Draft Regulations laid before Parliament under paragraph 2(2) of Schedule 2 to the European Communities Act 1972, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No.

ELECTRONIC COMMUNICATIONS
POSTAL SERVICES

The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011

Made - - - -	*****
	in accordance with
Coming into force - -	*regulation 1(2)*

The Secretary of State is designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972(**2**) in respect of matters relating to electronic communications and postal services and makes these Regulations in exercise of the powers conferred by section 2(2) of that Act.

A draft of this instrument has been laid before, and approved by a resolution of, each House of Parliament in accordance with paragraph 2(2) of Schedule 2 to the European Communities Act 1972.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011.

(2) These Regulations come into force 21 days after the day on which they are made.

(3) In these Regulations "the 2000 Act" means the Regulation of Investigatory Powers Act 2000(**3**).

Monetary penalty notices for certain unlawful interceptions of communications

2.—(1) After section 1(1) of the 2000 Act (unlawful interception of communications) insert—

"(1A) The Interception of Communications Commissioner may serve a monetary penalty notice on a person if the Commissioner—

(a) considers that the person—

(**1**) S.I. 1998/1750 and 2001/3495.
(**2**) 1972 c. 68.
(**3**) 2000 c. 23.

(i) has without lawful authority intercepted, at any place in the United Kingdom, any communication in the course of its transmission by means of a public telecommunication system, and

(ii) was not, at the time of the interception, making an attempt to act in accordance with an interception warrant which might, in the opinion of the Commissioner, explain the interception concerned, and

(b) does not consider that the person has committed an offence under subsection (1).

(1B) Schedule A1 (which makes further provision about monetary penalty notices) has effect."

(2) In section 71(2) of the 2000 Act (issue and revision by the Secretary of State of codes of practice) after "subordinate legislation" insert "and subject to subsection (10)".

(3) After section 71(9) of the 2000 Act insert—

"(10) A code of practice under this section may not relate to any matter which is to be dealt with by guidance of the Interception of Communications Commissioner by virtue of paragraph 7 of Schedule A1."

(4) Before Schedule 1 to the 2000 Act insert the Schedule set out in the Schedule to these Regulations.

Consent requirement for lawful interception of communications

3. In section 3(1) of the 2000 Act (lawful interception without an interception warrant where actual or believed consent) the words ", or which that person has reasonable grounds for believing," are repealed.

Home Office
Date

Name
Parliamentary Under Secretary of State

SCHEDULE Regulation 2(4)

Monetary penalty notices

"SCHEDULE A1

MONETARY PENALTY NOTICES IN RELATION TO CERTAIN UNLAWFUL INTERCEPTIONS

PART 1

MONETARY PENALTY NOTICES

General

1.—(1) A monetary penalty notice is a notice requiring the person on whom it is served to pay to the Interception of Communications Commissioner ("the Commissioner") a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(2) The amount determined by the Commissioner must not exceed £50,000.

(3) The monetary penalty must be paid to the Commissioner within such period as is specified in the notice.

(4) The period concerned must not be less than 28 days beginning with the day after the day on which the notice is served.

(5) The notice must, in particular—

(a) state the name and address of the person on whom it is to be served,

(b) provide details of the notice of intent served on that person,

(c) state whether the Commissioner has received written representations in accordance with that notice,

(d) state the grounds on which the Commissioner serves the monetary penalty notice,

(e) state the grounds on which the Commissioner decided the amount of the monetary penalty,

(f) state the details of how the monetary penalty is to be paid,

(g) provide details of the rights of appeal of the person concerned under paragraph 5 in respect of the monetary penalty notice,

(h) provide details of the Commissioner's rights of enforcement under paragraph 6 in respect of the monetary penalty notice.

(6) Any sum received by the Commissioner by virtue of a monetary penalty notice must be paid into the Consolidated Fund.

Enforcement obligations

2.—(1) The Commissioner may include one or more than one enforcement obligation in a monetary penalty notice if the Commissioner considers that the interception to which the notice relates is continuing.

(2) Each of the following is an enforcement obligation—

(a) a requirement on the person on whom the notice is served to cease the interception concerned on such day, or within such period, as is specified in the notice,

(b) (where appropriate for achieving such a cessation) a requirement on the person to take within such period as is specified in the notice, or to refrain from taking after the end of such period as is so specified, such steps as are so specified.

(3) No enforcement obligation is to have effect before the end of the period of 7 days beginning with the day after the day on which the notice is served.

(4) Where an enforcement obligation is included in a monetary penalty notice under this paragraph, the notice must state what the obligation is and the grounds for including it.

Consultation requirements before service of notices

3.—(1) The Commissioner must proceed in accordance with sub-paragraphs to (7) before serving a monetary penalty notice on a person.

(2) The Commissioner must serve a notice of intent on the person.

(3) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice on the person.

(4) A notice of intent must, in particular—

(a) state the name and address of the person concerned,

(b) state the grounds on which the Commissioner proposes to serve the monetary penalty notice,

(c) provide an indication of the amount of the monetary penalty that the Commissioner proposes to impose and the Commissioner's grounds for deciding that amount,

(d) state whether the monetary penalty notice is to include any enforcement obligation and, if so, what the obligation is and the grounds for including it,

(e) state the date on which the Commissioner proposes to serve the monetary penalty notice,

(f) inform the person concerned that the person may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and

(g) inform the person concerned that the person may, within a period specified in the notice, request an oral hearing before the Commissioner in order to make representations of the kind mentioned in sub-paragraph (6)(b).

(5) No period specified as mentioned in sub-paragraph (4)(f) or (g) may be less than 21 days beginning with the day after the day on which the notice is served.

(6) Where the person concerned has requested an oral hearing within the period specified for the purpose in the notice—

(a) the Commissioner must arrange such a hearing, and

(b) the person may make representations at the hearing about—

(i) any matter falling within section 1(1A)(a)(ii), or

(ii) any other matter relating to the Commissioner's proposal which, by virtue of section 17, the person would be unable to raise on an appeal under paragraph 5.

(7) The Commissioner must consider any representations which have been made by the person concerned in accordance with the notice or sub-paragraph (6).

(8) Subject to sub-paragraph (9), the Commissioner may not vary a notice of intent.

(9) The Commissioner may vary a notice of intent by extending the period mentioned in sub-paragraph (4)(f) or (g).

(10) Sub-paragraph (8) does not prevent the Commissioner from issuing a new notice of intent instead of varying such a notice.

(11) The Commissioner may cancel a notice of intent.

(12) A variation or cancellation of a notice of intent is effected by serving on the person on whom the notice was served a notice setting out the variation or cancellation.

(13) Subject to sub-paragraph (14), the Commissioner must not serve a monetary penalty notice on a person in respect of an interception if any notice of intent in respect of that interception was served on the person more than 3 months earlier.

(14) The Commissioner may serve a monetary penalty notice on a person where the service of the notice would otherwise be prevented by virtue of sub-paragraph (13) if the Commissioner—

(a) considers it reasonable to do so, and

(b) includes the reasons for doing so in the monetary penalty notice.

(15) If the Commissioner decides not to serve a monetary penalty notice on a person as a result of any representations which have been made by the person in accordance with a notice of intent or sub-paragraph (6), the Commissioner must inform the person of that fact.

Variation or cancellation of notices

4.—(1) The Commissioner may, subject as follows, vary or cancel a monetary penalty notice.

(2) The Commissioner may not vary a monetary penalty notice in a way that is detrimental to the person on whom it was served (whether by increasing the amount of the monetary penalty, by reducing the period specified in the notice as the period within which the penalty must be paid, by imposing a new enforcement obligation or making an existing enforcement obligation effective earlier or otherwise more onerous, or otherwise).

(3) The Commissioner must—

(a) in the case of a variation which reduces the amount of a monetary penalty, repay any excess already paid in accordance with the notice, and

(b) in the case of a cancellation, repay any amount already paid in accordance with the notice.

(4) A variation or cancellation of a monetary penalty notice is effected by serving on the person on whom the monetary penalty notice was served a notice setting out the variation or cancellation.

(5) The Commissioner may not serve another monetary penalty notice on a person in respect of an interception if the Commissioner has cancelled a previous notice served on the person in respect of the same interception.

(6) If the Commissioner refuses a request by a person to vary or cancel a monetary penalty notice which has been served on the person, the Commissioner must inform the person of that fact.

Appeals against notices

5.—(1) A person on whom a monetary penalty notice is served may appeal to the First-tier Tribunal against—

(a) the monetary penalty notice or any provision of it, or

(b) any refusal of a request by the person to issue a notice of variation or cancellation in relation to the monetary penalty notice.

(2) Where there is an appeal under sub-paragraph (1)(a) in relation to a monetary penalty notice or any provision of it, any requirement in the notice or (as the case may be) provision concerned which does not relate to the imposition of an enforcement obligation need not be complied with until the appeal is withdrawn or finally determined.

(3) Sub-paragraphs (4) to (6) apply in relation to an appeal under sub-paragraph (1)(a).