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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 146**

**BUILDING AND BUILDINGS**

**The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016**

*Made* - - - - *8th March 2016*  
*Coming into force* - - *1st September 2016*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 63 of the Climate Change (Scotland) Act 2009<sup>(1)</sup> and all other powers enabling them to do so. In accordance with section 96(4) of that Act<sup>(2)</sup>, a draft of this instrument has been laid before, and approved by resolution of, the Scottish Parliament.

**PART 1**

**Preliminary**

**Citation and commencement**

1. These Regulations may be cited as the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 and come into force on 1st September 2016.

**Application of Regulations**

- 2.—(1) Subject to paragraph (2), these Regulations apply to—
- (a) a non-domestic building; and
  - (b) a building unit,
- with a floor area of more than 1000 square metres.
- (2) These Regulations do not apply to—
- (a) a building or building unit constructed in accordance with relevant building standards;
  - (b) a green deal improved property; or

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(1) 2009 asp 12.  
(2) Section 96(4) has been modified by paragraph 5 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

- (c) a building to which the 2008 Regulations do not apply by virtue of regulation 4(a) of the 2008 Regulations.

### Interpretation

#### 3. In these Regulations—

“the 2008 Regulations” means the Energy Performance of Buildings (Scotland) Regulations 2008(3);

“action plan” means a document prepared and issued in accordance with regulation 6;

“advisory report” has the meaning given in regulation 12;

“alternative improvement measures” means improvement measures (other than the identified improvement measures) which the section 63 advisor has, when preparing an action plan, identified as improvement measures which are recommended to be carried out in respect of the building or building unit;

“approved methodology” means a methodology approved by the Scottish Ministers;

“approved organisation” has the meaning given in regulation 13;

“asset rating” means a numerical indicator of the estimated amount of—

- (a) energy consumed; and
- (b) carbon dioxide emitted,

to meet the different needs associated with a standardised use of the building or building unit, such estimate being made in accordance with an approved methodology;

“authorised recipient” has the same meaning as in the 2008 Regulations;

“building improvement measures” has the meaning given in regulation 6(3)(c);

“building unit” means a part of a non-domestic building which is designed or altered to be used separately;

“the compliance period”, in respect of a building or building unit, means the period of 42 months after the date on which the first action plan is issued;

“current action plan” means the most recent action plan issued for the building or building unit;

“display energy certificate” means a certificate which complies with regulation 11;

“document of confirmation of improvement” has the meaning given in regulation 9;

“electronic communication” has the meaning given in section 15(1) of the Electronic Communications Act 2000(4);

“emissions target” has the meaning given in regulation 7(2);

“energy performance target” has the meaning given in regulation 7(1);

“energy performance certificate” means a certificate which complies with regulation 6 of the 2008 Regulations;

“energy performance data” has the same meaning as in the 2008 Regulations;

“energy improvement data” means—

- (a) in relation to an action plan, the information contained in and needed to produce that action plan;

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(3) S.S.I. 2008/309 as amended by S.S.I. 2008/309, S.S.I. 2012/190, S.S.I. 2012/208, S.S.I. 2012/315, S.S.I. 2013/12 and S.S.I. 2015/386.

(4) 2000 c.7 as amended by paragraph 158 of Schedule 17 to the Communications Act 2003 (c.21).

- (b) in relation to a display energy certificate, the information contained in and needed to produce that certificate;
- (c) in relation to an advisory report, the information contained in and needed to produce that report; and
- (d) in relation to a document of confirmation of improvement, the information contained in and needed to produce that document;

“enforcement authority” has the meaning given in regulation 20(1);

“excluded building” has the same meaning as in the 2008 Regulations;

“first action plan” means, in respect of a building or building unit, the first action plan to be issued in respect of that building or building unit;

“green deal plan” has the same meaning as in section 1 of the Energy Act 2011<sup>(5)</sup>;

“green deal improved property” means a building or building unit to which qualifying energy improvements have been (at any time) carried out under a green deal plan;

“identified improvement measures” in respect of a building or building unit has the meaning given in the Schedule;

“improvement measures” means any works, measures or other steps which may be taken by the owner of a building or building unit to improve the energy performance of the building or building unit or to reduce emissions of greenhouse gases produced by or otherwise associated with that building or building unit;

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994<sup>(6)</sup>;

“keeper” means the Scottish Ministers or a person appointed by the Scottish Ministers to keep a register on their behalf in accordance with regulation 14;

“non-domestic building” has the same meaning as in section 63(7) of the Climate Change (Scotland) Act 2009;

“operational rating” for a building or building unit is an indicator, expressed numerically, of the energy consumption (measured in accordance with an approved methodology) associated with the actual use of that building or building unit;

“operational rating measures” means measures, implemented in accordance with regulations 10 to 12, to assess and record the energy consumption (measured in accordance with an approved methodology) associated with the actual use of a building or building unit;

“owner” means, in relation to a building or building unit, the person who has right to the building or building unit whether or not that person has completed title; but if in relation to the building or building unit more than one person comes within that description of owner, then “owner” means such person as has most recently acquired such right;

“prospective buyer” and “prospective tenant” have the meaning given in regulation 4;

“qualifying energy improvements” has the same meaning as in section 1(4)(b) of the Energy Act 2011<sup>(7)</sup>;

“relevant building standards” means, in relation to the construction of a building, the requirements set out in—

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(5) 2011 c.16.

(6) 1994 c.39.

(7) Energy efficiency improvements specified for the purposes of section 1(4)(b) of the Energy Act 2011 as set out in S.I. 2012/2105.

- (a) Schedule 5 to the Building (Scotland) Regulations 2004<sup>(8)</sup>; or
  - (b) the Building Standards (Scotland) Regulations 1990<sup>(9)</sup> as those Regulations had effect on or after 4th March 2002,
- applicable to the construction of that building;
- “report reference number”—
- (a) in respect of energy improvement data relating to an action plan, a display energy certificate, an advisory report or a document of confirmation of improvement, as the case may be, means the unique reference under which the energy improvement data relating to that document is entered onto the register; and
  - (b) in respect of energy performance data, has the same meaning as in the 2008 Regulations;
- “section 63 advisor” means, in respect of an action plan, the qualified member of an approved organisation who undertakes the assessment of the energy performance of the building or building unit and who prepares and issues the action plan;
- “unique identification number” is the unique number from which a member of an approved organisation can be identified by the keeper; and
- “unique property reference number” is the unique number from which a building or building unit can be identified by the keeper.

#### **Meaning of prospective buyer or prospective tenant**

4. A person becomes a prospective buyer or prospective tenant in relation to a building or building unit on the earliest of the dates when that person—
- (a) requests any information about the building or building unit from the owner for the purpose of deciding whether to buy or lease the building or building unit;
  - (b) makes a request to view the building or building unit for the purpose of deciding whether to buy or lease the building or building unit; or
  - (c) makes an offer, whether oral or written, to buy or lease the building or building unit.

## PART 2

### Assessment of Energy Performance

#### **Action plans on sale or rent of non-domestic buildings**

- 5.—(1) Where a building or building unit to which these Regulations apply is to be sold or is to be let by the owner of the building or building unit, the owner must—
- (a) make a copy of the action plan for the building or building unit available for inspection free of charge to a prospective buyer or a prospective tenant; and
  - (b) ensure that the energy improvement data relating to that action plan has already been sent to the relevant register in accordance with regulation 14.
- (2) Where a building or building unit is sold or let a copy of the action plan for the building or building unit must be provided free of charge by the seller to the buyer or, as the case may be, by the owner to the tenant.

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(8) S.S.I. 2004/406 as relevantly amended by S.S.I. 2006/53, S.S.I. 2008/310, S.S.I. 2010/32, S.S.I. 2011/120, S.S.I. 2012/209, S.S.I. 2013/143, S.S.I. 2014/219 and S.S.I. 2015/218.

(9) S.I. 1990/2179 as amended by S.I. 1993/1457, S.I. 1994/1266, S.I. 1996/2251, S.I. 1997/2157, S.S.I. 1999/173.

(3) The action plan to be made available under paragraph (1) or provided under paragraph (2) is the most recent action plan issued in respect of the building or building unit.

(4) Paragraphs (1) to (3) do not apply if the sale or lease of the building or building unit is an exempt transaction.

(5) In this regulation—

“exempt transaction” means—

- (a) the sale or lease of a building or building unit at any time before the construction of that building or building unit has been completed;
- (b) the lease of a building or building unit—
  - (i) on a short term lease; and
  - (ii) where the building or building unit has not been let by the owner during the period of 36 weeks immediately preceding the period of lease under that short term lease;or
- (c) the renewal of an existing lease with the same tenant; and

“short term lease” means a lease for a period of not more than 16 weeks and which does not include an option, right or obligation to extend the period of lease for a total period of longer than 16 weeks.

## **Action Plans**

**6.—(1)** An action plan for a building or building unit is a certificate prepared and issued in accordance with this regulation containing a programme for the implementation of measures to—

- (a) improve the energy performance of the building or building unit;
- (b) reduce emissions of greenhouse gases produced by or otherwise associated with that building or building unit.

(2) An action plan must—

- (a) be prepared and issued by a qualified member of an approved organisation (“the section 63 advisor”); and
- (b) be prepared following an assessment of the energy performance of the building or building unit undertaken by the section 63 advisor in accordance with an approved methodology and using energy performance data relating to a valid energy performance certificate for that building or building unit.

(3) Where there are identified improvement measures in respect of the building or building unit, the action plan must, in addition to including the information specified in paragraph (5)—

- (a) specify the identified improvement measures for the building or building unit;
- (b) include the energy performance target and the emissions target for the building or building unit;
- (c) specify the improvement measures which the section 63 advisor recommends are carried out in respect of the building or building unit (“building improvement measures”); and
- (d) state whether or not operational rating measures are to be implemented in respect of the building or building unit; and
- (e) state the date of expiry of the compliance period.

(4) Where there are no identified improvement measures in respect of the building or building unit, the action plan must, in addition to the information specified in paragraph (5), contain a statement that there are no identified improvement measures for the building or building unit.

(5) The information is—

- (a) the report reference number for—
    - (i) the energy performance data used in the preparation of the action plan; and
    - (ii) the energy improvement data relating to the action plan;
  - (b) the address of the building or building unit;
  - (c) the unique property reference number for the building or building unit;
  - (d) the unique identification number for the section 63 advisor;
  - (e) the date on which the section 63 advisor inspected the building or building unit in connection with the preparation of the action plan; and
  - (f) the date on which the action plan is issued.
- (6) The building improvement measures to be specified in the action plan under paragraph (3)(c)—
- (a) must be—
    - (i) the identified improvement measures;
    - (ii) alternative improvement measures; or
    - (iii) a combination of identified improvement measures and alternative improvement measures; and
  - (b) must when implemented be sufficient to—
    - (i) reduce the estimated energy consumption of the building or building unit to meet the energy performance target for the building or building unit; and
    - (ii) reduce the estimated level of greenhouse gas emissions from the building or building unit to meet the emissions target.
- (7) An action plan may only specify alternative improvement measures as building improvement measures under paragraph (3)(c) if, or to the extent that, it is possible using an approved methodology to calculate both—
- (a) the amount of energy by which it is estimated the energy consumption of the building or building unit would be reduced if the alternative improvement measures were to be carried out; and
  - (b) the reduction in the level of greenhouse gas emissions produced by or otherwise associated with the building or building unit which it is estimated would be achieved if the alternative improvement measures were to be carried out.
- (8) After the first action plan has been issued a subsequent action plan may be issued in respect of the building or building unit but—
- (a) a subsequent action plan issued on or after the date falling 12 months after the date of issue of the first action plan may only state that operational rating measures are to be implemented in respect of the building or building unit if—
    - (i) there is a valid display energy certificate in respect of the building or building unit;
    - (ii) the date of issue of the first display energy certificate in respect of that building or building unit occurred on or before the date falling 12 months after the date of issue of the first action plan; and
    - (iii) since the date of issue of the first display energy certificate in respect of the building or building unit there has always been a valid display energy certificate in respect of the building or building unit; and
  - (b) a subsequent action plan may not be issued on or after the date of expiry of the compliance period unless—

- (i) it states that operational rating measures are to be implemented in respect of the building or building unit; and
- (ii) the date on which the most recently issued display energy certificate for the building or building unit ceases to be valid in accordance with regulation 11(2) is no earlier than one month after the date on which the subsequent action plan is to be issued.

(9) In this regulation, “valid energy performance certificate” means an energy performance certificate which on the date on which the action plan is issued has not ceased to be valid in terms of regulation 6(2)(b) of the 2008 Regulations.

### **Energy performance target and emissions target**

7.—(1) The energy performance target for a building or building unit is the amount of energy, calculated in accordance with an approved methodology, by which it is estimated the energy consumption of the building or building unit would be reduced if the identified improvement measures were to be carried out.

(2) The emissions target for a building or building unit is the reduction in the level of greenhouse gas emissions produced by or otherwise associated with the building or building unit which, calculated in accordance with an approved methodology, it is estimated would be achieved if the identified improvement measures were to be carried out.

## **PART 3**

### **Implementation of action plans or operational rating measures**

#### **Implementation of building improvement measures**

8.—(1) The owner of the building or building unit to which the action plan relates must complete the building improvement measures before the compliance date for the building or building unit.

- (2) The compliance date for the building or building unit is the later of—
  - (a) the date of expiry of the compliance period for the building or building unit; or
  - (b) where on that date paragraph (3) applies in respect of the building or building unit, the first date occurring on which there is no valid display energy certificate in respect of the building or building unit.
- (3) This paragraph applies where—
  - (a) the current action plan contains a statement that operational rating measures are to be implemented in respect of the building or building unit; and
  - (b) there is, and since the date of issue of the first display energy certificate in respect of the building or building unit has always been, a valid display energy certificate in respect of the building or building unit.
- (4) In this regulation—
  - “building improvement measures” means the building improvement measures identified in the current action plan for the building or building unit; and
  - “compliance date” has the meaning given in paragraph (2).

#### **Confirmation of completion of building improvement measures**

9.—(1) Where building improvement measures identified in an action plan have been completed the owner of the building or building unit to which the action plan relates must—

- (a) ensure that an energy performance certificate for that building or building unit is issued on or after the date of completion of the building improvement measures; and
  - (b) ensure that a document (“document of confirmation of improvement”) containing the information specified in paragraph (2) is issued.
- (2) The information is—
- (a) the report reference number for—
    - (i) the energy performance data relating to the energy performance certificate issued by virtue of paragraph (1)(a); and
    - (ii) the energy improvement data relating to the action plan which identifies the building improvement measures;
  - (b) the address of the building or building unit;
  - (c) the unique property reference number for the building or building unit;
  - (d) a description of the building improvement measures;
  - (e) the date on which the building improvement measures were completed;
  - (f) the unique identification number for the member of the approved organisation issuing the document; and
  - (g) the date on which the document is issued.

### **Implementation of operational rating measures**

**10.**—(1) Where the current action plan for a building or building unit states that operational rating measures are to be implemented in respect of that building or building unit, the owner of the building or building unit must implement operational rating measures in respect of the building or building unit.

- (2) Operational rating measures are implemented in respect of a building or building unit where—
- (a) there is a valid display energy certificate for the building or building unit; and
  - (b) that valid display energy certificate is displayed within the building or building unit in a prominent place clearly visible to persons using the building or building unit.

### **Display Energy Certificate**

- 11.**—(1) A display energy certificate for a building or building unit must—
- (a) include the report reference number for the energy improvement data relating to that display energy certificate;
  - (b) where there is a valid energy performance certificate for the building or building unit, include the asset rating for the building or building unit;
  - (c) include a reference value;
  - (d) include the operational rating for the building or building unit;
  - (e) be issued by a qualified member of an approved organisation for that category of building or building unit;
  - (f) include the following information—
    - (i) the address of the building or building unit;
    - (ii) the total useful floor area of the building or building unit;
    - (iii) the unique identification number for the member of the approved organisation issuing the display energy certificate; and

- (iv) the date on which it was issued; and
  - (g) specify the nominated date.
- (2) A display energy certificate for a building or building unit is valid for a period of one year from the nominated date specified under paragraph (1)(g).
- (3) Paragraph (1)(d) does not apply in respect of a display energy certificate if the date of issue of that display energy certificate is earlier than the date falling 15 months after the date of issue of the first action plan for the building or building unit.
- (4) The date to be specified under paragraph (1)(g) (“the nominated date”) must be a date, determined by the person issuing the display energy certificate, which is both—
- (a) no later than the date of issue of the display energy certificate; and
  - (b) no later than three months after the date of the expiry of the assessment period.
- (5) Where a display energy certificate previously issued in respect of the building or building unit included an operational rating the display energy certificate is—
- (a) where only one such previous display energy certificate has been issued, to state the operational rating included in that certificate; or
  - (b) where two or more such previous display energy certificates have been issued, to state the operational rating included in the two most recently issued certificates.
- (6) A display energy certificate must not contain any information or data from which a living individual (other than the person issuing it or that person’s employer) can be identified.
- (7) In this regulation—
- “assessment period” means , in respect of a display energy certificate, the period, determined by an approved methodology, in respect of which the operational rating included in the display energy certificate is calculated;
  - “nominated date” has the meaning given in paragraph (4);
  - “reference value” means such current legal standard or benchmark which makes it possible to compare and assess the energy performance of the building or building unit;
  - “total useful floor area” means the gross floor area as measured in accordance with the guidance issued from time to time by the Royal Institution of Chartered Surveyors or by a body replacing that Institution; and
  - “valid energy performance certificate” means an energy performance certificate which on the date on which the display energy certificate is issued has not ceased to be valid in terms of regulation 6(2)(b) of the 2008 Regulations.

### **Advisory report**

- 12.—**(1) An advisory report is a report prepared and issued in connection with a display energy certificate which includes advice on, and cost effective and technically feasible recommendations for—
- (a) the improvement of the energy performance of the building or building unit; and
  - (b) the reduction of emissions of greenhouse gases produced by or otherwise associated with that building or building unit.
- (2) An advisory report must be issued by a qualified member of an approved organisation—
- (a) for that category of building or building unit; and
  - (b) in relation to the issuing of display energy certificates.

(3) An advisory report must not contain any information or data (except for the address of the building or building unit) from which a living individual (other than the person issuing it or that person's employer) can be identified.

## PART 4

### Approved organisations

#### Approved organisations

**13.**—(1) An approved organisation is an organisation approved by the Scottish Ministers in accordance with this regulation as an organisation whose members may issue one or more of the categories of documents specified in paragraph (4).

(2) The terms of approval of any organisation may be limited in relation to (either or both)—

- (a) the categories of documents which its members may issue;
- (b) the categories of building or building unit for which its members may issue such documents.

(3) Before approving an organisation the Scottish Ministers must be satisfied that the organisation will—

- (a) ensure that the preparation and issuing of action plans, display energy certificates, advisory reports or documents of confirmation of improvement, as the case may be, is carried out in a consistent, accurate and independent manner; and
- (b) ensure that members are fit and proper persons who are qualified by their education, training and experience to carry out the preparation and issuing of such documents.

(4) The documents are—

- (a) action plans;
- (b) display energy certificates;
- (c) advisory reports; and
- (d) documents of confirmation of improvement.

## PART 5

### Register of energy improvement data

#### Registration of energy improvement data

**14.**—(1) There must be one or more registers of energy improvement data from which the following documents may be produced—

- (a) an action plan;
- (b) a display energy certificate;
- (c) an advisory report; and
- (d) a document of confirmation of improvement.

(2) A register referred to in paragraph (1) is to be maintained by a keeper.

(3) A register may be maintained for different purposes or for different classes of buildings or building units.

(4) Where a member of an approved organisation issues any document referred to in paragraph (1) (a) to (d), that person must ensure that the energy improvement data relating to that document is sent to the relevant register before the document is issued.

(5) Any energy improvement data entered onto a register—

- (a) must be registered under a unique reference; and
- (b) must not be altered once registered.

(6) Any energy improvement data entered onto a register must be kept on the register for a period of at least 10 years beginning on the date on which it is entered onto the register.

### **Disclosures generally**

15. The keeper of a register may only disclose—

- (a) energy improvement data;
- (b) any document produced from that data; and
- (c) any information derived from that data,

if authorised by, or required to do so by, regulations 16 to 19.

### **Disclosure of documents**

16.—(1) The keeper of a register may disclose—

- (a) an action plan;
- (b) a display energy certificate;
- (c) an advisory report; or
- (d) a document of confirmation of improvement,

for a building or building unit to any person if the conditions in paragraph (2) are met.

(2) The conditions are that—

- (a) the request is made by means of a website operated by the keeper; and
- (b) the request includes—
  - (i) the full address (excluding the postcode) of the building or building unit;
  - (ii) the full postcode of the building or building unit; or
  - (iii) the report reference number for the energy improvement data relating to the document.

### **Disclosure of data relating to a particular building or building unit**

17.—(1) The keeper of a register may disclose energy improvement data relating to a particular building or building unit to an authorised recipient or an approved organisation if all of the conditions in paragraph (2) are met.

(2) The conditions are that—

- (a) a request for disclosure of the data is made—
  - (i) by means of a website operated by the keeper; or
  - (ii) by electronic communication sent to an address or location specified by the keeper for the purpose of the receipt of such requests;
- (b) the request includes—

- (i) the full address (excluding the postcode) of the particular building or building unit to which the data relates;
  - (ii) the full postcode of that building or building unit; or
  - (iii) the report reference number for energy improvement data relating to the building or building unit;
- (c) the disclosure is made subject to the condition that the data is to be used by the recipient solely for one or more of the purposes described in Part 2 of Schedule 1 to the 2008 Regulations; and
- (d) the particular building or building unit to which the data relates is not an excluded building.
- (3) The keeper may refuse to disclose information under paragraph (1) where the person who requests the disclosure has previously failed to comply with a condition of the kind referred to in paragraph (2)(c).

#### **Disclosure of bulk access data**

**18.**—(1) The keeper of a register may disclose energy improvement data to an authorised recipient or an approved organisation if all of the conditions in paragraph (2) are met.

- (2) The conditions are that—
- (a) the authorised recipient or an approved organisation has made a request for one or more specific descriptions of data to the keeper;
  - (b) the request is made—
    - (i) by means of a website operated by the keeper; or
    - (ii) by electronic communication sent to an address or location specified by the keeper for the purpose of the receipt of such requests;
  - (c) the data does not include any information revealing the location of an excluded building (or any information from which the location of such a building can be deduced);
  - (d) the disclosure is made subject to the condition that the data is to be used by the recipient solely for one or more of the purposes described in Part 2 of Schedule 1 to the 2008 Regulations; and
  - (e) the data does not relate only to a particular building or building unit.

(3) The keeper may refuse to disclose information under paragraph (1) where the person who requests the disclosure has previously failed to comply with a condition of the kind referred to in paragraph (2)(d).

#### **Disclosure of data**

- 19.** The keeper of a register must when requested to do so disclose energy improvement data—
- (a) to the Scottish Ministers;
  - (b) to an enforcement authority for the purposes of its duty to enforce these Regulations; or
  - (c) where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

## PART 6

### Enforcement

#### **Enforcement authorities**

- 20.**—(1) Every local authority is an enforcement authority for the purposes of these Regulations.  
(2) It is the duty of each enforcement authority to enforce these Regulations in its area.

#### **Power to require production of action plan**

**21.**—(1) An enforcement authority may require a person who appears to it to be or to have been subject to the duty under regulation 5(1)(a) or (2) in relation to a building or building unit to produce for inspection a copy of the action plan for that building or building unit.

- (2) The power conferred by paragraph (1) includes power—
- (a) to require the production in a legible documentary form of a copy of any action plan which is held in electronic form; and
  - (b) to take copies of any action plan produced for inspection.

(3) A requirement under this regulation may not be made more than 6 months after the last day on which the person concerned appeared to the enforcement authority to be subject to the duty under regulation 5(1)(a) or (2), as the case may be, in relation to the building or building unit.

(4) A person who is subject to a requirement under this regulation must, unless that person has a reasonable excuse for not doing so, comply with that requirement within the period of 7 days beginning with the day after that on which it is made.

#### **Penalty charge notices – failure to provide action plan**

**22.**—(1) An enforcement authority may, if it believes that a person has breached any duty under regulation 5(1)(a) or (2), give a penalty charge notice to that person.

- (2) A penalty charge notice may not be given to a person under paragraph (1)—
- (a) in respect of a breach of the duty under regulation 5(1)(a), unless that person has failed to make an action plan available to a prospective buyer or tenant within a period of 9 days after a request for such an action plan was made to that person; or
  - (b) after the end of the period of 6 months beginning with the day on which it appeared to the enforcement authority that the duty under regulation 5(1)(a) or (2), as the case may be, was breached.
- (3) A penalty charge notice must—
- (a) be in writing;
  - (b) state the enforcement authority’s belief that a breach of regulation 5(1)(a) or (2), as the case may be, has occurred;
  - (c) give such particulars of the circumstances as may be necessary to give reasonable notice of the breach;
  - (d) require the person to whom the notice is given, within the period specified in the notice—
    - (i) to pay the penalty charge specified in the notice; or
    - (ii) to give notice to the enforcement authority requesting the authority to review the notice;
  - (e) state the effect of regulation 27(3);

- (f) specify the person to whom and the address at which the penalty charge may be paid and the method or methods by which payment may be made; and
  - (g) state that there is a right to request a review of the notice and how and by what date a request for such a review is to be made.
- (4) The amount payable as the penalty charge is £1000.
- (5) The period specified under paragraph (3)(d) must not be less than 28 days beginning with the day after that on which the penalty charge notice is given.
- (6) The enforcement authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice.
- (7) The enforcement authority must withdraw a penalty charge notice where regulation 23 applies.
- (8) Any sum received by a local authority under this regulation shall accrue to that authority.

### **Defence where action plan unobtainable**

**23.**—(1) A person is not liable to a penalty charge for a breach of the duty imposed by regulation 5(1)(a) if it can be demonstrated that—

- (a) a request for an action plan was made at least 14 days before the relevant time, and despite all reasonable efforts and enquiries by that person, that person did not have possession or control of an action plan at the relevant time; or
- (b) in the case of a failure to make available an action plan to a prospective tenant—
  - (i) the prospective tenant was seeking to lease the building or building unit due to an emergency which required the tenant’s urgent relocation;
  - (ii) at the relevant time that person did not have possession or control of an action plan;
  - (iii) there was insufficient time in which that person could reasonably have been expected to obtain an action plan before letting the building or building unit to the prospective tenant; and
  - (iv) an action plan was provided to the tenant as soon as reasonably practicable after letting the building or building unit.

(2) In paragraph (1)(a) the reference to a request is to a request properly addressed to a person who usually provides or is likely to provide an action plan for the category of building or building unit in question and which includes such payment or an undertaking to make such payment as is usually necessary to obtain an action plan.

(3) In this regulation “relevant time” means the point in time at which one of the events specified in paragraphs (a) to (c) of regulation 4 first occurs.

### **Penalty charge notice - failure to implement building improvement measures**

**24.**—(1) An enforcement authority may, if it believes that an owner has breached any duty under regulation 8(1), give a penalty charge notice to the owner.

(2) A penalty charge notice may not be given under paragraph (1) if the building improvement measures identified in the current action plan for the building or building unit have been completed.

(3) A penalty charge notice must—

- (a) be in writing;
- (b) state the enforcement authority’s belief that the owner has breached regulation 8(1);
- (c) give such particulars of the circumstances as may be necessary to give reasonable notice of the breach;

- (d) require the person to whom the notice is given, within the period specified in the notice—
    - (i) to pay the penalty charge specified in the notice; or
    - (ii) to give notice to the enforcement authority requesting the authority to review the notice;
  - (e) state the effect of regulation 27(3);
  - (f) specify the person to whom and the address at which the penalty charge may be paid and the method or methods by which payment may be made; and
  - (g) state that there is a right to request a review of the notice and how and by what date a request for such a review is to be made.
- (4) The amount payable as the penalty charge is £1000.
- (5) The period specified under paragraph (3)(d) must not be less than 28 days beginning with the day after that on which the penalty charge notice is given.
- (6) The enforcement authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice.
- (7) Any sum received by a local authority under this regulation shall accrue to that authority.

### **Reviews**

**25.**—(1) If, within the period specified under regulation 22(3)(d) or 24(3)(d) as the case may be, the recipient of the penalty charge notice gives notice to the enforcement authority requesting a review, the authority must—

- (a) consider any representations made by the recipient and all other circumstances of the case;
- (b) decide whether to confirm or withdraw the notice; and
- (c) serve notice of its decision and the reasons for it on the recipient.

(2) A notice under paragraph (1)(c) confirming the penalty charge notice must also state the effect of regulations 26 and 27.

(3) If, following a review, the enforcement authority is satisfied that—

- (a) the recipient did not commit the breach of duty specified in the notice;
- (b) in the case of a penalty charge notice given under regulation 22(1) the notice was not given within the time allowed by regulation 22(2)(b);
- (c) the notice did not comply with any other requirements imposed by these Regulations; or
- (d) in the circumstances of the case it was not reasonable for a penalty charge notice to be given to the recipient,

it must withdraw the penalty charge notice.

### **Appeal to the sheriff court**

**26.**—(1) If after a review the penalty charge notice is confirmed by the enforcement authority, the recipient may appeal against the penalty charge notice to the sheriff court of the sheriffdom in which the building or building unit is situated.

(2) An appeal against a penalty charge notice must be made within the period of 28 days beginning with the day after that on which the notice under regulation 25(1)(c) is given.

(3) The sheriff may extend the period for appealing against the notice on cause shown.

(4) An appeal must be on one (or more) of the following grounds—

- (a) that the recipient did not commit the breach of regulations 5(1)(a) or (2) or 8(1), as the case may be, specified in the penalty charge notice;
  - (b) that in the case of a penalty charge notice given under regulation 22(1) the notice was not given within the time allowed by regulation 22(2)(b);
  - (c) the notice did not comply with any other requirements imposed by these Regulations; or
  - (d) that in the circumstances of the case it was not reasonable for the notice to be given to the recipient.
- (5) An appeal against a penalty charge notice must be by summary application.
- (6) The sheriff must determine an appeal against a penalty charge notice by upholding or quashing the notice.
- (7) A decision of a sheriff may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the Courts Reform (Scotland) Act 2014(10).

### **Recovery of penalty charges**

**27.**—(1) The amount of the penalty charge is recoverable from the recipient of the penalty charge notice as a debt owed to the enforcement authority unless—

- (a) the notice has been withdrawn or quashed; or
  - (b) the charge has been paid.
- (2) Proceedings for the recovery of the penalty charge notice may not be commenced—
- (a) before the end of the period specified in accordance with regulation 22(3)(d) or 24(3)(d) as the case may be; and
  - (b) if within that period the recipient of the penalty charge notice gives notice to the authority requesting the authority to review the penalty charge notice, such proceedings may not be commenced—
    - (i) before the end of the period mentioned in regulation 26(2); and
    - (ii) where the recipient appeals against the penalty charge notice, before the end of the period of 28 days beginning with the day on which the appeal is withdrawn or determined.
- (3) In proceedings for the recovery of the penalty charge, a certificate which—
- (a) purports to be signed by or on behalf of the person having responsibility for the financial affairs of the enforcement authority; and
  - (b) states that payment of the penalty charge was or was not received by a date specified in the certificate,

is evidence of the facts stated.

### **Repayment of penalty charge**

**28.** If the penalty charge notice is withdrawn or quashed, the enforcement authority must repay any amount previously paid as a penalty charge in pursuance of the notice.

St Andrew's House, Edinburgh  
8th March 2016

*MARCO BIAGI*  
Authorised to sign by the Scottish Ministers

## SCHEDULE

Regulation 3

## Identified Improvement Measures

1. The identified improvement measures in respect of a building or building unit are those improvement measures specified in paragraph 2 which—
  - (a) meet the criteria specified in paragraph 3; and
  - (b) the section 63 advisor has, when assessing the energy performance of the building or building unit, identified as improvement measures which it would be practicable to carry out in respect of the building or building unit.
2. The improvement measures are—
  - (a) installing draught stripping to doors and windows;
  - (b) upgrading lighting controls;
  - (c) upgrading heating controls;
  - (d) installing an insulation jacket to a hot water tank;
  - (e) upgrading low energy lighting;
  - (f) installation of insulation in an accessible roof space; and
  - (g) replacement of a boiler.
3. The criteria are—
  - (a) in the case of improvement measures specified in paragraph 2(c) to (f), the reduction, as estimated in accordance with an approved methodology, in the cost of the energy consumed in the building or building unit over a period of 7 years after the date on which the measure is carried out would be greater than the cost of carrying out the measure; and
  - (b) in the case of the improvement measure specified in paragraph 2(g), the boiler to be replaced is more than 15 years old.

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**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations make provision for the assessment of the energy performance of non-domestic buildings and of the emission of greenhouse gases from such buildings. They also provide for the circumstances in which the owners of non-domestic buildings are required to take steps to improve the energy performance of such buildings and reduce such emissions.

Regulation 2 sets out the non-domestic buildings and parts of such buildings to which the Regulations apply. Regulations 3 and 4 provide definitions for terms used in the Regulations.

Regulation 5 imposes a duty on the owner of a building to make an action plan available to prospective buyers or tenants where the building is to be sold or let. The requirements of an action plan are set out in regulation 6. Regulation 7 sets out the energy performance target and emissions target which are identified in an action plan.

Regulations 8 and 9 set out the requirement for an owner to implement the building improvement measures identified in an action plan and for a document confirming that building improvement

measures have been completed to be issued. Regulations 10 to 12 provide for the circumstances in which and the manner in which operational rating measures are to be implemented.

The Scottish Ministers may approve organisations whose members may issue action plans and other documents (regulation 13).

Regulation 14 provides that a register of energy improvement data from which action plans and other documents can be produced is to be maintained. The data must be sent to the register before the document in question is issued. Regulations 15 to 19 regulate the disclosure of information contained in the register.

Local authorities have powers to enforce the Regulations. Under regulation 21 the enforcement authority may require production of an action plan. Under regulation 22 a penalty charge notice may be served on owners of buildings who contravene the requirement to make an action plan available. Under regulation 24, a penalty charge notice may be served on owners of buildings who fail to implement building improvement measures. The penalty is £1,000. Regulations 23 and 25 deal with defences to and review of penalty charge notices. Regulation 26 deals with appeals to the sheriff. Regulation 27 deals with recovery of penalty charges. Regulation 28 deals with repayment of penalty charges where a penalty charge notice is withdrawn or quashed.

The Schedule to the Regulations identifies the improvement measures which are used to create the energy performance target and emissions target for a building.