in the order of receipt of each correctly completed application form.

6.3 The Committee asked OFCOM to explain why article 6 employs the word "will" as an auxiliary to denote what appeared to the Committee to be an obligation. The Committee has repeatedly made the point that, in its view, the use of the term "will" is inappropriate to impose an obligation. See in particular the Committee's First Special Report of the last Session and its observations on S.I. 2013/1695 and S.I. 2013/1974 in its 12th Report of the last Session and on S.I. 2013/3024 in its 24th Report of the last Session.

6.4 In a memorandum printed at Appendix 6 the Department agrees that article 6 is intended to impose an obligation and so should have employed the word "shall" instead of "will" and it undertakes to correct the error by amending the Order.

6.5 **The Committee accordingly reports article 6 for failing to comply with proper drafting practice, acknowledged by the Department.**

7 S.I. 2014/790: Reported for defective drafting

M275 and M27 Motorway (Speed Limit and Bus Lane) Regulations 2014 (S.I. 2014/790)

7.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in three related respects.**

7.2 The Regulations, which are made under section 17(2) and (3) of the Road Traffic Regulation Act 1984, replace the M275 and M27 Motorway (Speed Limit) Regulations 2005 following the construction of a new junction (the Tipner Interchange) and impose speed limits of 50 m.p.h and 60 m.p.h. on specified lengths and slip roads of the M275 Motorway and the M27 motorway at Portsmouth; they also create a bus lane on a specified length of the M275 motorway and its southbound entry slip road from the Tipner Interchange.

7.3 Schedules 1 to 3 specify the specified lengths of road for the purposes of the speed limits and the bus lane. Each Schedule ends with the statement "(All distances are approximate and measured from the junction centre.)"; in the case of Schedules 1 and 2 the statement is numbered as a paragraph of the Schedule, and in the case of Schedule 3 the statement simply appears at the end unnumbered.

7.4 The Committee asked the Department for Transport to explain why the road sections specified in the Schedules appear imprecise, having regard to the parenthetical statement about approximation, since breach of the Regulations is an offence (although that is not recorded in the Explanatory Note).

7.5 In a memorandum printed at Appendix 7, the Department records that at the end of each Schedule in the 2005 Regulations (which these replace) "there appeared the following inoperative wording in brackets and italics: "(All distances are approximate and measured from the junction centre)"". The Department explains that the rationale was "to provide clarity on how the distances were measured and build in a de minimis allowance in relation to the placing of the speed limit signs (in particular where a 100% accurate placement would result in the blocking of sight lines and create a risk of accidents)." The Department explains that it was intended to do the same in these Regulations, but "in the process of validating the SI, this wording was inadvertently given a paragraph number (in Schedules 1 and 2, though not in Schedule 3) and the italics were removed in all three Schedules." The Department further explains that it has arranged with the Registrar of Statutory Instruments for a correction slip to be issued restoring the words to italicised and unnumbered brackets.

7.6 The Department also agrees to consider identifying sanctions in the Explanatory Note for future instruments.

7.7 The Committee accepts the Department's explanation that the intention was for the statement about approximation to appear as inert and explanatory material. But that would not make it satisfactory in the Committee's opinion. The purpose of these Regulations is to specify lengths of road on which restrictions, backed by a criminal offence, apply; and the citizen is entitled to have those lengths identified with sufficient certainty to enable accurate compliance. The Department's observation about the placing

of signage explains the motive for the approximation and suggests that is aimed only at the road authorities; but as part of the Regulations (whether as an operative provision or as an explanation) it will be read as qualifying or attempting to qualify the requirements of the Regulations themselves. As part of the Regulations, the statements that the specification of roads is merely approximate renders the specifications insufficiently certain; and if presented as inert explanatory material then they are ineffective to override the provisions of the Regulations and therefore have no legislative effect (which provides another example of the unsatisfactory practice of mixing operative and inert material to which the Committee has drawn attention in its First Special Report of Session 2013-14). In the Committee's view the Department should consider the scope for achieving its intended policy by use of the power in section 17(2)(d) of the 1984 Act to include "provisions having effect in such places, at such times, in such manner or in such circumstances as may for the time being be indicated by traffic signs in accordance with the regulations" – e.g. by imposing speed restrictions once indicated by suitable signs within the relevant road lengths. The occasion could also be taken to specify in operative provisions the point from which measurements are taken ("the junction centre" is only apt where a junction is mentioned).

7.8 It follows from the above that, although the issuance of correction slips is a matter for the Registrar of Statutory Instruments, in the Committee's opinion this is not a case for deviating from its normal assumption that is not appropriate to seek to use a correction slip to downgrade provision that purports or appears to be operative into merely explanatory material.

7.9 Whether operative or inoperative, therefore, the Committee believes that these statements about approximation are not proper or effective legislation; **accordingly the Committee reports the final paragraph of each Schedule for defective drafting.**

8 S.I. 2014/817: Reported for requiring elucidation

Insolvency (Commencement of Proceedings) and Insolvency Rules 1986 (Amendment) Rules 2014 (S.I. 2014/817)

8.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they require elucidation in one respect.**

8.2 The Rules provide for the county court hearing centres where proceedings under the Insolvency Act 1986 may be commenced and amend the Insolvency Rules 1986 (S.I. 1986/1925) in consequence of the amendment of the County Courts Act 1984 by the Crime and Courts Act 2013 to create a single County Court for England and Wales.

8.3 Rule 2(1) provides that "[w]here section 117 of the [Insolvency] Act [1986] gives jurisdiction to the County Court in respect of proceedings under Parts 1 to 7 of the Act any such proceedings when they are commenced in the county court may only be commenced in the county court hearing centre which serves the area in which the company's registered office is situated."

8.4 The Committee asked the Department for Business, Innovation and Skills to explain the reference in rule 2(1) to Parts 1 to 7 of the Insolvency Act 1986 (only some of which relate to winding up) in the context of section 117 of that Act which appeared to the Committee to relate only to winding up.

8.5 In a very helpful memorandum printed at Appendix 8 the Department explains that section 117 is indeed a proposition about winding up: it confers on the County Court jurisdiction to wind up companies where the amount of the share capital paid up or credited as paid up does not exceed £120,000. But the memorandum goes on to explain that in section 251 of the Insolvency Act 1986 "the court" is defined for the purposes of Parts 1 to 7 of that Act as meaning, in relation to a company, a court having jurisdiction to wind up the company. The reference in rule 2(1) to section 117 giving jurisdiction to the County Court in relation to proceedings in Parts 1 to 7 other than winding up proceedings makes complete sense in the light of that definition.

8.6 The Department acknowledges that this might have been made clearer if rule 2(1) had referred to section 251 and undertakes to use the opportunity of a consolidation of the Insolvency Rules with revisions, planned for next year, to elucidate the point. The Committee considers that this should be done in a footnote as it is not a necessary legal proposition but an indicator of why a legal proposition is framed as it is.

8.7 **The Committee accordingly reports rule 2(1) on the ground that it requires the elucidation provided in the Department's memorandum, as amplified by this Report.**

9 S.I. 2014/870: Reported for defective drafting

Consumer Protection (Amendment) Regulations 2014 (S.I. 2014/870)

9.1 **The Committee draws the special attention of both Houses to the Regulations on the ground that they are defectively drafted in one respect.**

9.2 The Regulations make various amendments of primary and secondary legislation including the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (S.I. 2013/3134) ("the 2013 Regulations"). The 2013 Regulations come into force on 13th June 2014.

9.3 Regulation 1(2) provides that regulation 9 (which contains the amendments of the 2013 Regulations) come into force "on 13th June 2014 immediately before the coming into force of" the 2013 Regulations.

9.4 The Committee was somewhat perplexed by that proposition. Section 4(a) of the Interpretation Act 1978 provides that, where provision is made for an Act, or a provision of an Act, to come into force on a particular day, it comes into force at the beginning of that day. And by virtue of section 23(1) of the Interpretation Act 1978 section 4(a) applies to subordinate legislation as to Acts. So the 2013 Regulations come into force at the very beginning of 13 June 2014. Given that, the Committee could not see how the amendment made to the 2013 Regulations by regulation 9 could possibly come into force on that date but before those Regulations. Accordingly it asked the Department for Business, Innovation and Skills to explain, in the light of sections 4(a) and 23(1), the intention in the coming into force timing in regulation 1(2) and how it is considered that the intention is given effect.

9.5 In a memorandum printed at Appendix 9 the Department asserts that it is clear that the amendments made to the 2013 Regulations by regulation 9 are intended to come into force immediately before those Regulations. The Committee does not disagree with the Department that that was the intention. Furthermore, as the provisions of the 2013 Regulations that these Regulations amend themselves include amending provisions, the

Committee can understand the perceived necessity of achieving that intention, at least to that extent. But it wishes to stress the impossibility of that happening on 13 June 2014 given that the 2013 Regulations come into force at the very start of that date. In consequence the two propositions in regulation 1(2) are mutually exclusive.

9.6 The Committee therefore considers that a better course would have been to provide for regulation 9 to come into force immediately before the coming into force of the 2013 Regulations (but without a reference to 13 June 2014). Of the two alleged precedents for the approach taken in regulation 1(2) to which the Department's memorandum refers, one adopts that approach while the other suffers from the same solecism as that provision.

9.7 **The Committee accordingly reports regulation 1(2) for defective drafting.**

10 S.I. 2014/880: Reported for an unjustified breach of the 21 day rule

Energy Performance of Buildings (England and Wales) (Amendment) Regulations 2014 (S.I. 2014/880)

10.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they involve an unjustified breach of the 21 day rule.**

10.2 The Regulations make various amendments to the Energy Performance of Buildings (England and Wales) Regulations 2012 (S.I. 2012/3118).

10.3 The Regulations were made on 31 March 2014, were laid before Parliament on 2 April 2014 and came into force on 6 April, and so breach the 21 day rule mentioned in section 4.13 of Statutory Instrument Practice (which requires that instruments subject to annulment should not normally be brought into force until at least 21 days after being laid before Parliament) by 17 days. In paragraph 3 of the Explanatory Memorandum accompanying the Regulations the Department for Communities and Local Government states that it wishes the Regulations to come into force on 6 April 2014 (rather than have to wait until the next "common commencement date" of 1 October 2014) so that the benefit of the reduced fees for which the Regulations provide can be passed on as soon as possible. The desire not to cause that to be delayed to 1 October seems entirely reasonable to the Committee. But it does not explain why the Regulations were not laid sufficiently long before 1 April to secure compliance with the 21 day rule nor why a delay to 1 October, as opposed to 23 April, was assumed to be an unavoidable consequence of the rule being observed. In paragraph 3 the Department gives as the reason for that that "it was not possible to secure cross-government agreement to make the Regulations earlier". And it seeks to rely also on having informally notified those affected of the changes made by the Regulations.

10.4 The Committee asked the Department to explain why failure to reach agreement within Government was considered to be justification for breach of the 21-day rule. In a memorandum printed at Appendix 10, the Department, while repeating its desire to enable reduced fees to be passed on as soon as possible, concedes that it should have done more to ensure that cross-government agreement was secured in time to comply with the rule.

10.5 The Committee wishes to take this opportunity to stress the importance of compliance with the 21-day rule which is designed to protect those affected by changes in the law made by subordinate legislation subject to negative Parliamentary procedure from

being subject to the effect of the changes before they have had a reasonable opportunity to become aware of them. The Committee does not consider that failure to settle policy within Government will generally constitute justification for failing to comply with the rule. **It accordingly reports the Regulations for an unjustified breach of the 21 day rule, acknowledged by the Department.**

11 S.I. 2014/894: Reported for requiring elucidation

Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014 (S.I. 2014/894)

11.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.**

11.2 The Regulations implement in part the provisions relating to capital buffers in Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms. Regulation 2 includes a definition of "FPC"; it means the Financial Policy Committee of the Bank of England, i.e. a statutory sub-committee of its Court of Directors.

11.3 Regulation 3 provides that "Where these Regulations confer a function or discretion on the FPC, the FPC must exercise that function or discretion."

11.4 The Committee asked HM Treasury to explain why regulation 3 is included and what it adds to general principles of administrative law.

11.5 In a memorandum printed at Appendix 11, the Department explain that the provision is relevant to Part 3 of the Regulations, which is concerned with the countercyclical capital buffer. Article 136(1) of Directive 2013/36/EU requires each Member State to designate a public authority or body to set the buffer rate for that Member State. In the United Kingdom, the buffer rate is to be set by the FPC. The Department explains that "As the FPC is a sub-committee within the Bank of England, regulation 7 designates the Bank of England as the designated authority for the purposes of Article 136(1) of the capital requirements directive. Regulation 10 then requires the FPC to assess and set the buffer rate. Other regulations in Part 3 confer further functions or discretions on the Bank of England and the FPC. The purpose of regulation 3 is to make it clear that functions or discretions conferred on the FPC must be exercised by the FPC rather than by the Bank of England acting in any other way."

11.6 The Committee believes that normal principles of administrative law could be expected to produce the result that a duty imposed on the Financial Policy Committee must be exercised by that Committee and not by any entity of which it forms part. But in the context of the need to demonstrate exact compliance with European Union law and the explanation provided by the Department's memorandum, the Committee understands why the Department may have felt it safer to include what might be an unnecessary provision.

11.7 **Accordingly the Committee reports regulation 3 as requiring elucidation, provided by the Department's memorandum as amplified in this Report.**

12 S.I. 2014/912: Reported for requiring elucidation

Childcare (Welfare and Registration Requirements) (Amendment) Regulations 2014 (S.I. 2014/912)

12.1 **The Committee draws the special attention of both Houses to the Regulation on the ground that they require elucidation in one respect.**

12.2 In its 5th Report of last Session the Committee drew the special attention of both Houses to the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I 2012/938). Paragraphs 3.4 to 3.7 of the Committee's Report recorded the Committee's concerns that Section 3 of the document "Statutory Framework for the Early Years Foundation Stage" ("the Framework Document") which was referred to in those Regulations did not reflect precisely the propositions in regulation 3 of the Regulations which referred to it and that the drafting of that regulation did not redress the imprecision of the Framework document.

12.3 These Regulations make a considerable number of amendments of S.I 2012/938 and introduce a new version of the Framework Document. But in paragraph 3.2 of the Explanatory Memorandum accompanying the Regulations the Department for Education states that it is not appropriate to address the issues raised by the Committee (by amending regulation 3 of that instrument or making some further changes in Section 3 of the Framework Document) on this occasion. Furthermore the Explanatory Memorandum gives no indication of when the Department might expect to do either or both of those things. Given that the Regulations do not come into force until the start of September 2014 (thereby apparently allowing time for addressing the Committee's concerns), the Committee asked the Department to explain its reasons for considering that the making of these Regulations did not afford the opportunity to address those concerns and for not indicating when it might do so.

12.4 In a memorandum printed at Appendix 12 the Department re-states its view that it was not appropriate to deal with the issues raised by the Committee on this occasion and cites a number of reasons for that view. The Department feels that, because the changes required would involve making changes in regulation 3 of S.I 2012/938 or making some further changes in Section 3 of the Framework Document (or both) and that neither that regulation nor that Section have been revised in this exercise, this was not an appropriate context in which to make those changes, particularly as it would have taken some time to work out a means of dealing with the Committee's concerns which would have thereby delayed the making of the Regulations. The Committee appreciates those reasons. But it is somewhat concerned by the Department's further statements that it wanted to keep changes to a minimum, and that the structure of regulation 3 of S.I 2012/938 and Section 3 of the Framework Document has not caused difficulties, because the Committee understood that the Department accepted the force of the observations that were made by the Committee.

12.5 The Department's memorandum apologises for giving no indication of when it expected to address the Committee's observations. The Committee hopes that, although the Department is at the moment unable to say for certain when it will be able to revise regulation 3 of S.I 2012/938 and Section 3 of the Framework Document, it still intends to do so and without significant further delay.

12.6 **The Committee accordingly reports the Regulations on the ground that they require the elucidation provided in the Department's memorandum, as amplified in this Report.**

13 S.I. 2014/953: Reported for doubtful *vires*

Wireless Telegraphy (Mobile Communication Services on Aircraft) (Exemption) Regulations 2014 (S.I. 2014/953)

13.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is a doubt whether they are *intra vires* in three connected respects.**

13.2 The Regulations are made by the Office of Communications under section 8(3) of the Wireless and Telegraphy Act 2006 and, in implementation of an EU Commission Decision, they exempt the use of wireless telegraphy apparatus from licensing requirements in cases where the use complies with particular conditions and the apparatus meets particular standards. In three cases in regulation 5 (in paragraphs (1) and (6)(c) and (d)) a standard is specified, and then the standard is followed by the words "(or equivalent specification[s])".

13.3 Section 8(3B) of the 2006 Act requires that terms, provisions and limitations specified in regulations under section 8(3) must be—

"(a) objectively justifiable in relation to the wireless telegraphy stations or wireless telegraphy apparatus to which they relate,

(b) not such as to discriminate unduly against particular persons or against a particular description of persons,

(c) proportionate to what they are intended to achieve, and

(d) in relation to what they are intended to achieve, transparent."

13.4 The Committee asked the Department to explain why, in the light of section 8(3B), the concept of equivalence had been introduced without the inclusion of any criteria against which equivalence fell to be assessed.

13.5 In a memorandum printed at Appendix 13 the Department provides a wholly convincing explanation to the effect that secure compliance with the EU Commission Decision calls for mention of equivalence without any such criteria. However, the existence of an EU obligation is not normally relevant to the interpretation of the width of the particular enabling power used to implement it, and the memorandum does not address the question of transparency in section 8(3B) beyond making an assertion that the provision is transparent, of which the Committee is not convinced.

13.6 It follows in the Committee's view that, given the possible limits of the enabling power, consideration should have been given within Government to use of the power in section 2(2) of the European Communities Act 1972.

13.7 **The Committee accordingly reports the inclusion of the concept of equivalence in three places in regulation 5 on the ground that there is a doubt as to whether it is intra vires.**

14 S.I. 2014/1105: Reported for defective drafting

Territorial Sea Act 1987 (Guernsey) Order 2014 (S.I. 2014/1105)

14.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

14.2 The Order extends certain provisions of the Territorial Sea Act 1987 to Guernsey. Article 2 provides for sections 1 and 4(1) of that Act to extend to Guernsey subject to the exceptions, adaptations and modifications specified in the Schedule to the Order.

14.3 Section 1(1) of the Territorial Sea Act 1987 provides as follows—

> "(1) Subject to the provisions of this Act—
>
> (a) the breadth of the territorial sea adjacent to the United Kingdom shall for all purposes be 12 nautical miles; and
>
> (b) the baselines from which the breadth of that territorial sea is to be measured shall for all purposes be those established by Her Majesty by Order in Council."

14.4 Paragraph (a) of the Schedule to the Order omits paragraph (a) of section 1(1) but makes no exception, adaptation or modification in paragraph (b) of it. The Committee considered that a modification of the words "that territorial sea" (which appear to refer to the territorial sea adjacent to the United Kingdom) might be required and accordingly asked the Foreign and Commonwealth Office to explain why those words are not modified to refer to the territorial sea adjacent to the Bailiwick of Guernsey.

14.5 In a memorandum printed at Appendix 14 the Department accept that this was an error and undertakes to rectify it at the earliest opportunity.

14.6 **The Committee accordingly reports the Schedule to the Order for defective drafting, acknowledged by the Department.**

15 Draft S.I.: Reported for doubt as to *vires*

Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (Draft S.I.)

15.1 **The Committee draws the special attention of both Houses to these draft Regulations on the grounds that, if they are approved and made, there will be a doubt whether they are *intra vires*.**

15.2 The draft Regulations, which would be made under section 2(2) of the European Communities Act 1972, amend the way in which Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("the Directive") is implemented in

the United Kingdom. This is to give effect to Article 5(2)(b), which permits Member States to allow for an exception to the copyright and related rights provided for under the Directive—

> "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

15.3 Regulation 3(1) of the draft Regulations inserts a new section 28B in the Copyright, Designs and Patents Act 1988 ("the 1988 Act") to allow an individual to make personal copies of a copyright work (other than a computer program) which is lawfully owned by that individual without infringing copyright in the work, provided that the copies are made for that individual's private use. Regulation 3(3) inserts a new paragraph 1B into Schedule 2 to the 1988 Act, corresponding to the new section 28B, to provide for an equivalent personal copying exception in relation to the copying of a recording of a performance. But no provision is made in the draft Regulations for compensation.

15.4 The draft Regulations supersede a draft of the same title which was laid before Parliament on 27 March 2014 but subsequently withdrawn. They are identical to the superseded draft, except that the coming into force date has been changed from 1 June 2014 to 1 October 2014. The Committee asked the Department for Business, Innovation and Skills to explain, in relation to the superseded draft Regulations, why no provision had been made to enable rightholders to receive fair compensation, having regard to judgments of the Court of Justice of the European Union ("CJEU") in cases such as C-467/08 *Padawan v SGAE* and C-435/12 *ACI Adam BV v Stichting de Thuiskopie*, which indicate that a compensation scheme should be established where a Member State introduces a private copying exception under Article 5(2)(b).

15.5 In a memorandum printed at Appendix 15, and now in section 3 of the Explanatory Memorandum for the replacement draft Regulations, the Department contends that Article 5(2)(b) of the Directive, when read together with recital (35) and Article 5(5), does not require the establishment of a compensation scheme in cases where the private copying exception is narrow in scope and does not cause harm (or causes only minimal harm) to rightholders. The Department considers that this view is not inconsistent with the case law cited by the Committee, since the Court in both cases recognised that the requirement to pay compensation is necessary where the right to take private copies causes "harm" to the rightholder.

15.6 The Department relies in particular on recital (35) of the Directive which provides—

> "In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have

> already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations, where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

15.7 While the Department accepts that the CJEU has not ruled on what may constitute minimal prejudice in the context of recital (35), it points to judgments in cases such as C-521/11 *Amazon* where the CJEU indicates that Member States enjoy a degree of discretion over compensation schemes. The Department emphasises that the proposed new United Kingdom personal copying exception has been narrowly drawn to ensure that no harm is caused to rightholders. As it applies only to lawfully purchased copies, the exception ensures that rightholders remain able to receive adequate remuneration with respect to their works at the point of sale. The impact assessment shows that the type of activity permitted by the proposed new exception is unlikely to cause any harm to copyright owners.

15.8 The Department contrasts this approach with the much wider private copying exceptions provided by other EU Member States, which are accompanied by levies on media or sales of equipment in order to deliver fair compensation. These exceptions permit copies to be made from sources which are not owned by the copier – for instance, borrowed or rented DVDs, or music streamed over the internet – and allow copies to be distributed within private circles including friends and family. Therefore, the exceptions provided by these Member States enable individuals to acquire copies of works without paying for them. According to the Department, the proposed UK exception is much narrower than the private copying exceptions in these other Member States. As it is not expected to harm rightholders, no compensation is required, and therefore no compensation mechanism needs to be established.

15.9 It is clear from responses to the Department's consultation exercise, repeated in representations submitted to the Committee, that while several organisations support the Department, several others dispute the view that any harm caused to rightholders by the proposed private copying exception would be minimal; indeed they contend that losses to rightholders could be substantial. They assert that the introduction of a private copying exception triggers the requirement for rightholders to be fairly compensated in respect of all the private copying legitimised by the proposed legislation. This is because the provisions of the Directive and relevant case law of the CJEU make clear that there should be a high level of protection of copyright in Member States, and that those adversely affected should receive an appropriate award for the exploitation of their works.

15.10 The Committee's attention has been drawn in particular to the CJEU's judgment in case C-467/08 *Padawan* in which the Court held that 'fair compensation', within the meaning of Article 5(2)(b) of the Directive, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception; that Member States which decide to introduce the private copying exception into their national law are required to provide for the payment of 'fair compensation' to rightholders; that the word 'compensate' in recital (35) to the Directive expresses the intention of the European Union legislature to establish a specific

compensation scheme triggered by the existence of harm to the detriment of the rightholders, which gives rise, in principle, to the obligation to 'compensate' them; and that copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned.

15.11 Only a court, and ultimately the CJEU, can give an authoritative ruling on whether the Directive precludes the private copying exception provided for in regulation 3 without the inclusion of a compensation scheme for rightholders adversely affected by the exception. It is clear to the Committee that there are persuasive arguments that may be advanced against, and in favour of that proposition. It also seems likely that it would be for the Government to satisfy a court that "fair compensation" should, in effect, mean "no compensation". In those circumstances, the Committee considers it right that each House, when invited to approve the draft Regulations, should be aware that there is a doubt about the Secretary of State's power to make them in their present form.

15.12 **The Committee therefore reports regulation 3 of the draft Regulations on the ground that there appears to be doubt as to whether it would be *intra vires* to introduce the proposed exception to copyright and rights in performance without also providing for a compensation scheme.**

Instruments not reported

At its meeting on 25 June 2014 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Paragraph 3.2 of the Explanatory Memorandum to the Family Procedure (Amendment No.3) Rules 2014 (S.I. 2014/843) and paragraph 3 of the Explanatory Memorandum to the Civil Procedure (Amendment No.4) Rules 2014 (S.I. 2014/867), which were allowed by the Lord Chancellor on dates respectively just before and just after the publication of the Committee's 24th Report of the previous Session, draw attention to a usage parallel to the one commented on in paragraphs 1.1 to 1.15 of that Report.

Annex

Draft Instruments requiring affirmative approval

Draft S.I. Copyright and Rights in Performances (Quotation and Parody) Regulations 2014

Draft S.I. European Union (Definition of Treaties) (Partnership and Cooperation Agreement) (Iraq) Order 2014

Draft S.I. European Union (Definition of Treaties) (Partnership and Cooperation Agreement) (Mongolia) Order 2014

Draft S.I. European Union (Definition of Treaties) (Partnership and Cooperation Agreement) (Philippines) Order 2014

Draft S.I. European Union (Definition of Treaties) (Partnership and Cooperation Agreement) (Vietnam) Order 2014

Draft S.I. Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offences) Order 2014

Draft S.I. Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Disapplication of Section 85(1), Fines Expressed as Proportions and Consequential Amendments) Regulations 2014

Draft S.I. Adoption and Children Act Register (Search and Inspection) (Pilot) Regulations 2014

Draft S.I. Local Audit (Delegation of Functions) and Statutory Audit (Delegation of Functions) Order 2014

Draft S.I. Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) (No. 2) Regulations 2014

Draft S.I.	Green Deal (Qualifying Energy Improvements) (Amendment) Order 2014
Draft S.I.	Legal Services Act 2007 (Approved Regulator) Order 2014
Draft S.I.	Pensions Act 2011 (Consequential and Supplementary Provisions) Regulations 2014

Instruments subject to annulment

S.I. 2014/540	Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2014
S.I. 2014/586	Civil Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014
S.I. 2014/607	Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014
S.I. 2014/615	Marine Licensing (Application Fees) Regulations 2014
S.I. 2014/833	Family Court (Contempt of Court) (Powers) Regulations 2014
S.I. 2014/843	Family Procedure (Amendment No.3) Rules 2014
S.I. 2014/867	Civil Procedure (Amendment No. 4) Rules 2014
S.I. 2014/874	Civil Proceedings Fees (Amendment) Order 2014
S.I. 2014/875	Magistrates’ Courts Fees (Amendment) Order 2014
S.I. 2014/884	Social Security (Maternity Allowance) (Miscellaneous Amendments) Regulations 2014
S.I. 2014/1076	Lymington Harbour Revision Order 2014
S.I. 2014/1139	Transfer of Undertakings (Protection of Employment) (Transfer of Staff to the Department for Work and Pensions) Regulations 2014
S.I. 2014/1146	Local Government Pension Scheme (Offender Management) (Amendment) Regulations 2014
S.I. 2014/1185	Legal Services Act 2007 (Levy) (No. 2) (Amendment) Rules 2014
S.I. 2014/1198	Offender Management Act 2007 (Approved Premises) Regulations 2014
S.I. 2014/1229	Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2014
S.I. 2014/1231	Child Benefit (General) and Child Tax Credit (Amendment) Regulations 2014

S.I. 2014/1233 Civil Procedure (Amendment No. 5) Rules 2014

S.I. 2014/1257 School Governance (Constitution and Federations) (England) (Amendment) Regulations 2014

S.I. 2014/1261 Financial Services and Markets Act 2000 (Transparency) Regulations 2014

S.I. 2014/1309 Non-Road Mobile Machinery (Emission of Gaseous and Particulate Pollutants) (Amendment) Regulations 2014

S.I. 2014/1371 Licensing Act 2003 (Permitted Temporary Activities) (Notices and Fees) (Wales) Regulations 2014

S.I. 2014/1375 Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2014

Draft Instruments subject to annulment

Draft S.I. Selby (Electoral Changes) Order 2014

Draft S.I. Telford and Wrekin (Electoral Changes) Order 2014

Draft S.I. Shepway (Electoral Changes) Order 2014

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2014/1098 Ukraine (Sanctions) (Overseas Territories) (No. 3) Order 2014

S.I. 2014/1100 Ukraine (Sanctions) (Overseas Territories) (No. 2) Order 2014

S.I. 2014/1226 Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No. 3) Order 2014

S.I. 2014/1239 Firearms (Amendment) Rules 2014

Appendix 1

S.I. 2013/3318:

Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Victoria Line 09TS Vehicles) Exemption Order 2013 (S.I. 2013/3318)

Section 3 of the Explanatory Memorandum of the Department for Transport Matters of special interest to the Joint Committee on Statutory Instruments

1. A version of the Order was originally laid before Parliament on 9 December 2013 and considered by the JCSI at its meeting on 15 January 2014 (see the Seventeenth Report of Session 2013-14). However, it has recently come to the Department's attention that the version of the Order laid in December differed in two minor respects from the Order as actually signed by the Minister of State at the Department, Baroness Kramer.

2. The purpose of the Order, as noted, is to provide for exemptions from certain requirements for rail vehicle accessibility set out in the RVAR for certain specified types of London Underground trains. The Order as signed by the Minister included provision for one of the exemptions **(fn1)** to expire on 31 May 2015 ("the time limit provision"). The version of the Order laid in December (and published by the Stationery Office Limited as S.I. 2013/3031) however erroneously failed to include the time limit provision.

3. The version of the Order laid in December also cited section 183(4)(a) of the Equality Act 2010 in its preamble whereas the signed version cited section 183(4)(b).Section 183(4)(b) is the correct provision to be cited since the inclusion of the time limit provision meant that the Order was made in terms different to those which had been applied for by LUL (they had applied for the time-limited exemption to be made permanent – see further paragraph 7.8 below and section 5 of the application in Annex A *not printed*).

4. In the light of these errors, the Department has concluded that the Order cannot be considered to have been properly laid in December. Technically, therefore the Order (which came into force on 1st January 2014) will have come into force prior to being laid before Parliament.

5. The Department is therefore now laying the Order as originally signed (and so including the time limit provision and reference to section 183(4)(b) in the preamble). The version of the Order laid in December has been withdrawn and is replaced by the Order as now laid. In compliance with the proviso to section 4(1) of the Statutory Instruments Act 1946, the Department has also written to the Speakers of the House of Lords and the House of Commons, copies of these notifications are attached at Annex C *not printed*. The Department is also

ensuring that the correct version of the Order as made is published and that all purchasers of the incorrect version of the Order published as S.I. 2013/3031 who can be identified are provided with the replacement instrument free of charge. The incorrect version of the Order published in December has also been withdrawn by the Stationery Office and has been removed from the Government's legislation website (www.legislation.gov.uk)

6. The Department has sought to investigate how the mistake in this case occurred. What appears to have happened is that the version of the Order submitted electronically to the National Archives in December was a very late pre-signature version which did not include the time limit provision as opposed to the final made version of the Order which did correctly include this time limit provision. We are considering what further checks can be put in place to ensure that a similar error does not occur in the future.

7. It seems unlikely that there will have been any prejudice as a result of the error in this case. Whilst the version of the Order laid and published in December omitted the time limit provision, the Explanatory Memorandum laid with that instrument (on 9 December 2013) correctly referred to this provision. Transport for London, who applied for the Order to be made, were also made aware at the time that the relevant exemption would expire at the end of 31 May 2015 and so will have been able to start planning accordingly. Nor will there have been any prejudice to disabled users as a result of this error.

8. The Rail Vehicle Accessibility Exemption Orders (Parliamentary Procedures) Regulations 2008 **(fn2)** (the "2008 Regulations") govern how exemption orders such as this are to be made. Under the 2008 Regulations, orders exempting rail vehicles from RVAR without an expiry date, as is the case with this Order, would normally be subject to the draft affirmative resolution procedure **(fn3)**. However, regulation 5(2) of the 2008 Regulations provides for the Secretary of State, having regard to the circumstances and representations of the Disabled Persons Transport Advisory Committee **(fn4)** ("DPTAC"), to elect to make orders which would otherwise be subject to the draft affirmative procedure, using the negative resolution procedure instead.

9. Equivalent exemptions, though with expiry dates, have previously been granted for the same class of vehicles by the Rail Vehicle Accessibility (London Underground Victoria Line 09TS Vehicles) Exemption Order 2008 **(fn5)** (the "09TS Order 2008"). The 09TS Order 2008 was subject to the draft affirmative resolution procedure. As noted below (paragraph 4.5) this Order restates one exemption, provided for under the 09TS Order 2008 that previously would have expired at the end of 31 December 2013 without an expiry date and extends another that would also have expired at the same time to the end of 31 May 2015. It also restates an exemption for Pimlico station which is of limited duration. As the principles for those exemptions were previously considered

under the draft affirmative resolution procedure, the Secretary of State believes that Parliament's time can more effectively be used on other matters.

10. The Secretary of State consulted DPTAC on the use of the negative resolution procedure to make those exemptions which he believes are appropriate. DPTAC was content with the use of the negative resolution procedure on this basis. The Secretary of State has therefore used his discretion under regulation 5(2) of the 2008 Regulations to decide that the negative resolution procedure should be adopted for this Order.

1 This is the exemption (set out in article 3(b) of the Order) from requirements in relation to audible warnings before a door closes (as set out in paragraph 3(5)(b) of Part 1 of Schedule 1 to RVAR). Article 5 of the Order provides that this exemption is to expire at the end of 31 May 2015.
2 S.I. 2008/2975, see in particular regulation 5.
3 The Order sets out an exemption subject to conditions, but without an expiry date, for certain requirements (set out in paragraph 11(5) of Part 1 of Schedule 1 to RVAR) relating to information to be given passengers when a vehicle is stationary.
4 DPTAC was established under section 125 of the Transport Act 1985 to advise the Government on the public passenger transport needs of disabled people.
5 S.I. 2008/2969

Appendix 2

S.I. 2014/539: memorandum from the Department for Work and Pensions

Housing Benefit (Habitual Residence) Amendment Regulations 2014 (S.I. 2014/539)

1. In its letter of 11th June 2014, the Committee requested a memorandum on the following point:

   "Given the explanation of the context in paragraph 4 of the Explanatory Memorandum, identify the stages that made dispensation on grounds of urgency with the statutory requirements for reference to the Social Security Advisory Committee, and for consultation, which would otherwise apply, appear expedient."

2. The Department's response to the Committee's point is outlined below.

3. The Department hopes that this memorandum will give the Committee a fuller picture of the work involved and the reasons why it handled the process as it did. The Department regrets that it was unable to refer the Regulations to the Social Security Advisory Committee ("SSAC") before they were made and was unable to consult with organisations appearing to be representative of the authorities concerned for reasons of urgency.

4. The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013[a] came into force on 1st January 2014. They provided that European Economic Area (EEA) jobseekers have to serve a 3 month residency requirement before becoming entitled to Jobseeker's Allowance ("JSA"). The Government decided that this group should not be able to access housing benefit from the point at which they become potentially eligible for JSA (which was 1st April 2014). As such, the regulations to restrict their housing benefit entitlement needed to be in force before then. This was an extremely challenging delivery and legislative timetable.

5. JSA is administered by the Department, but housing benefit is administered by local authorities. The Department needed to fully consider operational issues arising from the structural differences between the two benefits, in particular concerning I.T. systems, including those used by local authorities to administer housing benefit, in order to ensure that it did not implement legislation that local authorities were unable to deliver in practice.

6. Work on those substantive issues, and liaison with the Office for Budget Responsibility ("OBR") around likely impacts of the policy (and associated costings), was still taking place at the very end of February. Certification of the impacts/costings from the OBR was only received on 12th March 2014.

7. Given the urgency, the Secretary of State decided not to refer the regulations under the provisions in sections 173(1)(a) and 176(2)(a) of the Social Security Administration Act 1992. In order to be clear about the Department's position from the outset, and to be transparent with SSAC and the local authority associations, this decision was communicated to both parties early on in the process. The devolved administrations and the Northern Irish Government were also informed of the Department's plans then.

8. The Department recognises that, in hindsight, it may have been useful to include this information on the operational complexities in paragraph 4 of the Explanatory Memorandum.

9. Although the Department did not formally refer the Regulations to SSAC, or formally consult, the Department did discuss the Regulations informally with the SSAC and engaged with local authority organisations about the Regulations and operational procedure, through the local authority Steering Group, before the Regulations were made. The Department recognises that, in hindsight, it may also have been useful to include this information in paragraph 4 of the Explanatory Memorandum.

Department for Work and Pensions
17 June 2014

[a] S.I. 2013/3196

Appendix 3

S.I. 2014/572: memorandum from Her Majesty's Revenue and Customs

Social Security (Contributions) (Amendment No.2) Regulations 2014 (S.I. 2014/572

1. The Joint Committee has requested a memorandum to

"Explain the structure of the definition of "offshore installation" in regulation 114D inserted by regulation 2(3)."

2. The amendments made to the Social Security (Contributions) Regulations 2001 deal with the application of National Insurance contributions in respect of workers who are working, principally, in the oil and gas industry in the exploitation of mineral resources.

3. Some of the exploitation takes place on "floating platforms" which can either be moved to a new area of exploitation, be decommissioned, or be put to another use. Consequently the policy intention makes it necessary to consider the status of the installation and the use it is being put to in order to ascertain whether it is a structure which is covered by the Regulations. Additionally, it is necessary to ensure that safety and cable laying vessels are not caught.

4. Accordingly, a number of elements must be considered in order to ascertain whether something is an "offshore installation". This is achieved by a combination of a widely drafted principal condition in paragraph (a) and a carve out of structures which are no longer going to be used to exploit mineral resources. The principal condition is then refined by clarifying the terms "structure", "relevant use", and "put to use in water". Therefore the definition is structured with the intention of enabling the reader to consider all the elements in the round. In other words the definition separates out each technical component in order to lead the user through the definition, making it clear and easier to use overall.

5. As a consequence "Offshore installation" is defined as meaning any structure that, having considered the components in (c), (d) and (e), falls within (a) and is not subsequently taken out by (b). The department's view is that the structure leads the reader through the various components and the meaning would be clear to the reader. The definition follows that used in section 1001 of the Income Taxes Act 2007 which is understood and applied by the oil and gas industry primarily affected by that provision and these Regulations.

Her Majesty's Revenue and Customs
18 June 2014

Appendix 4

S.I. 2014/591: memorandum from the Department for Work and Pensions

Social Security (Miscellaneous Amendments) Regulations 2014 (S.I. 2014/591

1. In its letter to the Department of 11th June 2014, the Committee requested a memorandum on the following point:

> *"Explain the need for the reference to a carer of a user in sub-paragraph (a) of the provisions inserted by regulations 2(2)(b), 4(2)(b), 7(2)(b), 8(2)(b) and 9(2)(b) in addition to sub-paragraph (b) of those inserted provisions."*

2. The Department's response to the Committee's point is outlined below.

3. The provisions in question mirror a provision in the Universal Credit Regulations 2013 (No. 376), which deals with the various ways in which claimants might be involved by public bodies in the designing, reviewing and monitoring of policies and services, for which they may receive expenses. The following explanation was given in the memorandum which the Department submitted to the Social Security Advisory Committee in relation to the Universal Credit Regulations 2013:

> "Under Universal Credit we will continue to treat the fees paid as a result of Service User Group activity as earnings. We will also preserve the easements introduced to ensure that all expenses paid as a result of participating are disregarded and that where a claimant refuses a fee for undertaking service user activity this will not be considered as notional income.
>
> We have further sought to address stakeholder concerns that the existing definition of service user groups is too narrow. The definition for Universal Credit clarifies that involvement includes a much wider field of public spirited employment, supporting the aim of encouraging all those who are able to do so to participate in work".

4. The Committee has questioned the need for the reference to carer in both sub-paragraphs (a) and (b) of the new definition.

5. The two sub-paragraphs deal with two distinct groups.

6. Sub-paragraph (a) deals with claimants who are consulted about their views or their experience of a particular service. For example, if it was a service provided for people with a particular type of disability, the people invited to participate in the consultation

might include not only people with that disability but also those who are carers of people with that disability. Alternatively, it might include the carer but **not** the person for whom they are caring. The reference to carers in sub-paragraph (a) is to cover those carers who are consulted and receive fees or expenses in their own right.

7. Sub-paragraph (b) deals with claimants who receive fees or expenses for caring for someone who takes part in a service user group consultation, for example if a disabled person wished to take part but could only travel to meetings if accompanied by their carer (who would receive fees or expenses for undertaking that role). In summary, sub-paragraph (a) covers carers who are consulted and sub-paragraph (b) covers carers who are not consulted but are caring for someone else who is consulted.

8. The definition is intended to capture a wide range of circumstances and the Department considers that the reference to carers is needed in both sub-paragraphs to ensure that carers are covered in those different capacities.

9. However, the Department accepts that the drafting of the definition could be improved. In particular, the reference in sub-paragraph (b) to "a person" could be interpreted to mean a "carer of a user" in sub-paragraph (a). We do not consider that such an interpretation causes any difficulty on a practical level, but accept that the drafting could be clearer. The Department will therefore re-consider the drafting of the provision, with stakeholders, with a view to amending the provision when an appropriate opportunity arises.

Department for Work and Pensions
17 June 2014

Appendix 5

S.I. 2014/651: memorandum from Department for Business, Innovation and Skills

Education (Student Loans) (Repayment) (Amendment) Regulations 2014 (S.I. 2014/651)

1. The Committee has requested a memorandum in respect of the following question:

   "Identify the vires for the open requirement in new regulation 23(2)(g) of the 2009 Regulations inserted by regulation 3 of these Regulations."

2. The Department's response to the question raised by the Committee is that section 22(5)(c) of the Teaching and Higher Education Act 1998 ("the 1998 Act") is the vires for the requirement in new regulation 23(2)(g) of the Education (Student Loans) (Repayment) Regulations 2009 (S.I. 2009/470).

3. Section 22(5)(c) of the 1998 Act provides:
   "c) imposing on borrowers requirements with respect to—
   (i) the provision of such information, and
   (ii) the keeping and production of such documents and records,
   relating to their income as may be prescribed;"

4. New regulation 23(2)(g) of S.I. 2009/470 imposes a requirement to provide:

   "(g) such other information about the borrower's financial position as may be required to determine whether the borrower is in receipt of any income."

   This information relates to the borrower's income and new regulation 23(2)(g) therefore falls within the vires of section 22(5)(c) of the 1998 Act.

5. The requirement addresses, for example, the situation where the borrower is not in the tax system and they claim that they have no income. In those circumstances the Student Loans Company would be keen to test that assertion by requiring information about the borrower's financial circumstances to determine if the borrower would be required to make repayments.

Department for Business, Innovation and Skills
16 June 2014

Appendix 6

S.I. 2014/774: memorandum from Ofcom

Wireless Telegraphy (Limitation on Number of Licences) Order 2014 (S.I. 2014/774)

1. The Committee has asked Ofcom for a memorandum on the following points:

   Explain why article 6 employs the word "will" as an auxiliary to denote what appears to be an obligation.

2. Regulation 6 should have employed the word "shall" as the provision was meant to denote an obligation upon Ofcom. Ofcom apologises for this error and undertakes to correct it by amending the Order.

Ofcom
17 June 2014

Appendix 7

S.I. 2014/790: memorandum from the Department for Transport

M275 and M27 Motorway (Speed Limit and Bus Lane) Regulations 2014 (S.I. 2014/790)

1. By a letter dated 11th June 2014, the Joint Committee on Statutory Instruments requested a Memorandum on the following:

   Given that a breach of the Regulations (sanctions for which are not identified in the Explanatory Note) is an offence, explain why the road sections to which they apply appear imprecise – see the final paragraph of each Schedule.

2. These Regulations revoke and replace the M275 and M27 Motorway (Speed Limit) Regulations 2005 (S.I. 2005/1999) ("the 2005 Regulations"). Their purpose is twofold – to update the stretches of road on which 50mph and 60mph speed limits are applicable and to create a bus lane.

3. At the end of each Schedule in the 2005 Regulations there appeared the following inoperative wording in brackets and italics:

"(All distances are approximate and measured from the junction centre)"

4. The rationale for this wording was to provide clarity on how the distances were measured and build in a de minimis allowance in relation to the placing of the speed limit signs (in particular where a 100% accurate placement would result in the blocking of sight lines and create a risk of accidents). In order to be consistent with this approach and for the same reason, the intention was to replicate this wording in the 2014 Regulations and that it should likewise appear in brackets and italics so that it was clearly presented as inoperative wording.

5. Unfortunately, in the process of validating the SI, this wording was inadvertently given a paragraph number (in Schedules 1 and 2, though not in Schedule 3) and the italics were removed in all three Schedules. The Department spotted this error prior to laying the SI before Parliament (though after signature by the Minister) and explained to the National Archives that the wording had been meant to appear in brackets and italics as inoperative wording. Following discussions with the Registrar it was agreed that the Department should proceed to lay the SI and that a correction slip would be issued. To delay would have meant that a road junction would have opened with associated speed limit signage, but no enforcement powers, and the Department considered that to be an unsatisfactory situation in terms of legal certainty. The National Archives are currently faced with a large backlog of correction slips and the Department has

therefore not yet received either electronic or hard copy versions of the final SI as corrected.

6. The Department regrets that this has happened. It understands that the Committee is not aware that a correction slip is pending (albeit not yet processed) in relation to these Regulations. The Department hopes that when the wording is corrected the concerns of the Committee will have been addressed.

7. With respect to sanctions, the Department notes the Committee's observation that sanctions were not mentioned in the Explanatory Note. The Department deals with these types of orders on a regular basis and it has never been Departmental practice to identify the sanctions in the Explanatory Note. However, in light of the Committee's comments consideration will be given as to whether it might be helpful to adopt this practice going forward. For reference, all breaches of regulations made under section 17(2) of the Road Traffic Regulation Act 1984 are automatically offences under section 17(4) of that Act, with the prescribed penalties and prosecution methods provided for in Schedule 2 to the Road Traffic Offenders Act 1988.

Department for Transport
17 June 2014

Appendix 8

S.I. 2014/817: memorandum from the Department for Business, Innovation and Skills

Insolvency (Commencement of Proceedings) and Insolvency Rules 1986 (Amendment) Rules 2014 (S.I. 2014/817)

1. The Committee has asked the Department for Business, Innovation and Skills for a memorandum on the following point:-

   "Explain the reference in rule 2(1) to Parts 1 to 7 of the Insolvency Act 1986 (only some of which relate to winding up) in the context of section 117 of that Act which appears to be confined to winding up".

2. Section 117 of the Insolvency Act 1986 ("the Act") (as amended by the Crime and Courts Act 2013) confers on the County Court jurisdiction to wind up companies registered in England and Wales where the amount of the share capital paid up or credited as paid up does not exceed £120,000. Section 251 of the Act (interpretation for Parts 1 to 7) provides—

"the court", in relation to a company, means a court having jurisdiction to wind up the company.

3. The effect is that references to "the court" in Parts 1-7 of the Act in relation to other kinds of insolvency proceedings are to the court having jurisdiction under section 117 to wind up the company concerned. So for example the County Court has concurrent jurisdiction to make an administration order where the company is one which the County Court has jurisdiction to wind up.

4. The reference to proceedings other than winding up proceedings in rule 2(1) therefore relies on section 251 extending the application of section 117 from winding up proceedings to other types of proceedings under Parts 1-7. The Department acknowledges that it would have been clearer if rule 2(1) had explicitly referred to section 251 in order to justify the rule referring to proceedings under Parts 1-7. The Department is currently preparing a revised and consolidated version of the Insolvency Rules 1986 to be made next year. This will subsume the rules made by SI 2014/817 and provide an opportunity to elucidate this point.

Department for Business, Innovation and Skills
17 June 2014

Appendix 9

S.I. 2014/870: memorandum from the Department for Business, Innovation and Skills

Consumer Protection (Amendment) Regulations 2014 (S.I. 2014/870)

1. The Committee has asked the Department for Business, Innovation and Skills for a memorandum on the following point:-

   "In the light of sections 4(a) and 23(1) of the Interpretation Act 1978, explain the intention in the coming into force timing in regulation 1(2) and how it is considered that the intention is given effect".

2. The intention of regulation 1(2) is that paragraphs (1) and (2) of that regulation and regulation 9 of the Consumer Protection (Amendment) Regulations 2014 ("2014 Regulations") should be treated as coming into force on 13th June 2014 immediately before the coming into force of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3154) ("the 2013 Regulations"). This is to ensure that the corrections to the 2013 Regulations made by regulation 9 of the 2014 Regulations come into force immediately before the provisions of the 2013 Regulations which are being

corrected by regulation 9. We recognise that the effect of sections 4(a) and 23(1) of the Interpretation Act 1978 is that the relevant provisions of the 2014 Regulations, and the 2013 Regulations, come into force at the beginning of that day but our view is that it is nevertheless clear that, once they are in force, the relevant provisions of the 2014 Regulations should be treated as coming into force immediately before the 2013 Regulations. The Department notes that there are examples of other statutory instruments that provide for their commencement immediately before the coming into force of another statutory instrument or of the provision of an Act. In the first category, see Article 1(2) of the Mental Health (Nurses) (England) Order 2008 (SI 2008/1207). In the second category, see the Public Audit (Wales) Act 2004 (Relaxation of Restriction on Disclosure) Order 2005 (SI 2005/1018).

Department for Business, Innovation and Skills
17 June 2014

Appendix 10

S.I. 2014/880: memorandum from the Department for Communities and Local Government

Energy Performance of Buildings (England and Wales) (Amendment) Regulations 2014 (S.I. 2014/880)

1. The Committee has requested a memorandum on the following point:

   "In the light of paragraph 3 of the Explanatory Memorandum, explain why failure to reach agreement within Government was considered to be justification for breach of the 21-day rule."

2. The Department apologises for breaching the 21-day rule. The Department acknowledges that it should have done more to ensure that cross-government agreement was secured in time to meet the rule.

3. The Department was keen to ensure that the benefit of reduced fees could be passed on to energy assessors as soon as possible. A further delay until the next Common Commencement date of 1st October 2014 to implement revised fees would have resulted in businesses and homeowners being charged more than was necessary for certificates that they were legally obliged to have.

Department for Communities and Local Government
16 June 2014

Appendix 11

S.I. 2014/894: memorandum from HM Treasury

Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014 (S.I. 2014/894)

1. By letter dated 11 June 2014, the Committee sought a memorandum on the following points:

   "Explain why regulation 3 is included and what it adds to general principles of administrative law"

2. This provision is relevant to Part 3 of the Regulations, which is concerned with the countercyclical capital buffer. Article 136(1) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ("the capital requirements directive") requires each Member State to designate a public authority or body to set the buffer rate for that Member State. In the United Kingdom, the buffer rate is to be set by the Financial Policy Committee (the "FPC"), which is a statutory sub-committee of the Court of Directors of the Bank of England. Although the FPC is a sub-committee within the Bank of England, its composition, objectives and proceedings are governed by the Bank of England Act 1998. It is the United Kingdom's macro-prudential regulatory authority.

3. As the FPC is a sub-committee within the Bank of England, regulation 7 designates the Bank of England as the designated authority for the purposes of Article 136(1) of the capital requirements directive. Regulation 10 then requires the FPC to assess and set the buffer rate. Other regulations in Part 3 confer further functions or discretions on the Bank of England and the FPC. The purpose of regulation 3 is to make it clear that functions or discretions conferred on the FPC must be exercised by the FPC rather than by the Bank of England acting in any other way.

HM Treasury

17 June 2014

Appendix 12

S.I. 2014/912: memorandum from the Department for Education

Childcare (Welfare and Registration Requirements) (Amendment) Regulations 2014 (S.I. 2014/912)

1. The Committee has requested a memorandum on the following point:

   Explain why, given that the Regulations—

   (a) make a considerable number of amendments of S.I 2012/938,
   (b) introduce a new version of the "Statutory Framework for the Early Years Foundation Stage" Document, and
   (c) do not come into force until the start of September 2014,

   the Department not only formed the view stated in paragraph 3.2 of the Explanatory Memorandum that it was not appropriate to address the issues raised in paragraphs 3.4 to 3.7 of the Committee's remarks on that instrument in the 5th Report of last Session (by amending regulation 3 of that instrument or making some further changes in Section 3 of that Document) but also gave no indication of when it might expect to do so.

2. In response to the Committee's first question (why the Department formed the view that it was not appropriate to address the issues raised in paragraphs 3.4 to 3.7 of the Committee's 5th Report of the last Session), the Department recognises the importance of the need for legislation to set out requirements clearly. Accordingly, the Department gave very careful consideration as to whether this instrument was a suitable and practicable opportunity to address the Committee's comments. In carrying out that consideration, the Department balanced the Committee's remarks with the following factors:

   - As stated in paragraph 3.2 of the Explanatory Memorandum to this instrument, the changes which the Department wished to make to the new Early Years Foundation Stage (EYFS) Document introduced by this instrument did not require the EYFS Document to be substantively revised. The changes could be made without making substantial changes to the structure, nature or content of the EYFS Document.
   - Although this instrument made amendments to S.I. 2012/938, the policy changes which the Department wished to make did not require any changes to be made to regulation 3.
   - To address the issues which the Committee had raised would have required substantive re-thinking of the structure and drafting of

regulation 3 of S.I. 2012/938 and/or Section 3 of the EYFS Document and substantive re-consideration of the interaction between the two.

- The EYFS Document was substantially revised and restructured in 2012 (less than two years ago). The Department was very mindful of the need to limit the changes to the legislative regime for early years providers to the absolute minimum required to implement the Government's reforms.
- So far as the Department is aware, the structure of the EYFS Document and S.I. 2012/938 has not, in practice, caused any difficulties or issues for early years providers.
- The Department was also very mindful of the need to give as much notice as possible to early years providers of the changes to the legislative regime. This is why the instrument was made in April, to come into force in September.

3. Having weighed these factors with the Committee's comments, the Department took the decision on this occasion not to make the additional changes, and not to delay the making of the instrument.

4. In response to the Committee's second question (why the Department did not indicate in its Explanatory Memorandum when it might expect to address the Committee's remarks), the Department apologises for this omission. The Department cannot definitively state when it will be in a position to revise the Regulations and the EYFS Document to address those remarks.

Department for Education
17 June 2014

Appendix 13

S.I. 2014/953: memorandum from Ofcom

Wireless Telegraphy (Mobile Communication Services on Aircraft) (Exemption) Regulations 2014 (S.I. 2014/953)

1. The Committee has asked Ofcom for a memorandum on the following point:

   Explain, in the light of section 8(3B) of the Wireless Telegraphy Act 2006, why the phrases "(or equivalent specifications)" and "(or equivalent specification)" in regulation 5(1) and (6)(c) and (d) have been included without providing any criteria against which equivalence falls to be assessed.

2. The statutory instrument gives effect to EU obligations of the United Kingdom contained in the Commission Decision 2013/654/EU of 12th November 2013 amending Decision 2008/294EC to include additional access technologies and frequency bands for mobile communications services on aircraft (MCA services) (OJ No L 303 14.11.2013, p. 48). (The decision set the technical and operational conditions necessary to allow the use of 3G and 4G mobile phones on board an aircraft, in addition to 2G GSM phones.)

3. Regulations 5(1) and (6)(c) and (d) of the statutory instrument implement the requirements of table 1 at Annex 1 of the Commission's Decision of 2008 (as amended). The table refers to "any equivalent specifications."

4. In relation to GSM systems, for example, the table says in the second row of the third column that these must comply with "the GSM Standards as published by ETSI, in particular EN 301 502, EN 301 511 and EN 302 480, or equivalent specifications."

5. The standards referred to in the table and in the statutory instrument are standards published by the European Telecommunications Standards Institute ("ETSI").

6. ETSI is recognised as a European Standardisation Body by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 21.7.1998, p. 37). ETSI produces a variety of standards to suit different purposes. The standards are amended and/or replaced from time to time, and new standards with new reference numbers are made.

7. It is common for EU legislation, in the context of the regulation and harmonisation of use of radio frequencies, to require compliance with standards set by ETSI. Several EU legislative instruments refer to the standards that apply at the time when the legislation is adopted but mention is also made to any "equivalent specifications" to these standards. In this case, we understand that the EU legislature is seeking not to exclude other alternative GSM, UMTS and LTE standards which might exist. (We understand that there are, in particular, standards which have been developed by other organisations for use by manufacturers in other parts of the world outside the EU).

8. Ofcom sought when drafting the statutory instrument to implement fully the requirements of the EU decision. This was in light of the purpose of the decision which is to harmonise regulation across Member States and in light of the fact

that EU decisions are binding in the entirety on the person to whom they are addressed.

9. In doing so Ofcom decided not to deviate from the wording in the EU decision in this respect in order to avoid narrowing its intended scope. While further elucidation as to what was meant by "equivalent specifications" would be desirable, the UK legislation might diverge from that in other Member States if Ofcom's statutory instrument set out particular criteria for equivalence. Further, mentioning key applicable standards without any mention of "equivalent specification" could narrow the scope by excluding any other standards.

10. In light of the need to accurately implement EU law, Ofcom considered the requirements in section 8(3B) of the Wireless Telegraphy Act 2006 for provisions in regulations to be objectively justified, non-discriminatory, proportionate and transparent, to have been met. The provision in question is objectively justified and proportionate because it is required by EU law. It is non-discriminatory in its application and it is transparent in the regulations.

11. Ofcom also considered that the reference to "equivalent specifications" would not be likely to cause any uncertainty or confusion in practice. This is because equipment manufacturers (who will be the main users of this statutory instrument) would be very familiar with the specifications published by ETSI and other standard-making bodies.

Ofcom
17 June 2014

Appendix 14

S.I. 2014/1105: memorandum from the Foreign and Commonwealth Office

Territorial Sea Act 1987 (Guernsey) Order 2014 (S.I. 2014/1105)

1. At its meeting on 11 June 2014, the Committee requested a memorandum on the following point:
   Explain why the words "that territorial sea" in section 1(1)(b) of the Territorial Sea Act 1987 are not modified to the territorial sea adjacent to the Bailiwick of Guernsey.

2. The Foreign and Commonwealth Office regrets that, in error, the words in question were not so modified and will ensure that this error is rectified at the earliest opportunity.

Foreign and Commonwealth Office
17 June 2014

Appendix 15

Draft S.I.: memorandum from the Department for Business, Innovation and Skills

Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (Draft S.I.)

1. By a request dated 7th May 2014, the Joint Committee on Statutory Instruments asked the Department to submit a memorandum on the following point:
   "The draft Regulations purport to give effect to Directive 2001/29/EC, Article 5(2)(b) of which permits a member State to provide for an exception to reproduction rights in respect of copies made by a natural person for private use and for non-commercial purposes "on condition that the rightholders receive fair compensation".

   Explain why no provision is made in the draft Regulations for rightholders to receive such compensation, having regard to judgments of the Court of Justice of the European Union in cases such as C-467/08 Padawan v SGAE and C-435/12 ACI Adam BV v Stichting de Thuiskopie, which indicate that a compensation scheme should be established where a member State introduces a private copying exception under Article 5(2)(b)."

2. As stated in paragraphs 13 to 19 of the Voluntary Memorandum submitted by the Department to the Committee and the Department's responses to the letters dated 1st and 11th April 2014 from UK Music to the Committee, the Department's view is that Article 5(2)(b), when read together with Recital (35) and Article 5(5), does not require the establishment of a compensation scheme in cases where the private copying exception is narrow in scope and does not cause harm (or at least causes only minimal harm) to rightholders. The Department considers that this view is not inconsistent with the case law cited by the Committee since the Court in both cases recognised that the requirement to pay compensation is necessary where the right to take private copies causes "harm" to the rightholder.

3. Cases C-467/08 Padawan v SGAE and C-435/12 ACI Adam BV v Stichting de Thuiskopie, considered the requirement for fair compensation in the context of the private copying exception.

4. The Court in the ACI Adam case referred to the requirement in paragraphs 50 to 51 of its judgment:

50 The purpose of such compensation is, according to the case-law of the Court, to compensate authors for private copies made of their protected works without their authorisation, with the result that it must be regarded as recompense for the harm suffered by authors as a result of such unauthorised copies (see, to that effect, *Padawan* EU:C:2010:620, paragraphs 30, 39 and 40).

51 Accordingly, it is, in principle, for the person who has caused such harm, namely the person who has made the copy of the protected work without seeking prior authorisation from the rightholder, to make good the harm suffered by financing the compensation which will be paid to that rightholder (see, to that effect, *Padawan* EU:C:2010:620, paragraph 45, and Case C-462/09 *Stichting de Thuiskopie* EU:C:2011:397, paragraph 26).

5. As noted by the Court at paragraph 50, the purpose of the compensation is to “recompense the **harm** suffered by authors” arising out of the exception. This is consistent with recital (35) which provides that “When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible **harm** to the rightholders resulting from the act in question….in certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise”.

6. The new UK personal copying exception has been narrowly drawn to ensure that no harm is caused to the rightholder. As it applies only to lawfully purchased copies, the exception ensures that rightsholders remain able to receive adequate remuneration with respect to their works at the point of sale.

7. This is in contrast with the much wider private copying exceptions provided by other EU Member States, which are accompanied by levies on media/equipment to deliver fair compensation. These exceptions permit copies to be made from sources which are not owned by the copier – for instance, borrowed or rented DVDs, or music streamed over the internet – and allow copies to be distributed within private circles including friends and family. Therefore, the exceptions provided by these Member States enable individuals to acquire copies of works without paying for them. The Department agrees that such exceptions may

undermine sales of copies of works, and that this may constitute prejudice to rightholders which requires compensation under the Directive.

8. The new UK exception is much narrower than the private copying exceptions in these other Member States. As it is not expected to harm rightholders, no compensation is required, and therefore no compensation mechanism needs to be established.

9. In summary, therefore the Department's position is that the Directive permits the introduction of a private copying exception without the establishment of a compensation scheme in cases where the exception will cause no (or minimal) harm to the rightholder.

Department for Business, Innovation and Skills
12 May 2014

Appendix 16

Draft S.I.: voluntary memorandum from the Department for Business, Innovation and Skills

Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (Draft S.I.)

1. The Department for Business Innovation and Skills is submitting this memorandum in order to assist the Joint Committee on Statutory Instruments in its deliberations relating to the above Regulations. The main purpose of those Regulations is to ensure that UK law contains appropriate exceptions to copyright and rights in performances in order to strike a fair balance between the rights of creators and users of copyright works and performances. The scope of national law relating to copyright is constrained by the provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (O.J. No L167, 22.6.2001, p 10). This directive was originally implemented in 2003 by the Copyright and Related Rights Regulations 2003 (S.I.2003/2498). The Regulations seek to expand the scope of exceptions relating to copyright and rights in performances, in order to achieve a fair balance between the rights of creators and users of copyright works and performances, in a manner that is permitted by the Directive.

2. The Committee and their legal advisers have received a number of representations relating to the scope of the powers under section 2(2) of the European Communities Act 1972 to make the proposed regulations.

Contract override clauses

3. It has been asserted that there is an argument against the Secretary of State being able to introduce contract override clauses, such as those implemented by new sections 29A(5), 31F(8) and 32(3). In particular, it is argued that such clauses are not allowed in the narrow area of on-demand services, by virtue of a reference to such services in Article 6(4) paragraph 4. The Department disagrees with this conclusion for the reasons below.

4. It appears to be clear that, in general, the Directive gives Member States freedom to choose whether or not they make copyright exceptions subject to contract terms or resistant to them. Certain exceptions (such as Article 5(3)(n), the “dedicated terminals” exception) are expressly subject to contract or licence terms (this is implemented by new Section 40B(3)(c)), but others are silent on the matter. Recital 45 explicitly states that “national law” is able to (but not obliged to) define contractual relations in order to provide “fair compensation” in the context of exceptions, but is silent on other types of contracts.

5. On the face of the legislation therefore, it appears that Member States generally have a choice over whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract terms. The judgment in the recent ECJ cases C-457/11 to C-460/11 VG Wort supports this view, and moreover suggests that the default position where contract or licence terms are not expressly allowed to limit the scope of an exception is that the exception will prevail over any rights holder authorisation. Paragraphs 36 to 38 of the judgment are as follows:

> “36 It must also be noted that ... it is open to Member States to decide to introduce, in their national law, exceptions or limitations ... Where a Member State does not make use of that option, rightholders retain, within that State, their exclusive right to authorise or prohibit reproduction of their protected works or other subject-matter.
>
> 37 Where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effects under the law of that State. ...
>
> 38 By contrast, where a Member State has decided not to exclude completely the right for the rightholders to authorise reproduction of their protected works or other subject-matter, but merely to introduce a limitation of that right, it is necessary to establish whether, in the particular case, the national legislature intended to preserve the reproduction right from which the authors benefit.”

6. Article 6(4) deals with something quite different to the question of contracts preventing use of the copyright exceptions – namely, complaints against technological

protection measures which prevent use of an exception. Article 6(4) paragraph 1, which deals with a number of exceptions, is implemented in domestic law via Section 296ZE. Article 6(4) paragraph 2, which deals exclusively with private copying, is implemented in the new appeal provision relating to personal copying (see the draft Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, new s296ZEA as inserted by regulation 3(2)). Article 6(4) paragraph 4 is explicitly implemented in each of these provisions, via Section 296ZE(9) and Section 296ZEA(7), respectively.

7. Article 6(4) paragraph 4 was inserted into the Directive to address the particular security concerns arising where material is made available on-demand. It was recognised that in an on-line environment rightholders should be entitled to enhanced protection against unauthorised copying and that technological measures applied to on-demand services should enjoy enhanced legal protection

8. In the Department's view, the language of Article 6(4)(4) is quite clear and it excludes the application of sub-paragraphs 1 and 2 when as part of on-demand services, works are made available to the public on agreed contractual terms. The effect of this provision is to remove, in respect of on-demand services provided on agreed contractual terms, the obligation or right of a Member State under subparagraphs 1 and 2 to require rightholders to cause their TPMs to permit users to benefit from the exceptions.

9. Accordingly, where rightholders elect to use TPMs to restrict or prevent certain uses of material made available on demand, where such material is made available on agreed contractual terms, a user will have no right to appeal for the removal or relaxation of those measures, even where they restrict uses permitted under copyright exceptions. The measure is clearly aimed only at the enforceability of TPMs in the area of exceptions and does not say that exceptions do not apply in these circumstances. If it were instead intended to constrain the scope of exceptions, it would appear under Article 5, which defines the scope of exceptions available to EU Member States.

10. The argument has been put forward that restricting the contractual freedom of the rightholder to prevent uses which are permitted under copyright exceptions would deprive article 6(4) para 4 of actual effect, because the condition precedent for its operation would be prevented from arising. This is on the basis that the evident purpose of the subparagraph is to permit TPMs to be used to police compliance with the contractual terms, even if those terms confer rights narrower than a relevant exception.

11. Taking the contract override provision which appears in the Regulations relating to text and data analysis for non-commercial research as an example, this provides:

> *29A(5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

This provision does not render *all* contractual terms relating to the supply of on-demand content unenforceable – merely those which prevent use as permitted under s29A. Where a work is made available on demand there will be many contractual terms relating to the on-demand provision of that work which will have no bearing on what a user can do with that work under an exception to copyright – e.g. they may set out what the user has to pay to access the work. So even if certain terms are prohibited, it would still be possible to make works available on "agreed contractual terms". There is therefore no basis for asserting that the existence of a contract override would deprive the provision of actual effect.

12. In view of this, and given the clear language of the Article (which relates solely to the protection conferred on TPMs to on-demand material supplied on agreed contractual terms) we consider there is no need to resort to the purposive interpretation which has been argued. As a policy matter we consider that a user should not be liable for damages for breach of contract in circumstances where the individual has used a work in a way permitted under an exception, but it is accepted that a rightholder may apply TPMs which might prevent or restrict a use under an exception. In our view this position does not conflict with the provisions of the Directive.

Private copying exceptions: fair compensation

13. Another point that has been raised is in relation to the ability of Member States to introduce a private copying exception (such as the new Section 28B exception for the making of personal copies for private use) without providing for a system of rightholder remuneration such as a levy on devices and media. Article 5(2)(b) of the Information Society Directive says that Member State may provide exceptions to the reproduction right:

> "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

14. Recital 35 of the Directive explains that, while certain general principles apply when determining fair compensation and its payment, Member States have discretion over the details:

> "When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain

situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

15. To date, the ECJ has not ruled on what may constitute a minimal prejudice situation in the context of Recital 35. However, it has indicated that Member States enjoy a good degree of discretion over compensation systems. Cases such as the Amazon case (Case C C-521/11) set out how Member States have discretion over how they provide compensation, as long as a fair balance is struck between rights holders and users of the exception.

16. As the Government does not intend to introduce the levies or taxes on media and devices which exist in many other EU states ("private copying levies") it has a policy of introducing private copying exceptions which do not cause harm (or at least cause only minimal harm) to rights holders and so which (in accordance with Recital 35) do not require compensation to be provided.

17. It is important to note that those countries which do provide levy systems in order to deliver compensation do so in the context of wide private copying exceptions which allow people to make copies for friends and family and from sources they may not own. In some Member States this includes copies made from illegal sources. The Government does not dispute that these wide exceptions may harm rights holders. Because they allow individuals to lawfully make copies for friends, and to make copies from borrowed, rented or illegally distributed sources, then it seems clear that they could lead to lost sales, and that compensation is required in that context.

18. However, the new Section 28B exception has been drawn narrowly to ensure that no such harm is caused. It is limited to allow copying only by an individual who owns a copy and prohibits sharing of such copies. The archetypal activity which it will allow is the "format shifting" of an individual's own CD's to their own iPod. The Government's impact assessment shows that this activity is unlikely to cause any harm to copyright owners. The effect of the exception on rightholders, if any, will amount, in the words of recital 35, to "minimal prejudice" which accordingly does not require compensation.

19. It is also worth noting that the Copyright, Designs and Patents Act already provides three exceptions based on Article 5(2)(b) which take a similar "minimal harm" approach and in relation to which it was not felt necessary to introduce a compensation system upon implementation of the Directive in 2003. The most well-known of these is the "time shifting" exception (Section 70 CDPA) which allows an individual to record a TV program for later viewing without infringing copyright. These exceptions have not been challenged in the UK courts, or by the European Commission.

Private copying exceptions: applicability to distribution and communication rights

20. It has also been argued that a private copying exception can only relate to the reproduction right conferred by the Article 2 of the Information Society Directive, and that new Section 28B goes further than this, creating exceptions to the Article 3 right of

communication and making available to the public, and the Article 4 right of distribution to the public, as well as an exception to the reproduction right. The Department disagrees that Section 28B creates an exception to the rights provided by Articles 3 and 4 of the directive.

21. Articles 2, 3 and 4 of the Information Society Directive (respectively reproduction, communication to the public including making available to the public, and distribution to the public) are implemented via Sections 17, 18 and 20 of the Copyright, Designs and Patents Act 1988. It is important to note that, although the reproduction right applies to private and public acts of reproduction, the communication and distribution rights apply only when works are communicated/distributed 'to the public'. It is correct that Article 5(2)(b)(private copying) only permits Member States to make an exception to the reproduction right, not the communication to the public right. This is logical, given that it concerns private, not public acts.

22. Consistent with Article 5(2)(b), the Section 28B personal copying exception only provides an exception to Section 17 – the CDPA equivalent to the reproduction right (Article 2). This is clear because Section 28B refers only to "the making of a copy of a work", and not to other restricted acts such as "issuing copies to the public" or "communicating copies to the public". The "transfer provisions" (Section 28B (6) to (9)) do not provide exceptions to the communication/distribution rights but govern what can be done where those rights do not apply - in particular where copies are distributed in private (not restricted by Section 18) or where the right to control issue/distribution of copies to the public has been exhausted (per Section 18(3)(a)).

23. The transfer provisions essentially provide that one can still give a copy (eg. of a CD) to a friend in private, or resell that copy (to the extent that they entitled to under Section 18) but where they do so they cannot retain any personal copies they have made from it under the exception. Private distribution of personal copies is restricted, and public distribution and communication remains restricted by Sections 18 and 20.