EXPLANATORY MEMORANDUM TO

THE ENERGY EFFICIENCY (PRIVATE RENTED PROPERTY) (ENGLAND AND WALES) REGULATIONS 2015

2015 No. 0000

and

THE ENERGY EFFICIENCY (DOMESTIC PRIVATE RENTED PROPERTY) ORDER 2015

2015 No. 0000

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

2.1 The Energy Efficiency (Private Rented Property) (England and Wales) Regulations (the "PR Regulations") introduce measures to improve the energy efficiency of private rented property in England and Wales.

2.2 They enable the tenant of a domestic private rented property ("domestic PR property") to request their landlord's consent to the tenant making energy efficiency improvements to the property, and place a duty on the landlord, and any superior landlord, not to unreasonably refuse consent to the improvements being made, prescribing exemptions as to when such consent will not be considered to be unreasonably withheld (the "tenants' energy efficiency improvements" provisions.) They also prescribe a minimum level of energy efficiency, defined with reference to the Energy Performance Certificate EPC ("the minimum level of energy efficiency"), for domestic PR properties and non-domestic private rented properties and provide that, subject to exemptions, a landlord may not: grant a new tenancy or renew an existing tenancy of a private rented property after 1st April 2018, continue to let a domestic PR property after 1st April 2020, or continue to let a non-domestic private rented property after 1st April 2023, where its energy performance falls below the minimum level of energy efficiency.

2.3 The Energy Efficiency (Domestic Private Rented Property) Order 2015 ("the PR Order") prescribes additional tenancy types, so that properties let on those tenancies types are domestic PR properties for the purposes of the PR Regulations.

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

3.1 None.

4. Legislative Context

4.1 The PR Regulations and the PR Order are the first instruments to be made using the powers conferred by Chapter 2 of the Energy Act 2011 ("the Act"). At the time of laying the PR Regulations and the PR Order, Chapter 2 of the Act will not have come into force but the Secretary of State will make a Commencement Order bringing into force the relevant provisions of that Chapter before making either instrument.

The PR Regulations

4.2 Section 46 of the Act places a statutory duty on the Secretary of State to make regulations implementing the tenants' energy efficiency improvements provisions by 1st April 2016.

4.3 Part 2 of the PR Regulations contains the tenants' energy efficiency improvements provisions. It provides that the landlord of a domestic PR property must not unreasonably refuse a request from their tenant for consent to make energy efficiency improvements to the property. It sets out the process by which a request may be made and must be dealt with, in particular: the manner in which a tenant's request may be made; the circumstances in which a request may not be made; the manner in which a landlord, and where applicable a superior landlord, must respond to a request; the circumstances in which a landlord is not required to give consent to requested improvements; the circumstances in which a tenant's request ceases to be valid; and the tenant's right to apply to the First-tier Tribunal in the event of a dispute. Section 11 of the Tribunals, Courts and Enforcement Act 2007 (c.15) provides a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal.

4.4 Sections 43 and 49 of the Act place statutory duties on the Secretary of State to make regulations, which are in force by 1st April 2018, setting a minimum level of energy efficiency in relation to domestic PR property and non-domestic private rented property ("non-domestic PR property": that is, property which is let under a tenancy in England and Wales and is not a dwelling).

4.5 Part 3 of the PR Regulations prescribe the minimum level of energy efficiency, defined with reference to the Energy Performance Certificate (EPC). It provides that a landlord of a property which falls below an EPC rating of E may not let the property unless prescribed exemptions apply. It requires prescribed information regarding any exemption relied upon by a landlord to be provided to a register ("the PRS Exemptions Register") which will be established and maintained by the Secretary of State, and enable local authorities to monitor compliance with Part 3. A local authority is the enforcement authority for properties in their area and may serve a compliance notice seeking information from a landlord where they have reason to believe the landlord is in breach of Part 3. Part 3 prescribes the civil penalties which may be imposed by way of a penalty notice in the event of a breach of that Part. Penalties for breach of Part 3 are financial

penalties and a publication penalty, which entails the publication on the PRS Exemptions Register of certain information regarding the penalty imposed. A landlord served with a penalty notice has a right to request a review by the local authority and, where the review results in the confirmation of the penalty notice, a right of appeal to the First-tier Tribunal.

The PR Order

4.6 Domestic PR property is defined in the Act to mean property which is let on an assured or regulated tenancy. The PR Order is made under section 42(1)(a)(iii) of the Act which confers power on the Secretary of State to specify other tenancies which fall within the definition of domestic PR property. The PR Order specifies certain tenancies of agricultural dwellings as additional categories tenancy, so that properties which are let on those tenancies fall within the definition of domestic PR property for the purposes of the tenants' energy efficiency improvements provisions and the minimum level of energy efficiency provisions.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Edward Davey, Secretary of State at the Department of Energy and Climate Change, has made the following statement regarding Human Rights:

In my view the provisions of the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 and the Energy Efficiency (Domestic Private Rented Property) Order 2015 are compatible with the Convention rights.

7. Policy background

- **What is being done and why**

7.1 Under the Climate Change Act 2008, a system of legally binding carbon budgets has been established to set the trajectory towards the Government's target to reduce UK greenhouse gas emissions by at least 80% compared to the 1990 baseline by 2050. Buildings are a major source of the UK's carbon emissions; domestic buildings were responsible for 25% of the UK's total carbon emissions in 2009 and non-domestic buildings for 12% of emissions. The domestic private rented sector in England and Wales represents 18% of the housing stock with 4.2 million households. The non-domestic private rented sector has around 1.2 million hereditaments comprising 66% of the non-domestic stock (by value). Improvements to energy efficiency in domestic and non-domestic buildings offer substantial cost effective abatement opportunities which, if exploited, can make a significant contribution to making these reductions.

7.2 Various approaches have been tried in the past to improve the energy efficiency of domestic properties including in the private rented sector. These include voluntary approaches such as the Green Deal and the Energy Company Obligation (ECO), information services, tax breaks for landlords such as the Landlords Energy Savings Allowance and a range of voluntary accreditation schemes and subsidies for the installation of energy efficiency measures. However, the private rented sector has been relatively unresponsive to these approaches.

7.3 In the non-domestic private rented sector there are also a range of policies that to some degree cover the non-domestic private rented sector such as the Carbon Reduction Commitment (CRC) and Climate Change Agreements (CCAs). However, these policies do not cover the entire non-domestic building stock. There are currently no policies directly driving improvements in energy efficiency in the non-domestic private rented sector stock which may result in inaction amongst some of the most energy inefficient properties.

7.4 The PR Regulations are intended to help overcome market barriers in the private rented sector such as the split incentive problem, whereby the party who invests in the energy efficiency improvements (the landlord) is not the party that reaps the benefits in reduced energy bills (the tenant). The split incentive problem may be exacerbated in the domestic sector by high tenant turnover. Regulation is considered necessary to improve the energy efficiency of domestic and non-domestic privately rented properties, especially the very least energy efficient properties, rated F or G on their Energy Performance Certificate. This will help us to smooth seasonal peaks in energy demand and thereby increase our energy security, meet the UK's carbon targets and tackle fuel poverty. Improving the energy efficiency of properties should also increase the demand for energy efficiency measures, supporting economic growth and jobs in the green construction industry.

7.5 By making the PR Regulations ahead of their applying from 1st April 2016, and by phasing in the regulatory requirements over time, market participants will have sufficient time to fully consider, prepare and implement their response as required, thereby encouraging voluntary early action, reducing the cost of complying, and decreasing the need for enforcement.

8. Consultation outcome

8.1 To inform the development of the consultation proposals, the Department established two sector stakeholder working groups in February 2013, one for the domestic private rented sector, and one for the non-domestic private rented sector, which ran until Autumn 2013. These groups comprised a diverse array of bodies, and included leading landlord, tenant, environmental and property professional representative organisations. The groups were tasked with providing views and recommendations on the design of the policy and regulations. Further details on these groups, including their membership,

meeting minutes and summary recommendation reports, can be found on the gov.uk website[1].

8.2 The Department carried out a public consultation on the provisions in this instrument for six weeks, between 22nd July and 2nd September 2014, seeking views across England and Wales. Cabinet Office guidance states that the amount of time required for consultation depends on the nature and impact of the proposals, and might typically vary between two and 12 weeks. A six week public consultation on the provisions in this instrument was considered appropriate given the extensive engagement undertaken by the Department with key sector representative bodies, through the sector working groups, and direct engagement with interested parties. In order to ensure that interested parties had sufficient opportunity to provide views during the consultation period, the Department undertook a range of engagement activities, including webinars (allowing stakeholders to view presentations and ask questions remotely through an internet web link), social media posts, and presentations at stakeholder events, workshops and bilateral meetings.

8.3 There were 107 written responses received in relation to the consultation for the domestic private rented sector and 49 for the non-domestic sector. Responses were received from a broad spectrum of interested parties and were generally highly supportive of the provisions in this instrument.

8.4 On the basis of our analysis of responses to the consultation, the Department amended the proposed design of the policy in the following key ways:

- Simplified the process for a tenant making a request for consent to energy efficiency improvements. This was in response to consultee suggestions that the process set out in the consultation required tenants to obtain too much information before being able to make a request, and that some of this information was more likely to be known by the landlord.
- Included an exemption where evidenced expert advice is provided that a building would be damaged by the installation of wall insulation. This was in response to concerns expressed by some consultees that in some situations, insulating solid walled properties risked a negative impact on a property's fabric. Whilst the Department considers this unlikely, it has provided the exemption as a safeguard to ensure that such insulation is not required where it is inappropriate.
- For the non-domestic sector, included an additional exemption where landlords have installed those measures that cost the same or less than the amount of energy bill savings the improvements are expected to produce within a seven year period. The calculation for repayments will be indexed to the Bank of England Base Rate. There were very high levels of support from consultees for a simple route for landlords to demonstrate they had installed cost effective measures. Having

[1] https://www.gov.uk/government/publications/non-domestic-private-rented-sector-regulations-working-group-report-report-to-government and https://www.gov.uk/government/publications/domestic-private-rented-sector-regulations-working-group-report-report-to-government

assessed evidence and views obtained during the consultation, and undertaken internal analysis, the Department considers that a seven year simple payback achieves this objective.

- Included renewals of tenancies and leases in scope of the PR Regulations from 1st April 2018. There was strong support for including renewals of leases/tenancies as a trigger for applying the regulations, and the Department agrees that it was appropriate to apply the provisions when both landlord and tenant were coming together to agree the continuation of a tenancy through a renewal.
- Proposed a centrally managed PRS Exemptions Register, to which landlords wishing to claim an exemption from achieving the minimum standard will be required to register details of their exemption, and which will be used to support enforcement agents target their enforcement activity. There was strong feedback from stakeholders in favour of the Department's proposal to require that landlords seek a form of certification for any exemptions from achieving the required minimum standard. In order to minimise burdens on local authorities, and to provide landlords with a consistent process for lodging exemptions, the Department considers that such a function would be best fulfilled centrally, through an exemptions register.
- Provided an additional six months grace period from the date at which a property has become in breach, to demonstrate compliance in certain prescribed circumstances. Consultees had highlighted circumstances where a landlord has little or no ability to comply with the regulations before a tenancy/lease is granted, raising questions as to whether in these situations the regulations would deliver the desired outcome of improving the energy efficiency of such a property, and whether the regulations could introduce conflicting duties. The provision of a grace period in such situations avoids the potential for conflicting duties and ensures that landlords are provided with time to improve the property and comply with the regulations.
- For the non-domestic sector, included a penalty regime for non-compliance by referencing the building's rateable value, with a range of minimum and maximum penalty caps depending on the nature of the breach. There was broad support from consultees to the principle of linking penalties to a property's rateable value, and of those that expressed a view as to whether the regime should include minimum and maximum penalties, all agreed there should be.
- For the domestic sector, included a simplified flat rate penalty system, with a maximum penalty of £5,000. There were mixed views on the merits of linking domestic penalties to the rent received for non-compliant properties, as proposed in the consultation. Concern was expressed that such a mechanism risked complicating the process and messaging around non-compliance, and that a simpler flat rate penalty would be preferred.

8.5 Full details are set out in the Department's response to the domestic and non-domestic consultations, which will be published on the gov.uk website[2] the week commencing 2nd February 2015.

[2] https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-domestic and https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-non-domestic

9. Guidance

9.1 The Department will work with stakeholders to provide advice and support about meeting the obligations imposed by the PR Regulations. Any guidance documentation produced to assist the sector with regards to the PR Regulations will be reviewed over time.

10. Impact

10.1 The impact on business, charities or voluntary bodies is that some may face costs as landlords associated with the installation of energy efficiency measures. However landlords will only have to undertake improvements under the PR Regulations if there is Green Deal finance, ECO or other funding available to pay for them. Depending on the circumstances of the case, it is possible that a landlord business may incur a Green Deal assessment cost (where not provided free), a cost related to understanding the obligations imposed by the PR Regulations, some potential hidden costs relating to facilitation of installing improvements, and potential Green Deal credit repayments during void periods. However there are also potential benefits from the installation of energy efficiency measures, including having an improved property, lower bills or more comfortable properties for tenants. Tenants are classified as businesses for the non-domestic sector.

10.2 The impact on the public sector is twofold. In practice, a small number of non-domestic landlords and tenants will be public sector. However, it has not been possible to quantify what impact this may have and so the assumption has been made that all non-domestic tenants are businesses. In addition, local authorities will enforce Part 3 of the PR Regulations and there will be an impact relating to the carrying out of enforcement procedures. However, the Department has committed that any net burdens on local authorities relating to their role in enforcing these provisions will be funded.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the Government is committed to laying the Regulations as soon as possible to provide certainty to the industry and ensuring there are no net costs to landlords from the Regulations.

11.3 The basis for the final decision on what action to take to assist small business was an assessment of the business characteristics in the private rented sector and the number of business impacted by aspects of the Regulations and the scale of any impact. A conservative estimate is that all domestic landlords should be classified as small and

micro business as most landlords only own one property and so their exclusion would remove most if not all, of the intended benefits of the policy. However, landlords with small property portfolios will not be disproportionately burdened by the Regulations as many of the costs incurred are likely to be on a per-property basis. It has not been possible to estimate the number of small and micro businesses in the non-domestic private rented sector, as the data are not available, even though evidence was sought on this during the consultation process.

12. Monitoring & review

12.1 The Department will monitor the operation and impact of the Regulations. The instrument will be reviewed by the Secretary of State every five years.

13. Contact

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