This draft guidance relates to the draft Aviation Security Act 1982 (Civil Penalties) Regulations, laid before Parliament on 2 March 2015. The guidance has no effect until such a time as these Regulations come into force, subject to their approval by Parliament. The guidance will be issued upon the Regulations coming into force and kept under review and updated as necessary.

CIVIL SANCTIONS
FOR FAILURE TO COMPLY WITH A REQUEST FOR INFORMATION OR A DIRECTION UNDER THE AVIATION SECURITY ACT 1982

THE AVIATION SECURITY ACT 1982 (CIVIL PENALTIES) REGULATIONS 2015

GUIDANCE ON DETERMINING WHEN AND AT WHAT LEVEL A CIVIL (FINANCIAL) PENALTY MAY BE IMPOSED

Introduction

1. Aviation remains an iconic target for terrorism and the threat to it from certain terrorist groups continues to evolve. In that context it is crucial that the first line of defence against attacks on aviation – our aviation security regime – is robust, up to date and enforced. The UK already has some of the strongest aviation security arrangements in the world at our own airports. Given the threat to aviation, we need to be able to ensure that levels of security applied to inbound flights to the UK are also appropriate to the threat and risk involved at any particular time.

2. We already work closely with foreign governments and airlines, as well as UK operators, to make sure that necessary security measures are in place and being implemented effectively, and will continue to do so. To support this, we have also recently enhanced the legal powers available to Government, through provisions in the Counter Terrorism and Security Act 2015.

3. Those provisions amend existing transport security legislation (in particular the Aviation Security Act 1982) in order to strengthen and clarify the powers under which the Secretary of State for Transport may require that certain security measures are implemented before a carrier may operate into the UK. Specifically the Act has expanded the current power of direction relating to security searches that must be undertaken by aircraft operators or airports. It has provided that particular security searches of persons, property or aircraft may be required, in accordance with directions made by the Secretary of State, in order to be able to operate into the UK. It has also removed the 7-day notice period for notices requiring airlines to submit information to the Secretary of State or the Civil Aviation Authority, to enable such information to be supplied at short notice.

4. In order to improve the ability of the Secretary of State to enforce these powers, the Act also introduced a power to create a civil penalty scheme through regulations. Civil penalties are available as an alternative to existing criminal sanctions and other powers. Those regulations (known as the Aviation Security Act 1982 (Civil Penalties) Regulations 2015) [have since been made and set out the legal basis of the civil penalty scheme].

5. This guidance is non-statutory and does not bind the Secretary of State. It is intended, however, to help both those who are subject to the regulations – air carriers operating into the UK – and decision-makers in Government, by indicating in advance the factors that it is envisaged may be taken into consideration when deciding whether or not to impose a civil penalty, and when determining at what level to impose such a penalty. The guidance will be kept under continuous review and updated as necessary.

Civil Penalty Scheme

6. The Aviation Security Act 1982 (Civil Penalties) Regulations 2015 (hereafter "the Regulations") create a civil penalty scheme which enables civil sanctions to be imposed in the following circumstances:

    a. A failure to comply with a request for information made under section 11 of the Aviation Security Act 1982;

    b. Making a reckless or false statement when providing information required by a notice under section 11 of the Aviation Security Act 1982; and/or

    c. Failure to comply with a direction under any of sections 12-14 of the Aviation Security Act 1982;

    where those information requests or directions related to flights inbound into UK airspace.

7. Under the Regulations, the Secretary of State has the power to impose a penalty, up to a maximum of £50,000, if he is satisfied, on the balance of probabilities, that an air carrier has failed to comply with a relevant direction or request for information, or has – in responding to a request for information – knowingly made a reckless or false statement. In the context of these civil penalties, compliance with a direction is subject to a defence of "reasonable excuse", a defence which the carrier in question would be able to make when responding with a notice of objection to the original penalty notice or, ultimately, through appeal to the courts. No such defence exists for providing reckless or false information. The Secretary of State may not pursue civil sanctions if criminal proceedings have begun in respect of the same failure.

8. In the guidance that follows, the circumstances set out in paragraphs 6.a. and 6.c. are taken together as 'failure to comply' offences, the guidance on these offences begins at paragraph 9. Separate guidance is provided on making reckless or false statements (6.b.), this begins at paragraph 14. Paragraphs 16-19 summarise the process by which a carrier would be notified of and may respond to, a penalty notice.

Deciding to pursue civil sanctions in the case of failure to comply

9. The Secretary of State may decide to impose a civil penalty whenever, on the balance of probabilities, he or she considers that a carrier has failed to comply with a relevant direction or request for information, and, in the case of a direction, had no reasonable excuse for doing so.

10. Rather than impose a civil penalty straight away, the Secretary of State may first decide to issue a warning letter. Situations where the Secretary of State may decide it is appropriate to issue a warning letter could, for example, include where:

    a. **It is the first occasion on which the carrier has failed to comply with a particular direction or request for information; and/or**

    b. **There is reason to believe a warning letter may increase the likelihood of future compliance; and/or**

    c. **The carrier has a record of co-operation with the Department for Transport ("DfT") on aviation security matters.**

11. Whether or not these circumstances apply, the Secretary of State may nonetheless consider it appropriate to move straight to impose a civil penalty.

<u>Factors that may be taken into consideration when deciding whether or not to impose a civil penalty, and the level of the penalty.</u>

12. Each case will be considered on a case-by-case basis by the Secretary of State. Where the Secretary of State decides to impose a civil penalty, that penalty may be levied at any value up to a maximum of £50,000 for each instance of failure. There is no set scale by which the different failures (described in paragraph 6 above) will attract different levels of penalty.

13. In reaching the decision to impose a civil penalty, and in determining the level of the penalty, the Secretary of State may take into consideration relevant factors including for example:

    a. **Whether or not a previous warning letter has been issued;**
    If a warning letter, as envisaged above, has been issued to the carrier previously and compliance has not improved, the Secretary of State may consider this a material factor in deciding to impose a civil penalty.

    b. **Whether or not the carrier has taken such reasonable steps as are necessary to comply with the request for information or direction;**
    The Secretary of State may take into consideration reasonable efforts the carrier has taken to comply, for example if the carrier has initiated the necessary procurement or recruitment processes to obtain relevant equipment or resources, or if the carrier has voluntarily and at an early stage alerted the DfT to specific local conditions which have a bearing on implementation.

    c. **The state of compliance at the time the penalty is considered;**
    Where compliance has been achieved but not within a required timeframe, the fact that it has been achieved may be taken into account as a mitigating factor in determining whether or not to impose a civil penalty and at what level. The reasons for delay in compliance, and any assurances that may have been received about future compliance, will also be a factor in determining whether a penalty should be imposed and at what level.

    d. **The number of times the carrier has not complied with directions or requests for information;**

The Secretary of State may take into account previous failures to comply with directions or requests for information within the preceding three year period, whether or not these resulted in penalties being imposed. Where a carrier has received a penalty or warning letter within three the last three years, those penalties or warnings will be taken into account.

e. **The carrier's general history of co-operation with the DfT on aviation security matters**
If the carrier in question has a record of co-operation with the DfT on aviation security matters and there is reason to believe that the failure was an anomaly, the Secretary of State may also take this into consideration when deciding whether or not to impose a civil penalty and at what level.

f. **The seriousness and extent of the failure to comply**
If the nature of the failure to comply is extensive or likely to have resulted in, or failed to address, a serious risk to aviation security, the Secretary of State may consider this a material factor in deciding to impose a civil penalty and at what level.

And specifically when considering the level of the penalty:

g. **Whether there is evidence of deliberate wrong doing by the carrier.**
The Secretary of State may take into consideration any evidence to suggest there has been a deliberate attempt to avoid compliance or to hide the fact of a failure to comply with a request or direction. In such cases the Secretary of State may decide to impose the maximum penalty.

Deciding to pursue civil sanctions and determining the level of penalty in the case of making a reckless or false statement.

14. Where the Secretary of State has, on the balance of probabilities, reached the view that a carrier has intentionally made a reckless or false statement in responding to a request for information, he may also under the Regulations seek to impose a civil penalty. In deciding whether or not to do so, and in determining the level of civil penalty, the Secretary of State may take into account relevant factors including:

a. **The material effect of the false statement;**
When considering whether to impose a penalty and at what level, the Secretary of State may take into consideration the material effect that provision of false information had on the security measures in place and/or the Department for Transport's ability to scrutinise and ensure the implementation of those measures. Where, in the Secretary of State's view, such a false statement has sought to obscure a failure to comply with a direction, with consequences for the protective security of the UK, he is likely to impose the maximum penalty.

b. **The number of times the carrier has not complied with directions or notices requiring information;**
When considering the level of penalty, the Secretary of State may take into account previous failures to comply with directions or notices requiring information within the preceding three year period, whether or not these resulted in penalties being imposed. Where a carrier has received a penalty or warning

letter within the last three years, those penalties or warnings will be taken into account.

Process for issuing and responding to a penalty notice

15. The Regulations (Regulations 6-8) describe the detailed process by which a carrier must be notified of, and respond to, a decision to impose a penalty. This process is summarised here for ease of reference.

16. A penalty notice must be issued in writing by the Secretary of State, and any such notification will state the Secretary of State's reasons for reaching his or her decision, the penalty amount, and the date on which it has been imposed. The notification will also specify the date before which payment must be made (which must be at least 28 days after the date the penalty is imposed). The notification will also need to specify how any penalty must be paid (including how any unpaid penalty may be recovered) and the steps that a carrier must take if it wishes to object.

17. If a carrier has received a penalty notification and wishes to object, a notice of objection must be made in writing and include the reasons for the objection. It will need to be given within 28 days from the date the original penalty was notified and be given in the manner and form which the Secretary of State had specified in the original notification.

18. Thereafter, the Secretary of State would respond in writing, within 70 days from receipt of, and having considered, the notice of objection. At this point, if the recipient was still minded to object to the penalty notice, it would be able to appeal to the courts, under the provisions of Regulation 7.