

**EXPLANATORY MEMORANDUM TO  
THE RAILWAY SAFETY LEVY REGULATIONS 2006**

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

**2. Description**

2.1 These regulations place an obligation on providers of railway services to pay a levy to the Office of Rail Regulation (ORR) for the purpose of meeting the cost of the ORR's policy making and enforcement activities in relation to railway safety. These regulations are laid in draft and must be approved by a resolution of each House of Parliament before they are made.

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

3.1 None.

**4. Legislative Background**

4.1 These regulations place an obligation on providers of railway services to pay a levy to the Office of Rail Regulation (ORR) for the purpose of meeting the cost of the ORR's policy making and enforcement activities in relation to railway safety. The regulations enable the ORR to determine certain matters in relation to the levy such as the total amount of the levy to be imposed and the criteria for assessing the proportion of the levy to be paid by a particular railway service provider. A draft of the ORR's annual determination is appended to this Memorandum.

4.2 Section 43A of the Health and Safety at Work Act 1974 (HSWA), by which these regulations are made, was inserted by the Railways and Transport Safety Act 2003 (s 105(1)). The section as originally enacted allowed the Secretary of State to make Regulations requiring persons who provide railway services to pay a railway safety levy to meet expenses incurred by activities related to railways undertaken by the Health & Safety Executive (HSE). Section 43A was amended by the Railways Act 2005 to confer like powers in respect of ORR.

4.3 Section 82(4) HSWA requires that, the first time that the power is exercised, a draft of the instrument must be laid before and approved by resolution of each House of Parliament before it is made. This is the first time that the power to make regulations under section 43A has been exercised.

4.4 During the passage of the Railways and Transport Safety Act 2003, assurances were given that the Health and Safety Commission/Executive would only recover via the safety levy the same proportion of costs as it did from its

existing direct charging regime (approximately 40% of its total rail safety costs). The policy context has changed with the integration of safety and economic regulation following the passage of the Railways Act 2005 and these Regulations allow ORR to recover the full costs of rail safety, not just those elements of work which were previously deemed chargeable. This reinforces the independence of the ORR as it will not be dependent on direct funding from central government.

## **5. Extent**

5.1 This instrument applies to Great Britain.

## **6. European Convention on Human Rights**

The Parliamentary Under Secretary of State, Derek Twigg, has made the following statement regarding Human Rights:

In my view the provisions of the Health and Safety Railways Safety Levy Regulations 2006 are compatible with the Convention rights.

## **7. Policy background**

- 7.1 The HSWA forms the broad regulatory framework for the regulation and enforcement of health and safety. Part 1 of HSWA sets out the general duties of employers to their employees (section 2), the general duties of employers and the self-employed to people other than employees (section 3) and the general duties of those who are in control of non-domestic premises (section 4). This currently applies to the railways by virtue of section 117 of the Railways Act 1993.
- 7.2 The Railways Act 2005 (the RA 2005) provides for the ORR to assume responsibility for functions relating to railway safety functions while removing responsibility for corresponding functions under the HSWA from the Health and Safety Commission (HSC). The safety provisions of the RA 2005 are set out at Section 2 and Schedule 3 and place a duty on the ORR to do things and make arrangements appropriate for the railway safety purposes, to carry out research and provide or arrange training and information in connection with those purposes. The ORR also has powers to investigate and make a report into a matter relating to the railway safety purposes and to enter into arrangements with other public authorities for the discharge of safety functions.
- 7.3 The definition of “railway safety purposes” is set out in section 1 of Schedule 3 RA 2005. The ORR exercises its functions in relation to these purposes only so far as they relate to risks that are exclusively or primarily relevant to one or more of the following –
- securing the proper construction and safe operation of a railway, tramway or other transport system using any other mode of guided transport (other than a guided bus system);
  - securing the proper construction and safe operation of locomotives, rolling stock and other vehicles used or to be used on those systems; and

- protecting workers and the public from personal injury and other risks arising from the construction and operation of such systems.

Secondary legislation will be made to amend the definition from 1 April 2006 so that responsibility for fairground equipment, trolley buses and guided buses does not pass to ORR.

- 7.4 Whilst the RA 2005 transfers the policy functions of the HSC to the ORR in relation to “railway safety purposes”, secondary legislation under the Health & Safety at Work etc Act 1974 is necessary to transfer responsibility from the HSE to the ORR for the enforcement of health and safety law in relation to railways (and also in relation to trams and certain other guided transport systems). Draft regulations prepared for this purpose (entitled the “Health & Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006”), were put out for public consultation on 8 November 2005. The railway safety levy can be used by the ORR to fund these enforcement activities as well as the policy functions transferred under the Railways Act 2005.
- 7.5 Currently HSE is partly funded by fees placed on the industry through the ‘Health and Safety (Fees) Regulations 2005’. However, the majority of its funding comes from Treasury via its parent department (Department for Work and Pensions). Section 43A was added to HSWA so that HSE could recover its costs in relation to railway safety activities. However, the rail review started shortly after the section was commenced, and making use of the power was put on hold pending the outcome of the review. The White Paper ‘The Future of Rail’ proposed that railway safety should transfer from HSE to ORR, which the RA 2005 and the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (currently in draft as described in paragraph 7.4) will enable.
- 7.6 Once railway safety has transferred to ORR, ORR will have two regulatory roles – economic regulator and safety regulator. ORR is an independent regulator and the costs incurred in performing its role as economic regulator are covered by way of a licence fee currently paid by Network Rail, and other licence holders, principally passenger and freight operating companies. In light of their new dual roles ORR have reviewed their funding arrangements and have proposed that the licence fee should be paid in full by Network Rail from April 2006 and other licence fee holders would no longer have to pay a fee. The intention here is that this will largely offset the increased cost of safety contributions via the new safety levy.
- 7.7 These Regulations give ORR the power to determine the total amount of levy, and the criteria for assessing the proportion of the levy that each railway service provider will pay. This will provide ORR an income stream which will fully fund its safety regulation role and reinforce its status as an independent regulator.
- 7.8 Consultation on these regulations was done in two parts. The first part of the consultation was carried out by ORR on the policy intentions. ORR’s consultation ran for a total of 8 weeks. DfT followed this by consulting on the

actual draft regulations for just under six weeks. Consultation on the policy intentions and the draft regulations therefore ran for approximately 14 weeks.

- 7.9 In the light of the consultations the proposals have been revised. The threshold mechanism has been amended so that railway service providers reporting a relevant turnover figure of between £1 million and £5 million will pay an annual flat rate fee of £1000, while those with a turnover of less than £1 million will remain exempt. This policy will be implemented by the ORR through its power to make determinations under the regulations and the template determination notice has been amended to reflect this change. In addition, representations were received suggesting that the requirement for an auditor's certificate could prove burdensome. As a result the conclusion was reached that those railway services providers with a reported relevant turnover of less than £10 million should be given the option of self-certification. The regulations have therefore been amended to reflect this.
- 7.10 A number of responses were received from the heritage sector. The principal issue was that assurances had been given during the passage of the Railways and Transport Safety Act 2003 concerning the continuation of the then existing exclusions from charging for low speed systems. As stated in paragraph 4.3 above the policy context has now changed and it has been determined that relevant turnover is the most appropriate proxy for risk. Nevertheless, with a payment threshold of £1 million, most heritage railways and tramways will not have to pay the levy and those that do have to pay are likely to fall within the £1 million to £5 million range of relevant turnover, incurring a flat rate fee of £1000.
- 7.11 Consideration was given to the comment from a number of respondents that there should be an appeal mechanism from decisions of ORR but it has been decided not to create such a specific mechanism as decisions of ORR would be capable of judicial review. Some respondents accepted the principle of a levy but suggested they would prefer a levy whereby those who created the greatest risk (and thus consumed most ORR resources) would pay more. This argument was put by those who perceived that their payments would increase from a turnover-based levy. ORR intends to review its policy on the levy arrangements (which it will deliver by making determinations under regulation 3(1) of the Regulations) in light of industry experience in approximately 2 years time.
- 7.12 ORR will produce guidance notes for the industry on the levy when sending out the request for details of turnover.

## **8. Impact**

- 8.1 A Regulatory Impact Assessment is attached to this memorandum
- 8.2 Overall there are expected to be benefits provided by these regulations for no increase in public sector costs.

## **9. Contact**

Alan Deighton at the Department for Transport Tel: 020 7944 6616 or e-mail: alan.deighton@dft.gsi.gov.uk can answer any queries regarding the instrument.

DRAFT

**DETERMINATION****Railway Safety Levy for the financial year beginning on 1 April 2006**

The Office of Rail Regulation, in the exercise of powers conferred on it by regulation 3 of the Railway Safety Levy Regulations 2006, determines as follows:

*Total amount of railway safety levy*

1. The total amount of railway safety levy payable by railway service providers for the financial year beginning on 1 April 2006 is [**£A**].

*Railway service providers' liability to pay levy*

2. Railway service providers whose relevant turnover for the financial year beginning on 1 April 2005 is:-
  - (a) less than £1,000,000 are not liable to pay levy.
  - (b) £1,000,000 or more, but is less than £5,000,000, are liable to pay the amount of levy specified in paragraph 3(1).
  - (c) £5,000,000 or more are liable to pay an amount of levy calculated in accordance with paragraph 3(2).

*Amount of levy payable*

3(1) For each railway service provider falling within paragraph 2(b) the amount of levy payable for the financial year is [**£B**].

3(2) For each railway service provider falling within paragraph 2(c) the amount of levy payable [**£C**] is determined as follows.

The total levy payable by all railway service providers falling within paragraph 2(b) for the financial year beginning on 1 April 2006 [**£D**] is deducted from the total amount of railway safety levy specified in paragraph 1 [**£A**] to leave an amount of [**£A-D**].

That amount is apportioned between railway service providers falling within paragraph 2(c) in proportion to their relevant turnovers for the financial year beginning on 1 April 2006.

The total relevant turnover of all such railway service providers for the financial year beginning on 1 April 2006 is [**£E**]; each such railway service provider is therefore liable to pay an amount of levy [**£C**] which is equal to [**£A-D**] multiplied by the ratio of its relevant turnover to [**£E**].

*Date of Payment*

4. Railway service providers shall pay the levy to the Office of Rail Regulation so that it is received no later than [date] 2006.

*Interpretation*

5. Expressions used in this determination which are used in the Railway Safety Levy Regulations 2006 have the same meaning as in the Regulations.

[signed by]

[designation]

on behalf of ORR.

Date: [     ] 2006

# Regulatory Impact Assessment on Regulations to enable ORR to raise a levy under the Health and Safety at Work Act 1974

## 1. Title of Proposal

Railway Safety Levy Regulations 2006

## 2. Purpose and intended effect of measure

### *Objective*

2.1 The key objective is to ensure that the Office of Rail Regulation (ORR) are able to meet the cost of its policy making and enforcement activities in relation to railway safety in a manner which is fair and transparent.

### *Background*

2.2 The Health & Safety at Work etc Act 1974 (HSWA) forms the broad regulatory framework for the regulation and enforcement of health and safety. Part 1 of HSWA sets out the general duties of employers to their employees (section 2), the general duties of employers and the self-employed to people other than employees (section 3) and the general duties of those who are in control of non-domestic premises (section 4). This currently applies to the railways by virtue of section 117 of the Railways Act 1993.

2.3 The Railways Act 2005 (the RA 2005) provides for the transfer of railway safety functions under the HSWA from the Health and Safety Commission (HSC) to the ORR. The safety provisions of the RA 2005 are set out at Section 2 and Schedule 3. The purposes of (Part 1 of) the HSWA in relation to which the ORR will assume safety functions are termed the "railway safety purposes". 'Railway safety purposes' relates to risks that are exclusively or primarily relevant to one or more of the following –

- securing the proper construction and safe operation of the following transport systems: a railway, tramway, trolley vehicle system and other transport systems using any other mode of guided transport;
- securing the proper construction and safe operation of locomotives, rolling stock and other vehicles used or to be used on those systems; and
- protecting workers and the public from personal injury and other risks arising from the construction and operation of such systems.

2.4 Whilst the RA 2005 transfers the policy responsibility for railway safety purposes, secondary legislation will be made to enable the transfer for the enforcement of railway activities. The proposed Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 will make ORR the enforcing authority for railways and other guided transport systems and set out the boundaries between HSE, ORR and other enforcing authorities.

2.5 Currently HSE is partly funded by fees placed on the industry through the 'Health and Safety (Fees) Regulations 2005'. However, the majority of its funding comes from Treasury via its parent department (Department for Work and Pensions). Section 43A was added to HSWA so that HSE could recover its costs in relation to railway safety activities. However, the rail review started shortly after the section was commenced, and making use of the power was put on hold pending the outcome of the review. The White Paper 'The Future of Rail' proposed that railway safety should transfer from HSC/E to ORR, which the RA 2005 and the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 will enable.

2.6 ORR is an independent regulator and the costs incurred in performing its role as economic regulator are covered by way of a licence fee currently paid by Network Rail, and other licence holders, principally passenger and freight operating companies. In reviewing its options for future funding ORR have proposed that Network Rail pay 100% of the licence fee and other licence holders would no longer have to pay a fee.

### *Risk Assessment*

2.6 Once the responsibility for policy and enforcement in relation to railway safety has transferred to ORR, ORR will have two regulatory roles – economic regulator and safety regulator. ORR is an independent regulator and the costs incurred in performing its role as economic regulator are covered by way of a licence fee currently paid by Network Rail, and other licence holders, principally passenger and freight operating companies. However, it is anticipated that the licence fee will be paid in full by Network Rail from April 2006 and other licence fee holders would no longer have to pay a fee.

2.7 ORR receives no financial support from the Exchequer at present. Continuation of direct funding of some safety regulation costs would therefore change the basis of ORR's funding and could be seen as inconsistent with its position as the independent regulator for the rail industry. In addition, opportunities which currently exist within HSE, as a much larger organisation, to prioritise between different health and safety activities would not be open to ORR as a 'single industry' safety regulator.

## **3. Options**

3.1 Option A – Retain the status Quo. Costs recovered via invoicing of direct charges (on the basis of time spent) and balance funded by direct funding.

3.2 Option B – use relevant turnover data for all companies benefiting from Rail Safety work.

## **4. Costs and Benefits**

4.1 It is anticipated that the introduction of a levy based on turnover will not change Government funding support from the status quo, or change public funding

levels in any respect. Also, there are not expected to be any monetary costs of the new regulation to private businesses as a whole compared to the status quo. This is because proposed increased charges on economic licence fees accruing to Network Rail are likely to be met by increased DfT funding.

4.2 The benefits of a levy based on turnover are a reduction in bureaucracy and uncertainty. The status quo of charging for safety work based on time recording is costly to administer and creates uncertainty for businesses operating in the rail industry. A levy will avoid the costly time recording activities and allow businesses to predict the level of their charge with reasonable certainty.

4.3 Overall, there are expected to be benefits provided by this proposal for no increase in public sector costs.

4.4 The table below provides a high level analysis of the impact of ORR's funding proposals for both economic and safety roles. The analysis uses indicative ORR costs for future years and the assumptions used for industry turnover are stated below. As the table shows, Network Rail will see a £10.0 million increase in total charges and London Underground an increase of £1.3 million. The Treasury's contribution will be reduced by £10.0 million but it is expected that this will be routed back to the relevant DfT budgets so that public financial support for rail services and their regulation is unchanged.

Table 1 – Charges and direct funding for railway safety activities

	<b>NR</b>	<b>TOCs</b>	<b>LUL</b>	<b>Other</b>	<b>Treasury</b>	<b>Total</b>
	<b>£ Million</b>	<b>£ Million</b>	<b>£ Million</b>	<b>£ Million</b>	<b>£ Million</b>	<b>£ Million</b>
<b>Status Quo – Licence Fees as per current methodology; specific charges for safety work and direct funding from Treasury</b>						
ORR	8.0	8.0	0.0	0.0	0.0	16.0
Safety	4.1	1.5	0.7	0.7	10.0	17.0
<b>Total</b>	<b>12.1</b>	<b>9.5</b>	<b>0.7</b>	<b>0.7</b>	<b>10.0</b>	<b>33.0</b>
<b>Proposal – Economic Licence Fee (100% NR); Safety Levy (by turnover – see note) – no direct funding</b>						
ORR	16.0	0.0	0.0	0.0	0.0	16.0
Safety	5.9	8.6	2.0	0.5	0.0	17.0
<b>Total</b>	<b>21.9</b>	<b>8.6</b>	<b>2.0</b>	<b>0.5</b>	<b>0.0</b>	<b>33.0</b>

**Note – Assumption on Turnover**

	£,000	Calculated %
TOC/FOC Turnover	8,030,000	50%
NR Turnover	5,500,000	35%
LUL Turnover	1,870,000	12%
Other Turnover	500,000	3%
<b>Total Turnover</b>	<b>15,900,000</b>	

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TOC/FOC Turnover	Based on FY 2003/04 turnover data submitted for licence fee calculation – including grants; plus 10% growth
NR Turnover	Turnover based on average forecast income for 2006-09 in NR Business Plan 2005 – including grants
LUL Turnover	Turnover based on summarised annual accounts for 2002/03 – includes grants; plus 10% growth
Other Turnover	Estimated

5.2 The turnover data for “Other” used for the analysis is an estimate. However, the results are not materially affected by plausible changes in this assumption.

5.3 Assuming that all other variables remain unchanged almost all the TOCs/FOCs will see their total charges for safety and economic regulation remain the same or reduce from their current levels. The only exceptions will be those companies that currently pay the international licence fee. Based on the assumptions used in this analysis, organisations can calculate their prospective charge by multiplying their relevant turnover by 0.107%.

## **6. Issues of Equity and Fairness**

6.1 There are no implications in relation racial equality.

## **7. Consultation with Small Business**

7.1 The proposed regulations will not unfairly affect small businesses. ORR will determine the proportion of levy to be paid by each railway service provider based on relevant turnover and only those railway service providers with an income of over £1m will be liable to pay the levy.

## **8. Competition Assessment**

8.1 The proposed regulations will have little or no effect on competition or market structure.

8.2 There are two relevant markets: the transportation of passengers and the transportation of goods. Substitutes for rail (principally road transport) are available in both markets, although there is a greater degree of price elasticity in the passenger market. Mainline rail passenger services are provided principally under franchise arrangements in many cases supported by government grants. Some open access operators provide competing services on certain routes without subsidy. Network Rail, as the national infrastructure operator, is a regulated monopoly. Rail freight services are provided by a small number of companies operating on a commercial basis.

8.3 The regulations will apply to both established operators and to new entrants. They replace existing and burdensome methods of funding safety functions (including

direct invoicing) with a simpler and more streamlined process, with the amount payable by each contributor based upon turnover on relevant activities. A turnover threshold is proposed so that the levy will not apply to the smallest operators and those start-up operations with a reported turnover below the threshold.

8.4 Most of the companies affected by the regulation will see a small reduction in costs in relation to their turnover. Network Rail's costs are estimated to increase by around £10.0m under the new charges. However, HM Treasury provide £10m funding a year at present and it is expected that this will be routed back to the relevant DfT budgets so that public financial support for rail services and their regulation is unchanged.

## **9. Enforcement and Sanctions**

9.1 In the event that a railway service provider has been served with a notice to pay railway safety levy in accordance with the regulations, the ORR is empowered to recover any amount of railway safety levy outstanding after the due date for payment. The ORR is empowered to recover the amount as a civil debt in the same way as other businesses and individuals can recover outstanding debts.

## **10. Monitoring and Review**

10.1 ORR will monitor the relevance of a levy based on turnover and review the effectiveness of the levy and licence fee arrangements in two years time.

## **11. Consultation**

11.1 The proposals have been developed closely with HSE and ORR. Formal consultation was in two parts. ORR consulted for 8 weeks on the policy intention and then DfT consulted specifically on the draft regulations for just under six weeks, giving nearly 14 weeks of consultation in total. DfT circulated the draft regulations to around 500 organisations in the railway industry. 36 responses were received, not all of which were on the draft regulations. Some respondents raised points or questions about the determination which ORR will make or asked questions about how the levy would apply to them.

11.2 Responses from the mainline railway welcomed the move to a levy. Some respondents, whilst accepting the levy, queried whether ORR was right to base the levy on turnover (this was an issue covered in ORR's own consultation). Some suggested that those who import the highest risk to the network should pay the most towards safety regulation, although there was an acceptance that reaching agreement on an acceptable measure. Some respondents wanted an appeal mechanism from decisions of ORR. The heritage sector was opposed to a levy, which they perceived as increasing their costs and requiring information which they could not easily provide.

11.3 In response to the consultation the regulations have been amended so that those operators with turnover less than £10m will be given the option of self-certification on turnover rather than being required to provide an auditor's certificate. ORR decided that those operators with a turnover between £1m and £5m will pay a flat rate of £1,000, with those with turnover below £1m remaining exempt. The effect

of the £1m turnover limit is to exclude the bulk of heritage operators from the levy. ORR will review the levy arrangements in about two years time in the light of experience. Consideration was given to creating a specific appeal mechanism against decisions of ORR but on balance, as ORR decisions would anyway be subject to judicial review, this was not taken forward.

**12. Summary and Recommendations**

12.1 It is recommended to move away from invoicing on the basis of direct charges for the following reasons:

- this system carries an increased risk of funding shortfall (see paragraph 8 above)
- the direct charging regime does not cover all the safety work done and can be perceived as somewhat arbitrary;
- there is a danger of perverse incentives (both internally, as inspectors may prioritise fee earning work, and externally, as operators may seek to avoid chargeable activities);
- direct charging tends to discourage industry “ownership” of the safety process;
- the existing system is complex and potentially expensive to administer.

**13. Declaration**

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

**Signed .....Derek Twigg.....**

**Date 16th February 2006.**

**Minister’s name, title, department**

**Contact point**

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