



Department  
for Transport



HM Treasury

# Statutory Guidance to the Highways Monitor and Office of Rail Regulation

## Legislative Basis

1. This guidance is issued to the Monitor under section 13 of the Infrastructure Act. Under section 13(1), the Secretary of State may give the Monitor guidance as to the manner in which it is to carry out its activities. Section 13(2) requires the Secretary of State and the Treasury, acting jointly, to give the Monitor guidance as to the circumstances in which the payment of a fine should be required. The guidance given to the Monitor in paragraphs 19 to 24 below is given jointly by the Secretary of State and the Treasury under that section. In accordance with section 13(3) of the Infrastructure Act the Monitor must have regard to this guidance.
2. The Secretary of State may from time to time choose to issue additional guidance to the Monitor. This document is intended to give guidance as to the Secretary of State's preferred strategic direction for the Monitor.

## Introduction

3. The Infrastructure Act 2015 ("the Infrastructure Act") has enabled the transformation of the Highways Agency into Highways England, a government-owned Strategic Highways Company ("the Company"), able to operate more flexibly and efficiently and develop into a world-leading road operator. The provisions also empower the Highways Monitor (the Monitor), part of the Office of Rail Regulation, to monitor the performance and efficiency of the company and to take action to drive improvements in the company's performance through enforcement action where necessary.
4. The Office of Rail Regulation has a history of monitoring the performance and efficiency of the rail industry and, when necessary, of proportionate enforcement, based on independent and objective review of evidence. This regime has been built on constructive relationships, expert scrutiny and challenge, and application of a staged approach to escalation of issues and potential enforcement. The Secretary of State is confident that these positive principles and working relationships can be replicated in its new responsibilities in the road sector.

5. The Company is required to act within the provisions of its statutory directions and have regard to guidance issued to it by the Secretary of State at all times, and is given a specific set of deliverables in the form of the Roads Investment Strategy (RIS). The provisions in the Infrastructure Act give the Monitor the power to take enforcement action as a means of driving performance when it is satisfied that the Company has contravened or is contravening its duties to comply with the RIS or statutory directions or its duties to have regard to guidance. In this situation the Monitor may, if it deems it appropriate, choose to give notice to the Company as to the contravention and the steps the Company must take in order to remedy it or require the company to pay a fine to the Secretary of State, who will ensure this is paid to the Consolidated Fund.
6. The Infrastructure Act also grants the Monitor the power to direct the Company to provide such information as the Monitor considers necessary to carrying out its activities. This power exists to ensure that the Monitor has access to all of the information required to hold the Company to account.

### **Reporting and Publication of Documents**

7. Under section 10 of the Infrastructure Act, the Monitor's activities may include publishing reports on whether, how and at what cost the Company has achieved its objectives under a RIS. The Secretary of State expects the Monitor to contribute to this process by publishing:
  - a. an annual report;
  - b. any reports requested by the Secretary of State on directions or guidance issued to the Company under section 6 of the Infrastructure Act 2015.
8. Under section 10(8) of the Infrastructure Act, the Secretary of State must lay any report published by the Monitor under section 10 before Parliament. To assist the Secretary of State in fulfilling his duty under section 10(8), the Monitor should notify the Secretary of State whenever it publishes a report in connection with its activities.
9. More generally, the Monitor is expected to act transparently and openly. From time to time, in addition to the publications listed above, it may wish to make other documents publically available.

### **Delineation of Responsibilities**

10. In addition to the Monitor's enforcement powers, the Secretary of State remains the sole shareholder of the Company. The Monitor's enforcement powers do not affect the Secretary of State's right to set the strategic direction of the Company in his or her role as shareholder or take action under wider legislative powers. The Secretary of State's shareholder powers are expected to be used to address issues with the strategic direction of the Company, and to issue directions when and where the delivery of the strategy requires calibration or alteration. The Monitor is expected to use its powers to address contraventions or failures against the RIS or the Company's statutory directions and guidance. As a consequence it is expected that the Secretary of State and the Monitor will separately review different aspects of the Company's performance, though the functions must be coherent and mutually, as necessary, co-ordinated.

11. In order to avoid duplication, the Monitor should not therefore have primary responsibility for monitoring all aspects of the Company's performance with respect to the contents of the Company's statutory directions and guidance. Where the conditions or guidance do not relate to the day-to-day operations of the Company, any monitoring is generally expected to be on a by-exception basis, with the Monitor investigating issues where other stakeholders or the Secretary of State have raised concerns with the conduct of the Company. In some cases, where mutually agreed between the Monitor and the Secretary of State, it may be appropriate under normal circumstances for the Monitor to monitor compliance with a specific provision by assessment by the Secretary of State, or by a third party agreed between the Monitor and the Secretary of State (such as the Health and Safety Executive). The Secretary of State and the Monitor will agree and periodically review any such delineation of responsibilities.
12. In monitoring situations described in section 10 of the Infrastructure Act, any assessment of the Secretary of State or third parties are without prejudice to the Monitor's ability to take enforcement action.
13. As stated, the Secretary of State will have a number of additional powers, as shareholder of the Company. If a failure to deliver or breach of duty by the Company is so great that it constitutes a loss of confidence in the ability of the Company to fulfil its legal duties or other obligations, above and beyond more routine directions issued by the Secretary of State, this may result in exceptional directions from the Secretary of State or, in extreme circumstances, revocation by the Secretary of State of the appointment of either Company board members or the Company's status as a strategic highways company.
14. Where the Secretary of State intends to take enforcement action against the Company for reasons that may relate to potential contraventions of the statutory directions and guidance or performance against the RIS, the Secretary of State will co-ordinate and agree the application of any enforcement action against the Company with the Monitor.
15. When considering a specific contravention, the Secretary of State would expect the Monitor to consider whether other bodies have already taken enforcement action against the Company or intend to do so before taking enforcement action.

#### **Data Exchange Principles**

16. The purpose of data reporting is to ensure that the Monitor is able to provide timely and well-evidenced advice to the Secretary of State and the public about the performance and efficiency of the Company.
17. In exercising its legal right to require the Company to provide such information, the Secretary of State expects the Monitor to ensure that these requests respect the Relationships principles described below [Point 27]. Data requests should be discussed and mutually agreed wherever possible
18. The Monitor should seek to deliver its activities in a way which limits the burden on the Company (for example, where possible requesting data in commonly used formats), whilst acting in line with its duties under the Infrastructure Act; for example, it should impose

additional reporting requirements only where necessary and provide the company with reasonable notice of any requirements. To minimise the reporting burden on the Company, the Secretary of State expects the Monitor to, as far as possible, only request data, commentary and analysis which already exists for other purposes within the Company. Any requests for new data series should be kept to a minimum and should only be made when existing sources have been exhausted and there is a clear need for the information to allow the Monitor to carry out its activities.

## Enforcement

19. The Monitor may at any time decide that, based on the evidence available to it or advice from Transport Focus or the Secretary of State, the Company is not fulfilling the conditions of its statutory directions, having regard to guidance or meeting the requirements of the RIS. If this is the case, the Monitor may determine enforcement action to be appropriate, and will not need to secure the approval of the Secretary of State before taking enforcement action. However, the Secretary of State would expect to be kept informed of any plans to take action.
20. When taking enforcement action, the Monitor should take into account the manner in which the cause of the contravention became apparent. The Company's statutory directions and guidance states that it must ensure the Monitor is made aware of any issues likely to lead to a potential contravention of its statutory directions and guidance at the earliest opportunity, and of action being taken to address the possibility. The Secretary of State will also expect the company to keep the Monitor informed at the earliest opportunity where there is a reasonable risk that the requirements of the RIS will not be met.
21. The enforcement actions available to the Monitor include:
  - a. Informal enforcement action, including publication of reports covered by the provisions of section 10(2) of the Infrastructure Act 2015;
  - b. Issuing improvement notices under section 11 of the Infrastructure Act 2015;
  - c. Levying fines<sup>1</sup> under section 11 of the Infrastructure Act 2015
  - d. Working with the Secretary of State to recommend action under other legal regimes; or,
  - e. Any combination of the above.
22. The nature and severity of any enforcement action should depend on what is proportionate and appropriate, as determined by the Monitor. Whilst individual enforcement actions should be determined on a case-by-case basis, regular or repeated infractions may warrant more serious actions or greater penalties and individual serious contraventions may warrant a fine without any previous actions.

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<sup>1</sup> Where the Monitor determines it necessary to issue a fine, it is for the Monitor to determine what an appropriate level for that fine is, ensuring the level of fine is proportional to the contravention. It is expected that the Monitor would keep the Secretary of State informed of any plan to issue a fine and this should include details on the scale of the fine to be issued. The Monitor should also inform the Secretary of State where it considers the fine likely to risk the delivery of the RIS or the Company's strategic duties and obligations.

23. The Monitor should publish its own policy on enforcement, setting out the different types of enforcement activity that it can undertake, and how these will be applied on a consistent and proportionate basis. This policy will take into account this guidance and any other guidance issued under section 13 of the Infrastructure Act. When considering enforcement action, the Monitor should have regard to any statement of its policy published at the time when a contravention occurred.
24. The Monitor's published enforcement policy should make it clear how it intends to notify the Company of any intent to take enforcement action, what action is being taken and the grounds on which action is being taken. It should specify how the Company can provide any evidence in defence of its own actions or indicate steps being taken to rectify the cause of the contravention. All notification notices, final decision letters and formal responses from the Company should be made public by the Monitor.

### **Relationships**

25. The Secretary of State expects all parties in the Roads Reform model to work together to build constructive working relationships, based on the principles of cooperation and communication.
26. The Monitor, in carrying out its activities, should seek to build relationships that are:
  - a. Positive, seeking to work together to improve the management of the network and avoiding an adversarial atmosphere.
  - b. Open and communicative, providing all parties with the information needed to understand the positions of the other parties and to undertake their respective roles.
  - c. Respectful, particularly in relation to the roles and capabilities of the respective organisations.
  - d. Aligned on the promotion of value for public money and efficient operations.
  - e. Collaborative and constructive, especially when issues arise between any of the parties.
27. These principles are elaborated on in the Secretary of State's Memorandum of Understanding with the Monitor.
28. The Secretary of State expects the Monitor to agree the basis of its working relations with the Company.
29. The Secretary of State is confident that if these principles are upheld, the Monitor, Company and Department can collectively develop a productive and effective roads monitoring regime.

**For the Department for Transport**

..... **Date** .....

**John Hayes, MP**  
**Minister of State**

**For HM Treasury**

..... **Date** .....

**Danny Alexander, MP**  
**Chief Secretary to the Treasury**