

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES)
(GREEN DEAL) (AMENDMENT) ORDER 2014

2014 No. 1850

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

2.1 This Order relates to the Green Deal energy efficiency scheme. It makes amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the “RAO”) in consequence of amendments which were made to the Consumer Credit Act 1974 (the “CCA”) in February 2014 by the Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014 (the “CCA Order”).

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

3.1 None.

4. Legislative Context

4.1 This instrument relates to the Green Deal energy efficiency scheme established by Chapter 1 of Part 1 of the Energy Act 2011 (“Energy Act”). It is being made in exercise of the power contained in section 30 of the Energy Act.

4.2 The Energy Act provides for a new type of arrangement for the installation of energy efficiency measures, called a “green deal plan”. Under a green deal plan, energy efficiency measures are installed in a property and then paid for wholly or partly in instalments which are collected through electricity bills for the property.

4.3 This instrument is part of a suite of instruments relating to the Green Deal. Other instruments in this suite include the following.

- (a) The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 (S.I. 2012/2079)¹. These regulations, which were subject to the affirmative procedure, were made on 6 August 2012. Some provisions came into force on 7 August 2012 and some on 1 October 2012, with the remainder coming into force on 28 January 2013.

¹ These regulations were amended by the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.)(Amendment) Regulations 2012 (S.I. 2012/3021), which were made on 4 December 2012 and came into force on 5 December 2012 and by the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.)(Amendment) Regulations 2013 (S.I. 2013/139), which were made on 27 January 2013 and came into force on 28 January 2013.

- (b) The Green Deal (Energy Efficiency Improvements) Order 2012 (S.I. 2012/2106). This Order, which was subject to the affirmative procedure, was made on 6 August 2012 and came into force on 7 August 2012.
- (c) The Green Deal (Qualifying Energy Improvements) Order 2012 (S.I. 2012/2105). This Order, which was subject to the affirmative procedure, was made on 6 August 2012 and came into force on 28 January 2013.
- (d) The Green Deal (Disclosure) Regulations 2012 (S.I. 2012/1660), which were subject to the negative procedure, were made on 27 June 2012 and came into force on 28 January 2013.
- (e) The Green Deal (Acknowledgment) Regulations 2012 (S.I. 2012/1661), which were subject to the negative procedure, were made on 27 June 2012 and came into force on 28 January 2013.
- (f) The Green Deal (Acknowledgment) (Scotland) Regulations 2012 (S.S.I. 2012/214), which were subject to the negative procedure in the Scottish Parliament, were made on 28 June 2012 and came into force on 28 January 2013.
- (g) The Green Deal Code of Practice, which is subject to the Parliamentary procedure described in section 39 of the 2011 Act. The version of the Code of Practice currently in force is Version 3 (which was issued on 31 July 2013). A draft of Version 4 of the Code of Practice was laid in Parliament on 2 April 2014 .
- (h) The Consumer Credit (Green Deal) Regulations 2012 (S.I. 2012/2798), which were subject to the negative procedure, were made on 7 November 2012 and came into force on 28 January 2013.
- (i) The Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014. (S.I. 2014/436). This Order, which was subject to the affirmative procedure, was made on 27 February 2014 and came into force on 28 February 2014.

5. Territorial Extent and Application

- 5.1 This instrument applies to England, Scotland and Wales.

6. European Convention on Human Rights

- 6.1 The Minister of State for Energy and Climate Change has made the following statement regarding Human Rights:

In my view the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 The Energy Act made provision for the development of the Green Deal. The Green Deal introduces a framework to support the delivery of energy efficiency measures that includes the option of entering into a new type of credit arrangement. This enables owners

and occupiers to make energy efficiency improvements to their property and pay for them over time through instalments added to their electricity bill. The arrangement introduced by the Green Deal is termed a “green deal plan” which includes a unique type of unsecured credit for energy efficiency improvements arranged at the initiative of an owner or occupier of a property (known as the improver). Under a green deal plan, instalments are paid 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, the obligation to pay Green Deal instalments passes to the new bill payer. The organisations that offer green deal plans to customers and provide the finance package for the installation of the improvements are known as Green Deal Providers.

- 7.2 Many green deal plans, particularly those in the domestic sector, will be regulated consumer credit agreements under the CCA. The CCA gives debtors under such agreements certain rights and protections. The CCA also regulates the manner in which credit agreements are entered into as well as the conduct of the creditor during the term of the agreement.
- 7.3 On 28 February 2014, the Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014 came into force. The purpose of that Order was to:
- help Green Deal Providers to write green deal plans by providing them with clarity and confidence on which parties should be treated as the “debtor” and the “creditor” for the purposes of the CCA.
 - ensure that those parties associated with green deal plans get the rights and protections they need, at the right stage.
 - help Green Deal Providers to better navigate the CCA.
 - simplify the test for determining whether or not a green deal plan will be a consumer credit agreement which is regulated by the CCA. From 28 February 2014, the CCA Order provided that all green deal plans for domestic properties will be consumer credit agreements, and that green deal plans for non-domestic properties were consumer credit agreements if the improver was an individual, and section 8 of the CCA then provided that they were regulated unless exempt under the CCA.
- 7.4 On 1 April 2014, responsibility for consumer credit regulation transferred from the Office of Fair Trading to the Financial Conduct Authority. The consumer credit regulatory regime was therefore transferred to a different legislative framework – that established by the Financial Services and Markets Act 2000 (“FSMA”). The RAO sets out which activities are regulated for the purposes of that regime.
- 7.5 The Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014, amends the RAO in consequence of the amendments which were made to the CCA by the CCA Order in February 2014. As much of the CCA will remain in force following the transfer of consumer credit regulation to the FCA in April, it is important that the CCA and RAO complement each other. The amendments to the RAO are intended to mirror the approach taken in the CCA Order to ensure that the policy introduced in February 2014 will remain in place under the new consumer credit

regulatory regime and the drafting of the RAO amendments has therefore been kept in the same terms as the CCA Order, as far as possible.

7.6 In summary, the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014, will make the following provision, which mirrors that made in the CCA Order:

- clarify, in the new article 60LB, which will be inserted into the RAO, who is to be treated as the “borrower” and “lender” in relation to a green deal plan;
- make provision in the new article 60LB as to the circumstances in which green deal plans are “credit agreements” for the purpose of the RAO;
- amend the exemption in article 60C(4)(c) of the RAO, which applies to green deal plans entered into for business purposes, to clarify that this can only apply if the property is a non-domestic property;
- clarify that green deal plans are “borrower-lender-supplier agreements” and “restricted-use credit agreements” for the purpose of the RAO.

7.7 In addition, article 7 of this draft Order will provide that the exemption at article 60F(2) of the RAO, for certain agreements for fixed-sum credit, cannot apply to a green deal plan. This exemption was not disapplied in the CCA Order, however, the Government has concluded, in discussion with the FCA, that this exemption cannot be applied effectively to green deal plans. The exemption normally applies to credit agreements where the number of payments to be made under an agreement are not more than four, and with green deal plans (which are collected via the electricity bill at whatever frequency the bill payer chooses to make payments, and where the instalments accrue as a daily charge) there can be no clear provision when a green deal plan is entered into as to exactly how many payments there will be. The Government has therefore concluded that this exemption should be disapplied.

7.8 The Order will come into force the day after it is made, and will apply to green deal plans made on or after 28 February 2014. The reason for this is that the CCA Order came into force on 28 February 2014, and only applied to green deal plans made from that date onwards. Accordingly, this article provides for the approach to regulation which was provided for in the CCA Order to be preserved.

7.9 However, with effect from 1 April 2014, section 8 of the CCA was amended (by S.I 2013/1881) to provide that a consumer credit agreement is a regulated agreement for the purposes of the CCA if it is a regulated credit agreement for the purposes of Chapter 14A of Part 2 of the RAO – rather than by applying the test provided for in the CCA Order (and mirrored in this draft Order). The effect of this amendment to the CCA on green deal plans is as follows:-

- (a) Plans which were entered into between 28 February and 1 April 2014 that meet the requirements contained in section 189B of the CCA will have been regulated at the time they were made. The new section 60LB, inserted by article 10 of this Order, will ensure that the same policy is maintained for plans entered into after the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014 comes into force.
- (b) However, this amendment to section 8 of the CCA will have affected the regulated status of certain green deal plans. The affected plans are green deal plans for domestic properties, for which the “improver” (the owner or occupier who establishes the plan) is not an individual or “relevant recipient of credit” (as defined in the RAO). Any such plans entered into between 1 April 2014 and the date this Order comes into force (“interim plans”) will not be regulated when established. This could occur for example where a corporate landlord is setting up a green deal plan for a domestic property. Such a scenario would contradict the policy introduced by section 189B of the CCA in February 2014.

7.10 The Government does not expect large numbers of “interim plans” to be made. However, given the Government’s policy that the consumer protections provided by the CCA should be afforded to consumer bill payers in respect of green deal plans, article 12 of this Order makes provision to ensure that, when this Order comes into force, the CCA applies to these plans in an appropriate way. Article 12 therefore provides, in relation to “interim plans”:-

- that certain sections of the CCA, which it would be unfair to impose on creditors or debtors, are disapplied entirely – see article 12(2). These are provisions which
 - (i) affect the establishment of credit agreements, or provide for the consequences of failing to establish a credit agreement in accordance with the requirements of the CCA,
 - (ii) would, if applied, interfere with the creditor’s rights under the agreement, or
 - (iii) would cause detriment to the debtor (this is section 80, which, if applied, would make it a criminal offence for the debtor to fail to provide certain information to the creditor);
- clarification as to the extent to which certain sections of the CCA apply, to ensure that they only apply where appropriate. These are sections which require the creditor to give notice to the debtor, to provide information on request, and which concern default sums and interest on judgment sums.

Consolidation

7.11 No consolidation is proposed at present.

8. Consultation outcome

- 8.1 The amendments to be made by the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014 are in consequence of the amendments which were made to the CCA by the CCA Order in February 2014 and mirror the approach taken in the CCA Order. Accordingly, the Government has not carried out a specific public consultation in relation to this Order.
- 8.2 The policy introduced by the CCA Order was consulted on in 2013. A consultation proposing to amend the definition of “debtor” in section 189 of the CCA for the purpose of the Green Deal was published by the Department of Energy and Climate Change (DECC) on 9 May 2013. The aim of the consultation was to seek views on a draft amendment that would provide Green Deal Providers (as creditors) with confidence as to the identity of the “debtor” under a regulated green deal plan. The consultation proposed that in relation to a prospective consumer credit agreement which is intended to be a green deal plan, the “debtor” would be the individual who will be liable to pay the energy bills for the property from the completion date.
- 8.3 For full details, a copy of the May consultation can be found at the following link:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197645/Consultation_on_the_proposal_to_amend_the_definition_of_debtor_in_Section_189_of_the_Consumer_Credit_Act_1974_for_the_purposes_of_the_Green_Deal_-_9_May_2013.pdf
- 8.4 Nineteen responses to the consultation were received overall. Most respondents indicated that they felt a clarifying amendment would be sensible and that such an amendment was necessary to ensure that Providers would have greater clarity and confidence when issuing green deal plans.
- 8.5 On 6 August DECC published a response to the May consultation. A copy of the Government response can be found here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226657/Government_response_-_FINAL.pdf
- 8.6 As part of DECC’s response it was confirmed that the Department would proceed with the amendment to the definition of “debtor” in section 189 of the CCA but that in the case of a prospective credit agreement, the amendment would clarify that the “debtor” will be the person who is the bill payer at the point at which the credit agreement is entered into (and who therefore signs the credit agreement). This would remove the requirement to look at a point in the future.
- 8.7 DECC also proposed to amend the CCA to clarify that a green deal plan will be both restricted-use credit and a debtor-creditor-supplier agreement, irrespective of whether the improver and the debtor are the same person and hence whether the supply contract and credit agreement are “linked” in the usual sense under the CCA.

8.8 After the Government response was published in August, DECC received some further representations from stakeholders with regards to the proposed CCA amendments. In particular, stakeholders raised concerns that:

- i) it might be difficult for Providers to determine whether green deal plans ought to be regulated or not, particularly in the domestic rented sector;
- ii) unregulated green deal plans might be issued on a domestic property to a corporate landlord that could then be passed onto consumer tenants;
- iii) the improver should be entitled to certain rights and protections under the CCA, particularly at the outset.

8.9 In response to this additional feedback, an addendum to the Government response was published on 9 January 2014, explaining certain refinements to the policy. The addendum explained that all domestic green deal plans would be regulated regardless of the identity of the improver or bill payer (unless they fell within an exemption in sections 16-16C of the CCA – these exemptions are now provided for in article 60C of the RAO), and non-domestic green deal plans would be regulated only if the improver (i.e. the occupier or owner of the property who makes the arrangement for the plan) was an individual.

8.10 The addendum also explained that the Government also considered that the improver should be treated as a debtor for the purposes of certain sections in the CCA. This would ensure that those parties would receive specific rights and protections that are relevant to their roles under a green deal plan. A copy of the Addendum to the 6 August Government response can be found at the following link:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270290/Addendum_to_Government_response_-_FINAL_9-1-14.pdf

9. Guidance

9.1 DECC plans to update its Green Deal Provider Guidance after the Order is made, to reflect both the amendments introduced by the Consumer Credit Act 1974 (Green Deal (Amendment) Order 2014 and the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014. The existing version of the Green Deal Provider Guidance can be found at the following link:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65611/6975-green-deal-provider-guidance.pdf

10. Impact

10.1 The impact on business, charities or voluntary bodies is expected to be minimal. The Green Deal is a voluntary scheme. This instrument and those referred to in section 4 above only apply to business, charities, voluntary bodies and others if they choose to participate in the Green Deal scheme.

10.2 The impact on the public sector is also minimal, for the reasons outlined above.

10.3 An impact assessment has not been prepared for this instrument as no significant impact on the private, voluntary or public sectors is foreseen. However, a full regulatory impact assessment of the effect that the overall Green Deal scheme will have on the costs of business and the voluntary sector is available from the Green Deal Legislation Team, Department of Energy and Climate Change at 3 Whitehall Place, SW1A 2AW and is published alongside the Green Deal Framework (Disclosure, Acknowledgment, redress etc.) Regulations 2012 (S.I. 2012/2079) on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small businesses that have chosen to participate in the Green Deal. The Green Deal is however, a voluntary scheme and it does not therefore place mandatory regulation on small businesses. SMEs can play a vital role in the Green Deal market and the Green Deal 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 Providers or, in some cases, as Providers in their own right.

Some small businesses may be covered by the CCA if they do not enter into a green deal plan wholly for business purposes, in which case they will benefit from the rights and protections that are offered by the CCA. However they will not be treated any differently to any other consumer.

12. Monitoring & review

12.1 This Order will come into force on the day after the day on which it is made.

12.2 The Secretary of State is not obliged to carry out a review of this instrument but in accordance with best practice the Secretary of State will carry out a review five years after the amendment comes into force.

13. Contact

13.1 Jenna Owen at the Department of Energy and Climate Change, tel: 0300 068 5285 or email: jenna.owen@decc.gsi.gov.uk, can answer queries regarding this instrument.