EXPLANATORY MEMORANDUM TO

THE NON-DOMESTIC ALTERNATIVE FUEL PAYMENT APPLICATION SCHEME PASS-THROUGH REQUIREMENT REGULATIONS 2023

2023 No. 428

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Energy Security and Net Zero and is laid before Parliament by Command of His Majesty.

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

2. Purpose of the instrument

2.1 This instrument requires intermediaries, such as commercial landlords, to pass on benefits received as the result of an application for the Non-Domestic Alternative Fuel Payment (including an application for a top-up payment ('Top-Up Payment') for high users of kerosene heating oil) to end users, such as commercial tenants, who are the intended beneficiaries of the scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Committee reported S.I. 2023/188 for imposing an obligation on intermediaries to provide certain information to end users without a mechanism for enforcing it. The Department has duly considered the Committee's view but has decided not to amend its approach in this instrument. Section 19(10)(b) of the Energy Prices Act 2022 provides that pass-through regulations may require an intermediary who is in breach of requirements to provide information to pay a specified amount on application by the end user to a specified person. The Department decided that the incentive for end users to make such an application for payment would have been insufficient given the time and administrative burden involved in doing so. However it is still considered that there is merit in including notification requirements in the instrument. This is on the basis that many intermediaries would be likely to comply with the requirements notwithstanding the lack of an enforcement mechanism. This would be aided by the associated guidance being able to explain the requirements and that they are a legal obligation. Furthermore, it is considered important to ensure consistency across the pass-through regulations relating to the energy support schemes.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 Amanda Solloway, Parliamentary Under-Secretary of State for Energy Consumers and Affordability in the Department for Energy Security and Net Zero has made the following statement regarding Human Rights:

"In my view the provisions of the Non-Domestic Alternative Fuel Payment Application Scheme Pass-through Requirement Regulations 2023 are compatible with the Convention rights".

6. Legislative Context

6.1 Section 19 of the Energy Prices Act 2022 ("the Act") enables the Secretary of State to impose pass-through requirements on persons to whom energy price support is provided ("intermediaries") by regulations.

6.2 Previous instruments have used Section 19 to impose pass-through requirements for the delivery of energy support schemes, for instance, the Energy Bills Relief Scheme Pass-through Requirement (England and Wales and Scotland) Regulations 2022.

6.3 In particular, the Non-Domestic Alternative Fuel Payment Pass-Through Requirement and Amendment Regulations 2023 (S.I. 2023/188) imposed pass-through requirements on intermediaries receiving a £150 Non-Domestic Alternative Fuel Payment.

6.4 This instrument complements S.I. 2023/188, by establishing an equivalent pass-through requirement in cases where an intermediary has not received the £150 Non-Domestic Alternative Fuel Payment automatically but is eligible to proactively apply for a Non-Domestic Alternative Fuel Payment, and/or a Top-Up Payment for high users of kerosene heating oil.

7. Policy background

What is being done and why?

7.1 The Act provides statutory underpinning for, or enables the creation of, energy support schemes to help households, businesses and others with energy costs for winter 2022 and future periods. Failing to offer support could have resulted in financial turmoil for businesses and consumers, as energy bills would have increased much more significantly without intervention.

7.2 The purpose of section 19 of the Act (requirement to pass on energy price support to end users) is to enable the government to ensure that intermediaries who have received energy price support pass through the benefit obtained to end users (who are the intended beneficiaries of the relevant schemes). For example, the legislation will require commercial landlords to pass support to their tenants as appropriate.

7.3 The Non-Domestic Alternative Fuel Payment scheme provides a single payment of £150 to non-domestic users of alternative fuels in Great Britain and Northern Ireland. In addition, high users of kerosene heating oil may apply for an additional Top-Up Payment in keeping with the level of kerosene heating oil consumption at an eligible non-domestic premises.

7.4 S.I. 2023/188 established pass-through requirements with respect to £150 payments made automatically – without the requirement for an application to be submitted – to selected premises in Great Britain and Northern Ireland. In Great Britain, £150

payments are being made to non-domestic premises that are in an off-gas grid postcode, supplied with and using electricity. In Northern Ireland, £150 payments are being made to properties in both off- and on-gas grid postcodes meeting the same criteria.

7.5 This instrument will establish an equivalent pass-through requirement in cases where an intermediary receives either a £150 Non-Domestic Alternative Fuel Payment or a Top-up Payment following a proactive application. The primary purpose of the application scheme is to provide a mechanism for disbursement of a Top-up Payment to eligible non-domestic users of kerosene heating oil. In addition, the application scheme provides a mechanism for disbursement of £150 payments in appropriate cases where a premises would not have received a payment automatically (for example, because it is not supplied with electricity) but remains eligible for a payment.

7.6 Relevant intermediaries are any individual that is in receipt of some or all of a scheme payment (either directly or from another intermediary), and passes on the costs of energy or energy products (or both) supplied to them under a non-domestic supply contract to an end user of the energy supplied. This would also cover intermediaries supplying a product (or service) where contractually a component of the price relates directly to the use of energy. Intermediaries may include, but are not limited to, commercial landlords and heat networks. These Regulations apply in respect of relevant intermediaries other than those providing certain types of hospitality accommodation (defined as "excluded person" under these Regulations).

7.7 Intermediaries should pass on the payment irrespective of how the end user pays for their energy use. The intermediary should pass the payment in a just and reasonable way and must follow the regulations in calculating the pass-through amount. The instrument sets out what must be taken into account in determining a just and reasonable amount in various circumstances depending on how energy costs are borne by the end user, and whether the intermediary itself bears energy costs related to the benefit concerned, for example for common services provided.

7.8 If an intermediary does not pass through the whole of the scheme benefit provided to them, then they must demonstrate to the end user that the amount they are passing on is just and reasonable, including taking into account the extent to which the intermediary's charges to end users reflect the increased cost of energy as a result of the energy crisis. The intermediary must follow the regulations in calculating the pass-through amount.

7.9 The intermediary must, within 30 days of a scheme benefit being provided, provide information to the end user in writing. This includes but is not limited to the amount of scheme benefit received, the amount that the intermediary intends to pass through to the end user, when and how they will pass-through the benefit, and that the end user can recover amounts to which they are entitled but do not receive as a civil debt.

7.10 The intermediary must ensure the end user receives the pass-through amount as soon as reasonably practicable. The instrument sets out the ways in which a pass-through can be effected.

7.11 Where an intermediary fails to effect a pass-through to which an end user is entitled, that end user may recover the amount from the intermediary as a civil debt. In such cases the end user may claim interest to be paid by the relevant intermediary at a rate

of 2% per annum above the Bank of England base rate from 60 days after the intermediary receives the scheme benefit.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 No consolidation is necessary for this instrument.

10. Consultation outcome

10.1 No formal public consultation has taken place on this instrument given the urgency of ensuring that support is received. We will continue to review this instrument as necessary following its implementation based on stakeholder feedback.

11. Guidance

11.1 The Department for Business, Energy and Industrial Strategy developed guidance to explain existing pass-through requirements for a range of its energy support interventions in further detail for key stakeholders, including individuals and organisations who may be intermediaries or end users. The guidance is available here: https://www.gov.uk/government/publications/pass-through-requirements-for-energy-price-support-provided-to-intermediaries. Guidance will be updated to account for the Non-Domestic Alternative Fuel Payment.

12. Impact

12.1 The impact on business, charities or voluntary bodies is likely to be minimal, as the instruments do not change the energy price support to which they are entitled under the scheme; rather the instruments ensure that support they receive as intermediaries is passed on to the end user. Intermediaries will be required to provide information to end users which may involve minimal administrative costs for these bodies.

12.2 The impact on the public sector is minimal. Some public sector bodies, such as Local Authorities, may be classed as intermediaries. Civil courts will be impacted if end users need and decide to claim civil debts from intermediaries.

12.3 An Impact Assessment for the Non-Domestic Alternative Fuel Payment scheme, prior to the setting of payment levels, has been published and can be found online here, at pages 19-20: https://publications.parliament.uk/pa/bills/cbill/58-03/0159/AnnexE.pdf.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 Where intermediaries (such as heat networks or commercial landlords) are small businesses, they will be affected by these Regulations. However, the Regulations offer flexibility in the calculation of the pass-through, which will reduce the administrative cost of compliance. Where small businesses are not directly receiving the scheme payment, but are intended beneficiaries of the scheme, they stand to benefit from the pass-through regulations.

13.3 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken will be to provide guidance to relevant intermediaries,

including small businesses, to help them understand and implement the requirements under these instruments.

14. Monitoring & review

14.1 The Department will continue to monitor this instrument following its implementation, including any feedback from stakeholders, and will review as necessary.

14.2 This instrument does not include a statutory review clause by virtue of section 28(3)(d) of the Small Business, Enterprise and Employment Act 2015. This is because the instrument relates to a scheme which will be open for applications for a time-limited period only. Amanda Solloway, Parliamentary Under-Secretary of State for Energy Consumers and Affordability in the Department for Energy Security and Net Zero, has made the following statement: "A review provision in these Regulations is not included given that they relate to payments under the Non-Domestic Alternative Fuel Payment Scheme which will be open to applications for a time-limited period.

15. Contact

15.1 Ben Shotnes (ben.shotnes@beis.gov.uk) at the Department for Energy Security and Net Zero, can be contacted with any queries regarding the instrument.

15.2 Tara Deshpande, Deputy Director for Electrification, Products, Buildings and Delivery, at the Department for Energy Security and Net Zero can confirm that this Explanatory Memorandum meets the required standard.

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