

EXPLANATORY MEMORANDUM TO
THE ENERGY PERFORMANCE OF BUILDINGS (ENGLAND AND WALES) ETC.
(AMENDMENT) REGULATIONS 2013

2013 No. 10

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

2. Purpose of the instrument

The Energy Performance of Buildings (England and Wales) etc. (Amendment) Regulations 2013 (“the 2013 Regulations”), which extend to England and Wales only, relate to the green deal energy efficiency scheme (“the green deal scheme”). They amend the Energy Performance of Buildings (England and Wales) Regulations 2012 (“the 2012 Regulations”) and the Building Regulations 2010 (“the 2010 Regulations”) to require information about any green deal plans entered into in respect of a property to be included in the energy performance certificate (“EPC”) for that property. These amendments facilitate the green deal disclosure obligations in section 12 of the Energy Act 2011 (“the 2011 Act”) and Part 7 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 (S.I. 2012/2079) (“the Framework Regulations”), which require an EPC to be given to those people who may become responsible for making payments due under a green deal plan.

The 2013 Regulations also make consequential amendments to the provisions in the 2012 Regulations relating to public access to EPC data.

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

3.1 The 2013 Regulations were made on 9th January, laid before Parliament on 11th January and will come into force on 27th January 2013. Therefore, the Department is not observing the usual 21 day rule for negative resolution instruments as these Regulations will come into force 17 days after being laid. The reasons for not observing the 21 day rule in this case are as follows:

(a) The Secretary of State did not have the power to make the provisions in the 2013 Regulations until 9th January 2013.

(i) The 2013 Regulations amend the 2012 Regulations. The majority of the amendments are made using the power contained in section 9 of the 2011 Act. That section provides the Secretary of State with a power to amend the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (“the 2007 Regulations”). The 2012 Regulations consolidate the 2007 Regulations by revoking and replacing them with effect from 9th January

2013. Whilst section 17 of the Interpretation Act 1978 enables the reference to the 2007 Regulations in section 9 of the 2011 Act to be read as a reference to the new 2012 Regulations, this would only be the case once the 2007 Regulations have been revoked by the 2012 Regulations on 9th January.

- (ii) The 2012 Regulations were made by Parliamentary Under Secretary of State for Communities and Local Government . The Department worked closely with the Department for Communities and Local Government (“DCLG”) to try to avoid the need to breach the 21 day rule but it was not possible for DCLG to make the 2012 Regulations before 17th December 2012. Having laid the 2012 Regulations on 19th December, it was not then possible to bring them into force earlier than 9th January without breaching the 21 day rule.
 - (iii) The 2013 Regulations have therefore been made at the earliest opportunity and laid before Parliament as soon as possible after being made.
- (b) The green deal scheme commences on 28th January. The 2013 Regulations must come into force in time for that date.
- (i) The 2013 Regulations are part of a suite of legislation relating to the green deal scheme. The legal framework for the scheme will come into force on 28th January and therefore these Regulations are required to come into force by that date to ensure that the legal framework is complete. (Further information regarding the green deal scheme and the legislation which underpins it is set out in sections 4 and 5 below.)
 - (ii) These Regulations must be in force in time for 28th January to ensure that, from that date, it will be possible for a green deal provider to confirm a green deal plan in accordance with the requirements of section 8 of the 2011 Act and regulation 42 of the Framework Regulations. Those provisions require, amongst other things, a green deal provider to secure that a new EPC is produced once energy efficiency improvements have been installed at a property under a green deal plan. It is essential that the EPC includes the green deal plan information envisaged by the 2013 Regulations as it will ensure that that EPC can then be used to comply with the green deal disclosure obligations referred to above. If these Regulations were to come into force after 28th January, green deal plans may be confirmed without green deal plan information being included in the EPC. This would undermine the disclosure obligations referred to above and would increase the likelihood that the requirement to make payments under a green deal plan would be challenged under Part 8 of the Framework Regulations, which could lead to the green deal plan being cancelled. In addition to creating a potential route for challenging green deal plans, the absence of a complete legal framework may undermine investor confidence and affect take-up.
 - (iii) In addition, on 10th December 2012, the Department laid the draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) (Amendment)

Regulations 2013 (“the Draft Amendment Regulations”) before Parliament. Those Regulations include provision made under section 11(6) of the 2011 Act relating to the updating of the green deal plan information in EPCs. These provisions enable green deal plan information to be updated to reflect changes to that information during the term of the plan. Before provision can be made under section 11(6), section 11(3) requires provision to have been made under section 9(3) so as to require EPCs to contain green deal plan information. Therefore, the Draft Amendment Regulations cannot be made until the amendments to the 2012 and 2010 Regulations made by the 2013 Regulations have come into force. The Draft Amendment Regulations should be in force in time for 28th January to ensure that the legal framework for the green deal scheme is complete. In addition to the updating provisions, the Draft Amendment Regulations also contain other provisions, such as modifications to regulation 30 of the Framework Regulations (which sets out the basis on which suppliers must estimate the amount of instalments for the purpose of the Golden Rule), which would not, in the event of a delay, be in place on 28th January when the first green deal plans may be made.

- (iv) Subject to Parliamentary approval, the Draft Amendment Regulations will come into force on the day after the day on which they are made (see regulation 1). To ensure the Draft Amendment Regulations are able to come into force on 28th January, the 2013 Regulations will therefore need to come into force on 27th January.

3.2 For the reasons set out above, the Departments concluded that these Regulations should come into force on 27th January.

3.3 The amendments made by the 2013 Regulations are administrative in nature and support substantive obligations contained elsewhere in the legal framework for the green deal scheme. These amendments are most likely to be relevant to green deal providers and assessors and the organisation which operates and maintains, on behalf of the Secretary of State, the register of data from which EPCs may be produced. In order to mitigate to some extent part of the impact of breaching the 21 day rule, the Department circulated an advanced draft of the 2013 Regulations to green deal providers and green deal assessors before Christmas. In addition, the Department has already published guidance for green deal providers explaining how the confirmation process (which these Regulations relate to) will operate on a technical level. The Department has also, over the past year, been working with the organisation which operates and maintains the EPC register to ensure that the register is updated to reflect the new requirements relating to green deal plan information envisaged by the 2013 Regulations. The Department is also intending to publish guidance in time for 28th January 2013 to support the practical implementation of the green deal disclosure obligations. Those obligations require an EPC to be provided to, for example, prospective buyers where a property is being sold.

4. Legislative Context

- 4.1 The 2013 Regulations relate to the green deal scheme. They are being made in exercise of powers contained in sections 9, 40(1) and 74 of the 2011 Act.
- 4.2 They amend the 2012 Regulations and the 2010 Regulations so as to require information about green deal plans to be included in the EPC for a property with a green deal plan. (The Scottish Government is making similar changes to the Scottish Energy Performance of Buildings Regulations using the power in section 10 of the 2011 Act.) They also amend the provisions in the 2012 Regulations relating to public access to EPC data insofar as those provisions relate to properties which have a green deal plan.
- 4.3 The green deal scheme enables property owners and occupiers to enter into a new type of arrangement for the installation of energy efficiency improvements called a “green deal plan”. Under a green deal plan, energy efficiency improvements are installed in a property and then paid for wholly or partly in instalments which are collected through electricity bills for the property.
- 4.4 As mentioned above, the 2013 Regulations are part of a suite of instruments relating to the green deal scheme. The other instruments in this suite include the following:

(a) The Framework Regulations. These regulations contain provisions relating to the authorisation of green deal assessors, installers, providers and certification bodies; the terms of green deal plans; the requirement for consent from those who may have to pay the instalments due under a green deal plan; the formal requirements relating to confirmation of a green deal plan once it has been set up; the requirement to disclose information about the green deal plan to those who may move into a property and have to pay the instalments due under the plan; and the enforcement of the various obligations imposed by the green deal scheme.

The Framework Regulations were amended by S.I. 2012/3021, which came into force on 5 December 2012.

As mentioned in section 3 above, on 10th December 2012, the Department laid before Parliament a further set of draft amendments to the Framework Regulations. Those amendments are referred to in this Memorandum as the Draft Amendment Regulations. Subject to Parliamentary approval, it is envisaged that the Draft Amendment Regulations will be made on 27th January, after the 2013 Regulations have come into force. They will then come into force on 28th January.

(b) The Green Deal (Energy Efficiency Improvements) Order 2012 (S.I. 2012/2106) and the Green Deal (Qualifying Energy Improvements) Order 2012 (S.I. 2012/2105). These Orders contain provisions relating to the energy efficiency improvements which can be installed under a green deal plan.

(c) The Green Deal (Disclosure) Regulations 2012 (S.I. 2012/1660), which contain provisions relating to the point at which a seller or person letting out a property must provide a copy of a document containing information about the green deal plan at a

property to a prospective buyer or tenant in order to comply with the disclosure obligation contained in the 2011 Act.

(d) The Green Deal (Acknowledgment) Regulations 2012 (S.I. 2012/1661), which specify the forms of words that must be used when a person gives an acknowledgment pursuant to the acknowledgment obligations contained in the 2011 Act and the Framework Regulations.

(e) The Green Deal (Acknowledgment) (Scotland) Regulations 2012 (S.S.I 2012/214), which make similar provision in respect of Scotland as the instrument referred to in paragraph (d).

(f) The Energy Act 2011 (Amendment) (Energy Performance of Buildings) Regulations 2012 (S.I. 2012/3170), which make minor, technical amendments to section 11(6) of the 2011 Act.

(g) The Green Deal Code of Practice, which contains provisions regulating the conduct of green deal assessors, installers, providers and certification bodies. The current version of the Code of Practice was issued by the Secretary of State on 27 September 2012. A revised version of the Code of Practice was laid before both Houses of Parliament on 27 November 2012. Provided that Parliament does not resolve not to approve the draft Code, it is anticipated that the revised version of the Code will be issued in the week commencing 21st January.

4.5 The Department plans to lay a further negative resolution instrument relating to the green deal scheme. This will amend the Enterprise Act 2002 to facilitate authorisation, monitoring and enforcement under the green deal scheme. This will be made as soon as possible in January 2013.

4.6 In addition, the Department will be bringing forward a set of amendments to the Consumer Credit Act 1974 using the power in section 30 of the Energy Act 2011. These amendments, which will be subject to the affirmative resolution procedure, will clarify how a number of the provisions in that Act operate in the context of the green deal scheme. These amendments will be brought forward as soon as possible.

5. Territorial Extent and Application

This instrument applies to England and Wales.

6. European Convention on Human Rights

The Secretary of State has made the following statement regarding Human Rights:

In my view, the provisions of the Energy Performance of Buildings (England and Wales) etc. (Amendment) Regulations 2013 are compatible with the Convention rights.

7. Policy background

- 7.1 The 2011 Act made provision for the development of the green deal scheme. Through the consequential secondary legislation referred to in section 4 above, a novel scheme has been developed which provides that the instalments due under a green deal plan are paid via the electricity bill for the property by the person who is the bill payer at the time the instalment is due. Accordingly, when the electricity bill payer for a property changes, for example when a property is sold or let out, the obligation to pay the green deal instalments passes to the new electricity bill payer. The disclosure requirements (set out in section 12 of the 2011 Act and Chapter 2 of Part 7 of the Framework Regulations) are designed to ensure that the new electricity bill payer is given information about the green deal plan before they take on the property.
- 7.2 In England and Wales, information regarding the green deal plan is to be included in the EPC for the property. This document must be given to prospective electricity bill payers. (A slightly different approach has been adopted in Scotland.)
- 7.3 In England and Wales, when a green deal plan is confirmed in accordance with section 8 of the 2011 Act and regulation 42 of the Framework Regulations, the green deal provider is required to secure that a new version of the EPC is produced, which contains information about the green deal plan that has been entered into for the property.
- 7.4 Section 9 of the 2011 Act provides a power for the Secretary of State to amend the EPC regime in England and Wales to require EPCs to include information about green deal plans. When a new EPC is produced, the regulations which govern the content of EPCs (which are the 2012 and the 2010 Regulations) will require those documents to contain information about green deal plans. That information will also be stored on the EPC register.
- 7.5 The EPC, including green deal plan information, will then be used for the purposes of complying with the green deal disclosure obligations in section 12 of the 2011 Act and Part 7 of the Framework Regulations. Making an EPC available on sale or rent of a property is an existing requirement in the property market, which implements European law requirements to communicate information about the energy performance of buildings to prospective building occupiers. Therefore, the requirements in the 2011 Act and the Framework Regulations to use the EPC for green deal disclosure purposes builds on an established mechanism.
- 7.6 Information stored on the EPC register is publically available. The 2013 Regulations use powers in the 2011 Act to ensure that green deal plan information is not made available more than is necessary to facilitate the operation of the green deal scheme.
- 7.7 As mentioned above, section 11 of the 2011 Act enables the Secretary of State to make provision requiring the EPC/green deal plan information to be updated in certain circumstances in accordance with requirements specified in the Framework Regulations.

Subject to Parliamentary approval, these provisions will be inserted by the Draft Amendment Regulations.

8. Consultation outcome

- 8.1 On 23 November 2011, the Department launched a consultation on proposals for the green deal scheme. The consultation also covered the Energy Company Obligation (ECO) which is being implemented through separate legislation. The consultation proposals were published on the Department's website alongside a number of supporting documents, including a draft impact assessment and drafts of the main statutory instruments forming part of the legislative framework for the green deal scheme.
- 8.2 The consultation sought views across England, Wales and Scotland on all aspects of the proposals, including the policy relating to disclosure of information about green deal plans and the use of the EPC regime for that purpose. The Department participated in stakeholder events across Great Britain and hosted workshops and a web chat to further explain and take comments on the details of the proposals. The consultation was complemented by the Department's participation in various stakeholder events, hosting of blogs and a webchat, industry workshops, and stakeholder factsheets on the Department's website to help make the content accessible. The consultation closed on 18 January 2012 and received over 600 written responses from a variety of organisations and individuals. Respondents were broadly supportive of the proposals relating to disclosure and the use of the EPC regime for this purpose. In response to the consultation the Department amended its policy in one important regard: giving 90 rather than 30 days to seek redress in response to disclosure-related disputes to provide additional consumer protection.
- 8.3 Further details of respondents' views, together with Government's response, Impact Assessment and associated publications are available on the Department's website at http://www.decc.gov.uk/en/content/cms/consultations/green_deal/green_deal.aspx.
- 8.4 Given the amendments made by this instrument implement the policy that was consulted upon, no further consultation was considered necessary.

9. Guidance

The Department does not consider that the amendments provided for in this instrument are such that specific guidance is required. Some aspects of the 2013 Regulations will, however, be explained in the general guidance documents that the Department is producing on the green deal scheme. For example, the Department's guidance for green deal providers (published on 19 November 2012) includes guidance on the confirmation process, to which the 2013 Regulations are relevant. The Department will also be issuing guidance to support the practical implementation of the disclosure obligations referred to above, in the property market. As mentioned above, the 2013 Regulations are relevant to those disclosure obligations.

10. Impact

- 10.1 The green deal is a voluntary scheme. As such, the legislation relating to the green deal scheme only applies to business, charities, voluntary bodies and others if they choose to participate in the scheme.
- 10.2 An Impact Assessment has not been produced for this instrument as no specific impact on the private, voluntary or public sectors is foreseen. However, an Impact Assessment relating to the green deal scheme itself has been prepared and is published alongside the Framework Regulations on www.legislation.gov.uk.

11. Regulating small business

- 11.1 The green deal scheme is a voluntary scheme and it does not therefore place mandatory regulation on small businesses. However, SMEs can play a vital role in the scheme and it has been designed to allow a variety of models to develop which may include for example SME participation:
- as part of the supply chain for a larger firm;
 - as partners to green deal providers or, in some cases, as green deal providers in their own right.
- 11.2 Should a small business wish to become a green deal provider, the confirmation and disclosure provisions (to which the 2013 Regulations relate) should provide reassurance as to the long term continuance of the green deal plan. They should reduce the possibility that a green deal plan will be cancelled, which could result in a monetary loss to the green deal provider. Therefore, we do not think the 2013 Regulations will give rise to particular issues for small businesses.

12. Monitoring & review

- 12.1 This instrument will come into force on 27th January 2013.
- 12.2 The Secretary of State is not obliged to carry out a review of the 2013 Regulations but, in accordance with best practice, the Secretary of State will carry out a review of the regulatory system established under Chapter 1 of Part 1 of the 2011 Act and the Framework Regulations and publish a report on the findings five years after it comes into force.
- 12.3 The Secretary of State is also required under the 2012 Regulations to carry out a review of those Regulations (which the 2013 Regulations amend) and publish a report of the findings every five years, starting on the date on which those Regulations come into force.

13. Contact

Stephen Penlington at the Department of Energy and Climate Change Tel: 0300 068 5282 or email: stephen.penlington@decc.gsi.gov.uk can answer any queries regarding the instrument.