

**EXPLANATORY MEMORANDUM TO**  
**THE BUILDING SAFETY (LEASEHOLDER PROTECTIONS) (ENGLAND)**  
**(AMENDMENT) REGULATIONS 2023**

**2023 No. 126**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 The instrument uses powers in the Building Safety Act 2022 (“the Act”) to make amendments to regulation 3 of the Building Safety (Leaseholder Protections) (England) Regulations 2022 (“the 2022 Regulations”), which relates to associated persons for the purpose of the landlord group to which the contribution condition in paragraph 3 of Schedule 8 to the Act applies.
- 2.2 This instrument amends the list of persons who are not to be considered associated with the relevant landlord for the purposes of paragraph 3 of Schedule 8 of the Act. The effect of this is that a landlord will now be considered to be associated with the relevant landlord for the purpose of establishing whether the landlord met the contribution condition in the circumstances set out in sections 121(5)(b) and 121(6)(a) of the Act.
- 2.3 The instrument will come into force the day after the day on which it is made to ensure that unscrupulous landlords cannot evade the new provisions in the regulations in relation to their calculation of their landlord group’s net worth.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 This instrument uses powers in section 121(12) of the Act.
- 3.2 The intention of regulation 3 of the 2022 Regulations was to exclude directors in common as it was deemed inappropriate for the calculation of the net worth of a landlord group. However, in doing so, parent and sister companies unintentionally became excluded. Parent companies refers to those companies which have a controlling interest in one or more smaller company and sister companies are subsidiary companies owned by the same parent company. This instrument seeks to rectify this unintentional error and ensure that the net worth of a landlord group includes parent and sister companies, for the purposes of determining whether or not they meet the contribution condition in Schedule 8.
- 3.3 As this instrument is being made to rectify an error in the 2022 Regulations it is being issued free of charge to all known recipients of the 2022 Regulations.

#### **4. Extent and Territorial Application**

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

#### **5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

#### **6. Legislative Context**

- 6.1 Part 5 of, and Schedule 8 to, the Act provide that, in many cases, a leaseholder may not be required to pay a service charge to cover the cost of remediating historical safety defects in a relevant building. Paragraph 3 of Schedule 8 to the Act gives the Secretary of State the power to make regulations to determine whether the landlord group met the contribution condition based on the net worth of the landlord group and for the landlord to calculate the value of a qualifying lease under paragraph 6 of Schedule 8.
- 6.2 Using the powers in section 121(12) of the Act, regulation 3(2) of the 2022 Regulations modifies the definition of associated persons for the purpose of the contribution condition in paragraph 3 of Schedule 8 to exclude sections 121(4), (5) and (6)(a) of the Act. This instrument amends regulation 3(2) of the 2022 Regulations by removing two of the modifications so that a person will be considered associated with a relevant landlord where they are associated by virtue of either: 121(5)(b): Where a body corporate controls another ("sister company") or a third body corporate controls both of them ("parent company"); or 121(6)(a): Where a body corporate possess or is entitled to acquire at least half of the issued share capital of a company.
- 6.3 The Act provided that the contribution condition in paragraph 3 of Schedule 8 applied retrospectively, as at 14 February 2022; this ensured that unscrupulous landlords could not game the system by disposing of assets to avoid meeting the contribution condition. As we are unable to make retrospective provision through secondary legislation, the change to the definition of associated persons (and thus the calculation of net worth) will only apply from the day the instrument comes into force. Giving notice between the laying (i.e. publishing) and coming into force of the SI could enable unscrupulous landlords to circumvent the new provisions. By bringing the change into force the day after the instrument is published and made, we are able to ensure that landlords who have yet to issue certificates must follow the new rules and cannot circumvent the leaseholder protection provisions to avoid paying for remediation.

#### **7. Policy background**

##### *What is being done and why?*

- 7.1 Regulation 3(2) in the 2022 Regulations makes an amendment to Section 121 of the Building Safety Act 2022 in relation to the definition of associated persons for the contribution condition. The intention of regulation 3(2) was to exclude directors in common, as this provision had the unintended consequence of making liable under the Act, unrelated companies that shared non-executive directors .

- 7.2 As the Act passed through different parliamentary stages and new clauses were added, numbering changed. Unfortunately, as the 2022 Regulations were drafted at the same time as the Bill clauses, an accidental numbering error occurred in regulation 3(2). This had the unintended consequence of excluding parent and sister companies from being considered as associated with the landlord, and thus their net worth would not be taken into account when considering the landlord group's net worth.
- 7.3 We became aware of this error in Autumn 2022, as we were notified that a large landlord group had claimed that they did not meet the contribution condition – on the basis that their Special Purpose Vehicle (SPV) was the landlord of the building and did not itself have a net wealth of more than £2 million – even though our gov.uk guidance indicated that the parent company would be in scope, as was our intention. The result was that the parent company was able to avoid liability by claiming they were not associated to the landlord, as per the terms of the regulations.
- 7.4 This instrument amends regulation 3(2) of the 2022 Regulations by removing two of the modifications so that a person would be associated with the relevant landlord for the purposes of paragraph 3 in the circumstances set out in sections 121(5)(b) and 121(6)(a) of the Act. This reinstates parent and sister companies as associated persons for the purpose of the contribution condition in paragraph 3 of Schedule 8 to the Act, in line with the original policy intent and that published in guidance on gov.uk.
- 7.5 This amendment will mean that a greater number of landlord groups will meet the contribution condition and therefore have to cover the capped remediation costs which could have otherwise been passed on to qualifying leaseholders where historical safety defects were discovered in a relevant building. Consequently, a greater number of leaseholders will be protected from paying anything at all towards remediation of their blocks, in line with the broad objectives of the Act.
- 7.6 In laying the statutory instrument we will not be following the usual parliamentary procedure of giving 21 days' notice between the publishing and coming into force of this negative instrument. Instead, the instrument will come into force the day after it is laid to prevent unscrupulous landlords from circumventing the new provisions and rushing to complete their landlord certificate before the instrument comes into force, which would ensure that their parent and sister companies' net worth is not taken into account and could mean they do not meet the contribution condition. By bringing the change into force the next day (breaking the 21-day rule), we are able to ensure that landlords who have yet to issue certificates follow the new rules and cannot circumvent the leaseholder protection provisions to avoid paying for remediation. This is important given the behaviour we have already seen from landlords seeking to minimise their liabilities under the protections.

### ***Explanations***

#### *What did any law do before the changes to be made by this instrument?*

- 7.7 The leaseholder protection provisions in the Building Safety Act 2022 came into force on 28 June 2022, with the accompanying regulations coming into force on 20 and 21 July 2022. Under the Act, building owners and landlords who are, or are connected to, the developer must fix all historical safety defects in buildings they own that are above 11 metres or five storeys. In addition, landlords whose landlord group had a net worth of more than £2 million per relevant building on 14 February 2022 (“the contribution condition”) must not pass on costs for historical safety remediation to qualifying

leaseholders. The regulations set out how to calculate a landlord group's net worth, along with what are considered as associated persons of the landlord.

*Why is it being changed?*

- 7.8 Regulation 3(2) in the 2022 Regulations makes an amendment to Section 121 of the Building Safety Act 2022 in relation to the definition of associated persons for the contribution condition. The intention of regulation 3(2) was to exclude directors in common, however, a numbering error meant it also had the unintended consequence of excluding parent and sister companies from being considered as associated with the landlord, and thus their net worth would not be taken into account when considering the landlord group's net worth. This instrument corrects this error.

*What will it now do?*

- 7.9 The instrument will mean that, for the purpose of the contribution condition in paragraph 3 of Schedule 8 to the Act, the definition of landlord group will include body corporates where (i) one is in control of the other, (ii) a third party controls both, and (iii) where a body corporate is entitled to or possesses at least half of the issued share capital of the company. This reflects the original policy intent.
- 7.10 These regulations do not apply retrospectively and therefore landlords which have already issued a certificate will not immediately be impacted. However, if an updated certificate is required (e.g. if new relevant defects are discovered), the new provisions will apply and will need to be followed.
- 7.11 In practice, this will mean that, over time, the original error which narrowed the scope of a landlord group for the purpose of the contribution condition will be rectified in many cases and more leaseholders will be protected from historical safety remediation costs, as was the original policy intention of the contribution condition. As a consequence, such landlords will no longer be able to pass on costs of historical safety remediation to qualifying leaseholders.

**8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

**9. Consolidation**

- 9.1 Not applicable.

**10. Consultation outcome**

- 10.1 Not applicable, a consultation was not required for these regulations.

**11. Guidance**

- 11.1 The Department has published guidance relating to the leaseholder protections here:  
<https://www.gov.uk/guidance/building-safety-leaseholder-protections-guidance-for-leaseholders>
- 11.2 An online tool to see whether leaseholders will have to pay to fix historical safety defects in their building is available here:  
<https://www.gov.uk/check-building-safety-costs>

## **12. Impact**

- 12.1 The majority of the impact on business, charities or voluntary bodies in respect of the leaseholder protections is in relation to Part 5 of, and Schedule 8 to, the Building Safety Act 2022 rather than these regulations. The policy transfers liabilities from leaseholders to businesses which operate as building owners and landlords. The leaseholder protections should drive enhanced proportionality, as landlords will consider much more carefully what works are essential and proportionate to make the building safer. We anticipate that this will result in reduced costs for remediation going forward.
- 12.2 The impact on the public sector is similar to that for the private sector. However, the Building Safety Act 2022 does not apply the contribution condition to registered social housing providers, therefore they will not be affected by these regulations and will continue to be required to pay for all relevant works only where they are, or are connected to, the developer, or where remediation costs exceed the leaseholder cap.
- 12.3 A full Impact Assessment has not been prepared for this instrument because it simply amends the original regulations to enable the original policy intent to have full effect. Since this instrument does not apply retrospectively, landlords who have already issued a certificate will not immediately be impacted and will not need to revise their net worth calculation until an updated certificate is required (e.g. if new relevant defects are discovered).
- 12.4 There will be no impact to landlords whose group (even taking account of the new definition) does not meet the £2 million per relevant building threshold; landlord groups that do will no longer be able to pass on capped costs for non-cladding defects and interim measures to qualifying leaseholders. Landlords may choose to apply for funding via industry and government schemes to cover certain remediation costs (notably those relating to unsafe cladding) and the Act provides routes for them to pursue those responsible.
- 12.5 As this instrument corrects the associated persons definition to meet the original policy intent, it does not change the qualitative assessment of the contribution condition's impact on landlord groups, nor the illustrative examples, which were set out in the original Impact Assessment. This was published on 20 June 2022 and is available on legislation.gov.uk website here:

[https://www.legislation.gov.uk/ukia/2022/52/pdfs/ukia\\_20220052\\_en.pdf](https://www.legislation.gov.uk/ukia/2022/52/pdfs/ukia_20220052_en.pdf)

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the leaseholder protections on small businesses, the Act and existing leaseholder protection regulations provide that landlord groups with a net worth of below £2 million per relevant building – which would include small businesses – are only liable for an appointed share of costs after the leaseholder has paid up to their cap, unless they are (or are connected to) the developer.

## **14. Monitoring & review**

- 14.1 The instrument does not include a statutory review clause as this is already included in the 2022 Regulations which this SI amends.

## **15. Contact**

- 15.1 Kate Pickering at the Department for Levelling Up, Housing and Communities. Telephone: +44 (0) 303 444 8916 or email: [kate.pickering@levellingup.gov.uk](mailto:kate.pickering@levellingup.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Camilla Sheldon, Deputy Director for the Regulatory Stewardship and Reform Programme, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State for Building Safety, Lee Rowley MP, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.