EXPLANATORY MEMORANDUM TO

THE NON-DOMESTIC ALTERNATIVE FUEL PAYMENT PASS-THROUGH REQUIREMENT AND AMENDMENT REGULATIONS 2023

2023 No. 188

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 from the Non-Domestic Alternative Fuel Payment in Great Britain and Northern Ireland, to end users, such as commercial tenants, who are the intended beneficiaries of the scheme.

2.2 This instrument also makes a minor amendment to the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument corrects a drafting error in the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023 (S.I. 2023/10), following the Committee's Twenty-Sixth Report of Session 2022–23. The amendment to the definition of "EBSS AFP NI support payment" clarifies that the support is delivered as a single rather than a monthly payment.

3.2 The Committee reported S.I. 2023/10 for defective drafting also 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 at this stage. 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, except for Part 4, which extends to Northern Ireland only.

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, except for Part 4, which applies to Northern Ireland only.

5. European Convention on Human Rights

5.1 The Rt Hon Graham Stuart, Minister of State 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 Pass-through Requirement and Amendment 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 This instrument makes provision for pass-through requirements on intermediaries in respect of the Non-Domestic Alternative Fuel Payment in Great Britain and Northern Ireland.

6.3 Previous instruments have used Section 19 to impose pass-through requirements for the delivery of other energy support schemes, for instance, the Energy Bills Relief Scheme Pass-through Requirement (England and Wales and Scotland) Regulations 2022 which ensure the pass-through requirements took effect in Great Britain for those schemes. Section 19 was also used for the Energy Bill Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023.

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. The support schemes enabled by the Act will see a typical household pay significantly less for energy, while businesses will be paying less than half of predicted wholesale costs this winter.

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 with to pass support to their tenants as appropriate.

7.3 This instrument will ensure that pass-through requirements for the Non-Domestic Alternative Fuel Payment are put in place. The scheme will provide a single £150

payment to non-domestic users of alternative fuels in Great Britain and Northern Ireland. In Great Britain payments are being made to non-domestic premises that are in an off-gas grid postcode, supplied with and using electricity. In Northern Ireland payments are being made to Off and On Grid postcodes meeting the same criteria.

7.4 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).

7.5 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.

7.6 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.

7.7 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.

7.8 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.

7.9 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.

7.10 The instrument also introduces a minor amendment to the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023. This amendment corrects a minor drafting deficiency and clarifies that the "EBSS AFP NI support payment" is a single rather than a monthly payment.

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 they need this winter. 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 payment being set at £150, 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 time-limited scheme, which requires all payments to be made by 30th June 2023 at the latest. The Rt Hon Graham Stuart, Minister of State for the Department of 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 must be made by 30th June 2023 at the latest.

15. Contact

15.1 Andrew McLean, Policy Adviser (andrew.mclean@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.

15.3 The Rt Hon Graham Stuart, Minister of State at the Department for Energy Security and Net Zero can confirm that this Explanatory Memorandum meets the required standard.