

EXPLANATORY MEMORANDUM TO

**THE HOUSING (SERVICE CHARGE LOANS) (AMENDMENT) (ENGLAND)
REGULATIONS 2009
2009 No. 602**

AND

**THE HOUSING (PURCHASE OF EQUITABLE INTERESTS) (ENGLAND)
REGULATIONS 2009
2009 No. 601**

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1 Both instruments concern assistance to leaseholders of social landlords (principally local authorities and housing associations) for the purpose of enabling such leaseholders to pay leasehold service charges owed to their landlords. All properties to which both sets of Regulations will apply will be flats.

2.2 The Housing (Service Charge Loans) (Amendment) (England) Regulations 2009 (“the Loan Amendment Regulations”) amend the Housing (Service Charge Regulations) 1992 (“the 1992 Regulations”), which make provision for loans under sections 450A and 450B of the Housing Act 1985 (“the 1985 Act”). The amendment enables a landlord who makes such a loan under the discretionary power deriving from section 450B to do so on terms other than payment of interest.

2.3 The Housing (Purchase of Equitable Interests) (England) Regulations 2009 (“the Equitable Interest Purchase Regulations”) give social landlords the power to assist a leaseholder by buying an equitable interest (ie, a share of the value) in the flat.

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

3.1 None.

4. Legislative Context

4.1 Sections 308 and 309 of the Housing & Regeneration Act 2008 (“the 2008 Act”) contain the provisions giving rise to these two sets of Regulations. Section 308 amends section 450C of the 1985 Act with regard to the terms of loans under sections 450A and 450B to certain leaseholders, enabling the Secretary of State to amend the regulations under which those loans are made.

4.2 Section 309 adds a new section 450D to the 1985 Act containing a power to make regulations with regard to purchase of equitable interests.

4.3 Both sets of Regulations concern assistance to long leaseholders of social landlords (mainly local authorities and housing associations). In the majority of cases their flats will have been bought originally under the Right to Buy scheme (“RTB”).

4.4 A secure tenant of a flat who exercises the RTB under Part 5 of the Housing Act 1985, or a purchaser of an ex-RTB flat on the open market, will usually be required, under the terms of the lease, to pay service charges to the landlord. These payments will be the leaseholder’s contribution to works of repair and maintenance, which the landlord is obliged to carry out under the terms of the lease, and to any improvement work which the landlord carries out. Service charges may include variable sums in respect of such works to the common parts of the building in which the leaseholder’s flat is located, or to the grounds of the estate.

4.5 In the majority of secure tenancies, the landlord is a local authority. However, until the Housing Act 1988 created the assured tenancy scheme, housing associations could also grant secure tenancies. In a relatively small number of cases, therefore, the landlord of a leaseholder of an ex-RTB flat is a housing association.

Meaning of “housing authority”

4.6 The Loan Amendment Regulations affect only the discretionary power to make loans deriving from section 450B (see paragraph 7.8). The landlords to whom sections 450B and C, new section 450D and the 1992 Regulations apply, and to whom the Loan Amendment Regulations, and the Equitable Interest Purchase Regulations will apply, are “housing authorities”. In this context, this means largely local authorities and housing associations. Virtually all of the latter are also registered social landlords (ie, registered with the social housing regulator; up to 1st December 2008 the Housing Corporation or since that date the Tenant Services Authority) under the Housing Act 1996. However the exact meaning of “housing authority” varies slightly between the Loan Amendment Regulations and the Equitable Interest Purchase Regulations.

4.7 A housing authority is defined in section 4 of the 1985 Act for the purposes of the whole Act as meaning “a local housing authority or a new town

corporation”, and “local housing authority” is defined in section 1 of the Act as “a district council, a London borough council, the Common Council of the City of London, a Welsh county council or county borough council, or the council of the Isles of Scilly”. The general definition of “housing authority” is glossed by two further interpretation provisions, so far as sections 450B and C are concerned. In section 458(1) for the purposes of Part 14 of the Act “housing authority” includes “any local authority, an urban development corporation, the Housing Corporation and a registered social landlord”.

4.8 Section 450B(4) adds the further gloss that “housing authority” includes “any registered social landlord other than a co-operative housing association and any co-operative housing association which is not a registered social landlord.”. This will apply to the Loans Amendment Regulations.

4.9 With regard to the Equitable Interest Purchase Regulations, the new section 450D of the 1985 Act (inserted by section 309 of the 2008 Act) contains a separate gloss on the meaning of “housing authority”. That term –

- a. “does not include a registered provider of social housing, or a registered social landlord, which is a co-operative housing association;
- b. “includes a co-operative housing association which is neither a registered provider of social housing nor a registered social landlord.”.

4.10 This wording has the same effect as that in section 450B(4) but is phrased differently in order to update the terminology in the light of other changes made by the 2008 Act, among which will be the replacement of the term “registered social landlord” by “registered provider of social housing”. That change will not have come into force by commencement of these Regulations.

4.11 In the case of housing associations, the loan was payable by the Housing Corporation but since 1st December 2008 is payable by the Homes and Communities Agency which has assumed the Corporation’s non-regulatory functions since that date.

4.12 Neither set of Regulations applies to cases where the Secretary of State is the landlord, except where this is as a result of exercising functions under Part 3 of the Housing Associations Act 1985 (see sections 450B(1A) and 450D(4) of the 1985 Act).

The Loan Amendment Regulations

4.13 In order to give assistance in paying service charges, sections 450A, 450B and 450C of the 1985 Act give powers to the Secretary of State to make provision by regulations for mandatory and discretionary loans to leaseholders of flats whose landlords are housing authorities, The 1992 Regulations were made

jointly for England and Wales under these powers. The power to make regulations for Wales was subsequently devolved to the National Assembly for Wales, and now lies with the Welsh Ministers.

4.14 Two sorts of loans are provided for in the 1992 Regulations –

- a. mandatory loans (deriving from the power in section 450A), available only where certain criteria are satisfied, and in respect of which terms are specified in detail;
- b. discretionary loans (deriving from the power in section 450B) in other cases, in respect of which the terms are to be determined by the lender.

4.15 The Regulations do not specify in so many words that loans must be on interest-bearing terms, but this is implied by the wording. Regulation 6(3) states that “A loan under these Regulations shall, as regards the rate of interest payable on it ... be subject to the provisions of Schedule 2 to these Regulations”. Paragraph 1 of Schedule 2 to the 1992 Regulations is headed “The rate of interest” and specifies that –

- a. “Except in a case falling within sub-paragraph (b), the rate of interest payable on the loan shall be such reasonable rate as may be determined by the lender;
- b. “In the case of a loan under regulation 2 [*i.e. a mandatory loan*] where the lender is a local authority, the provisions of Schedule 16 to the Act [*i.e. the 1985 Act*] shall apply.”.

4.16 These provisions regarding payment of interest on loans in the 1992 Regulations repeat wording to the same effect in section 450C, which contains supplementary details with regard to the regulation-making powers under sections 450A and B.

4.17 In order to enable the Secretary of State to amend the 1992 Regulations with regard to payment of interest on loans on flats in England, therefore, it was necessary first to amend the enabling wording in section 450C to the 1985 Act. Section 308 of the Housing & Regeneration Act 2008 (“the 2008 Act”) has made such amendment, by substituting, in section 450C(4), the phrase “in a case where a rate of interest is payable on some or all of” for the previous wording “as regards the rate of interest payable on”.

4.18 Section 308 of the 2008 Act was commenced on 1st December 2008 by article 4 of the Housing and Regeneration Act 2008 (Commencement No 2 and Transitional, Saving and Transitory Provisions) Order 2008 (S.I. 2008/3068) (“the Second Commencement Order”) in respect of service charges on flats in England only.

4.19 No amendment has been made to the provisions in the 1992 Regulations regarding terms of mandatory loans, and therefore the powers in section 450A of the 1985 Act are not used in this instrument (see paragraph 7.8).

The Equitable Interest Purchase Regulations

4.20 Section 309 of the 2008 Act was partly commenced by the Second Commencement Order, for the purpose of enabling the Secretary of State to make regulations under section 450D of the 1985 Act. Commencement of the remainder of section 309 will be either shortly before or simultaneous with commencement of the Regulations.

4.21 Where a purchase is made of an equitable interest in a flat, payment for that interest is subject to similar requirements as apply to payment of loans under the 1992 Regulations. The aim of these provisions is to ensure that the money made available is used for the purpose for which it is intended. Section 450D(2) requires that the Regulations –

“... shall ensure that the purchase price is to be met by the landlord reducing or (as the case may be) cancelling the service charge payable to the landlord by the tenant to such extent as corresponds to the amount concerned.”.

4.22 By section 450D(3)(c) the landlord is entitled to make a charge for administrative expenses, and the purchase price for the equitable interest may (at the option of the purchaser) take into account a deduction for these expenses. In such circumstances, therefore, the amount paid can take into account the administrative expenses as well as the amount needed to cancel the service charge. In other words, the equitable interest which the landlord buys must be sufficient for the price paid to equal the total of both the service charge amount and the administrative expenses.

4.23 Since all properties to which the Regulations will apply will be leasehold flats, any agreement between the landlord and leaseholder with regard to purchase by the former of an equitable interest in the flat may need to be reflected in the terms of the lease. Alternatively the parties may agree to replace the existing lease with a lease on shared ownership terms.

5. Territorial Extent and Application

5.1 Both these instruments apply in relation to flats in England only.

6. European Convention on Human Rights

As these instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 These two sets of Regulations will give housing authority landlords discretionary powers, for the purpose of assisting their leaseholders in the payment of service charges, to –

- a. offer them loans on equity share terms, i.e. wholly or partly interest-free loans in which instead the lender is entitled on repayment of the loan to a percentage of the market value of the flat;
- b. purchase an equitable interest in the flat, so that the housing authority will be entitled to a specific share of the value of the flat when it is sold.

7.2 The Regulations fulfil the Government's commitment to give housing authorities such powers in a statement to Parliament made by Yvette Cooper on 29 March 2007:

<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070329/wmstext/70329m0001.htm#07032949000022>.

Further background is given in the following news release published on the same date:

<http://www.communities.gov.uk/news/corporate/government-helps-local>.

7.3 The Government is aware that some leasehold owners of flats with housing authority landlords are finding it difficult to meet the service charges which are due under the terms of their leases.

7.4 A review by the Department of the issues being faced by leaseholders in connection with service charges focused on the range of ways in which housing authorities can help leaseholders to pay such bills. Housing authorities can already offer leaseholders a range of payment options, but the review highlighted the view of stakeholders that powers to offer a loan on equity share terms, or buy an equitable interest in the flat, would give housing authorities greater flexibility in assisting leaseholders, and would provide leaseholders with significantly different payment options which might be more appropriate for them than the options already available. The provisions in sections 308 and 309 of the 2008 Act were included for these reasons.

7.5 The decision on whether to buy an equity share or offer an equity loan is at the discretion of the housing authority, and entering into any agreement will be

voluntary for both the housing authority and the leaseholder. It will also be up to these parties to decide the terms of any agreement.

7.6 In keeping with the principle that it should be for the parties concerned to decide all terms, the Equitable Interest Purchase Regulations do not include provision for specifying administrative expenses, calculation of purchase price, the imposition of charges for the services of district valuers, or allocating pro-rata future service charges (although a power to make such provision is included in section 450D(3)). However the Regulations provide the landlord with the power to charge administrative expenses (in regulation 5), and for these to be taken into account with regard to the purchase price (regulation 4(2)).

7.7 Similarly, with regard to the Loan Amendment Regulations, although section 308 of the 2008 Act inserts a new paragraph 450C(4)(aa) in the 1985 Act, giving a power to make provision about calculating the market value of the flat and imposing charges for the services of district valuers, this power has not been used. Again, it will be up to the parties to agree such terms.

7.8 It is open to the parties to agree to a loan under the discretionary provisions of the 1992 Regulations even where the leaseholder would be entitled to rely on the mandatory provisions. For this reason the Loans Amendment Regulations enable non-interest-bearing terms in respect only of discretionary loans deriving from the powers in section 450B of the 1985 Act. The provisions in the 1992 Regulations regarding payment of interest on mandatory loans have not been amended. Given that there is to be no mandatory element to equity share loans, it was not considered necessary to add wording about discretionary choices to the mandatory provisions.

Consolidation

7.9 Additional provision with regard to loans under section 450B of the Housing Act 1985 has previously, as in this case, been made by amending the 1992 Regulations. The Government does not at present plan to issue a consolidated version of this instrument. The Government takes the view that purchases under the Equitable Interest Purchase Regulations constitute sufficiently different provision from the 1992 Loans Regulations that it is not appropriate to combine both types of subject matter into one new instrument.

8. Consultation outcome

8.1 The Department consulted a range of bodies including local authorities, Registered Social Landlords, tenant organisations, housing and lending regulators and other interested organisations. The consultation was conducted over a 10 week period. This was because a 12 week consultation period would have allowed insufficient time for appropriate consideration of the consultation responses or the drafting of any changes to the Housing & Regeneration Bill in

relation to these responses. Furthermore, introduction of the provisions was being contemplated as a response to existing discussions with stakeholders.

8.2 The proposals were not expected to be controversial in any way, and it was considered highly desirable to introduce these powers as soon as possible to enable housing authorities to offer their leaseholders a wider range of support in relation to their service charge bills.

8.3 75 per cent of respondents supported the proposals. Those who disagreed were concerned that the proposals would be costly and complex to administer. The Department has responded to these concerns by minimising regulation, and by leaving it to the discretion of the housing authorities whether to make use of these powers and on what terms.

9. Guidance

9.1 Housing authorities will be notified that the Regulations have come into force.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is that housing authorities will have the discretion to offer a loan on equity sharing terms or purchase an equitable interest in a flat where they and the leaseholder are in agreement over the terms.

10.3 An Impact Assessment has not been prepared for these instruments because no impact on the private or voluntary sector is foreseen. The impact on the public sector is that a wider range of discretionary options will be available to housing authorities and their leaseholders, in relation to service charge bills.

10.4 A general Impact Assessment was included in the consultation document referred to in paragraph 8.1, issued in August 2007, on proposed changes to the Right to Buy scheme which were subsequently enacted in the Housing and Regeneration Act 2008. This Impact Assessment noted that:

- a. the economic impact of the changes was likely to be negligible;
- b. the measures would not impose any additional costs on local or central Government;
- c. loans by housing authorities would not reduce opportunities for other lenders as the leaseholders concerned were unlikely to be able to afford commercial rates;

d. there would be no race or gender equality impact, nor any impact on the environment or adverse impact on rural communities;

e. the social impact of the changes was likely to be negligible, and there was no adverse impact on competition.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The decision on whether to use the powers enabled by these Regulations will rest solely with housing authorities and their leaseholders, and the extent to which the options are taken up will depend largely on external factors such as the financial markets. The Department will therefore conduct an internal review 3 years after the powers become available to housing authorities, as the impact of the Regulations is not expected to be apparent before then.

13. Contact

Diana Fergus at the Department for Communities and Local Government; Tel: 020 7944 5499 or email: Diana.fergus@communities.gsi.gov.uk can answer any queries regarding these instruments.