

Regulations made by the Secretary of State, laid before Parliament under sections 19(13) and 26(5) of the Energy Prices Act 2022, for approval by resolution of each House of Parliament within 28 days beginning with the day on which these Regulations were made subject to extension for periods of dissolution, prorogation or adjournment for more than four days.

STATUTORY INSTRUMENTS

2023 No. 188

ENERGY

The Non-Domestic Alternative Fuel Payment Pass-through Requirement and Amendment Regulations 2023

<i>Made</i>	- - - -	<i>22nd February 2023</i>
<i>Laid before Parliament</i>		<i>23rd February 2023</i>
<i>Coming into force</i>	- -	<i>24th February 2023</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 19 and 26(2)(a) and (b) of the Energy Prices Act 2022⁽¹⁾.

PART 1

Introductory

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Non-Domestic Alternative Fuel Payment Pass-through Requirement and Amendment Regulations 2023 and come into force on 24th February 2023.

(2) These Regulations extend to England and Wales, Scotland and Northern Ireland, subject as follows.

(3) Part 4 extends to Northern Ireland only.

Interpretation

2.—(1) In these Regulations—

“electricity supply licence” means a licence granted under section 6(1)(d) of the Electricity Act 1989⁽²⁾;

(1) 2022 c. 44.

(2) Section 6(1)(d) was amended by S.I. 2012/2400.

“end user” means an end user as defined in section 19(3) of the Energy Prices Act 2022 other than an excluded end user;

“energy products” means heating, hot water (or both) provided through a heat network;

“excluded end user” means a person to whom a relevant intermediary located in Northern Ireland supplies or makes available energy⁽³⁾, energy products (or both) at premises located outside England, Wales, Scotland or Northern Ireland;

“excluded person” means a person engaged in the provision of either or both of—

(a) accommodation within the meaning of standard industrial classification divisions 55.1, 55.2, 55.3 (except relevant accommodation providers) and 55.9 (except persons providing student residences, school dormitories, workers hostels and rooming and boarding houses),

(b) energy or energy products (or both) to such accommodation;

“heat network” means a network that, by distributing a liquid or a gas, enables the transfer of thermal energy for the purpose of supplying heating or hot water to a building or persons in that building;

“ND AFP” means an “ND AFP” as defined in the ND AFP Direction⁽⁴⁾;

“ND AFP Direction” means the Non-Domestic Alternative Fuel Payment Great Britain Direction published on 6 February 2023⁽⁵⁾ made by the Secretary of State for Business, Energy and Industrial Strategy pursuant to sections 7(3)(a) and 107 of the Electricity Act 1989⁽⁶⁾ and condition 59 of the standard conditions of each ND AFP non-domestic electricity supplier’s electricity supply licence;

“ND AFP eligible customer” means an “eligible customer” as defined in the ND AFP Direction⁽⁷⁾;

“ND AFP NI” means an “ND AFP” as defined in the ND AFP NI Direction⁽⁸⁾;

“ND AFP NI Direction” means the Non-Domestic Alternative Fuel Payment Northern Ireland Direction published on 6 February 2023⁽⁹⁾ made by the Secretary of State for Business, Energy and Industrial Strategy pursuant to section 22 of the Energy Prices Act 2022;

“ND AFP NI eligible customer” means an “eligible customer” as defined in the ND AFP NI Direction⁽¹⁰⁾;

“ND AFP NI non-domestic electricity supplier” means a “non-domestic electricity supplier” as defined in the ND AFP NI Direction⁽¹¹⁾;

“ND AFP NI scheme benefit” means an ND AFP NI provided by an ND AFP NI non-domestic electricity supplier to an ND AFP NI eligible customer pursuant to the ND AFP NI Direction;

(3) Defined in section 28(4) of the Energy Prices Act 2022.

(4) In the ND AFP Direction, “ND AFP” means “a support payment totalling £150 which a non-domestic electricity supplier is required to provide to an eligible customer pursuant to this direction”.

(5) A hard copy of the ND AFP Direction can be obtained from the Department for Energy Security and Net Zero, 1 Victoria Street, London, SW1H 0ET. For an electronic copy, see: <https://www.gov.uk/government/publications/non-domestic-alternative-fuel-payment-scheme-great-britain-ministerial-direction>.

(6) 1989 c. 29. Section 7(3) was amended by section 32(1) and (4)(b) of the Utilities Act 2000 (c. 27).

(7) In the ND AFP Direction, “eligible customer” means “a Non-Domestic Customer who is: (i) on the list of MPANs; and (ii) on the Qualifying Date, is party to a Non-Domestic Supply Contract or a Deemed Contract for electricity supply which relates to the Non-Domestic Premises associated with the MPAN on the list of MPANs”.

(8) In the ND AFP NI Direction, “ND AFP” means “a support payment totalling £150 which a non-domestic electricity supplier is required to provide to an eligible customer pursuant to this direction”.

(9) A hard copy of the ND AFP NI Direction can be obtained from the Department for Energy Security and Net Zero, 1 Victoria Street, London, SW1H 0ET. For an electronic copy see: <https://www.gov.uk/government/publications/non-domestic-alternative-fuel-payment-scheme-northern-ireland-ministerial-direction>.

(10) In the ND AFP NI Direction, “eligible customer” means “a non-domestic customer who takes a non-domestic electricity supply and is on the DNO list on the Qualifying Date”.

(11) In the ND AFP NI Direction, “non-domestic electricity supplier” means “a Supplier supplying electricity to an Eligible Customer at Non-Domestic Premises”.

“ND AFP non-domestic electricity supplier” means a “non-domestic electricity supplier” as defined in the ND AFP Direction⁽¹²⁾;

“ND AFP scheme benefit” means an ND AFP provided by an ND AFP non-domestic electricity supplier to an ND AFP eligible customer pursuant to the ND AFP Direction;

“pass-through” means the act of a relevant intermediary of passing through all or part of a scheme benefit to an end user;

“pass-through amount” means an amount, being all or part of a scheme benefit, which is passed through to an end user by a relevant intermediary pursuant to these Regulations;

“relevant accommodation providers” means—

- (a) in England, Wales or Scotland, persons providing mobile homes on protected sites as defined in the Mobile Homes Act 1983⁽¹³⁾, or
- (b) in Northern Ireland, persons providing caravans on protected sites defined in the Caravans Act (Northern Ireland) 2011⁽¹⁴⁾;

“relevant intermediary” means a person to whom a scheme benefit has been provided in circumstances in which there is one or more end user other than the relevant intermediary except where that person is an excluded person, and for the purpose of regulation 3, “relevant intermediary” includes a person who will have entitlement to have a scheme benefit provided to it but to whom it has not yet been so provided;

“scheme benefit means”—

- (a) an ND AFP scheme benefit, including such a scheme benefit provided before these Regulations came into force,
- (b) an ND AFP NI scheme benefit, including such a scheme benefit provided before these Regulations came into force, or
- (c) where the end user is also a relevant intermediary, a pass-through made by virtue of these Regulations where the amount of the scheme benefit is the pass-through amount provided to the end user concerned (as intermediary),

and the amount of the scheme benefit may be an amount in pounds sterling or in pounds sterling per kWh (as appropriate) of energy or energy products (or both);

“standard industrial classification” means the Office for National Statistics’ “UK Standard Industrial Classification of Economic Activities 2007 (SIC 2007)”⁽¹⁵⁾;

“standard conditions” means the standard conditions of electricity supply licences incorporated by virtue of section 8A(1) of the Electricity Act 1989⁽¹⁶⁾ in electricity supply licences granted or treated as granted under section 6(1)(d) of that Act;

“usage” means the quantity of—

- (a) energy in respect of which a scheme benefit has been provided, or
- (b) energy products produced using energy in respect of which a scheme benefit has been provided,

made available by a relevant intermediary to an end user.

⁽¹²⁾ In the ND AFP Direction, “non-domestic electricity supplier” means “a person who holds a licence granted under section 6(1)(d) of the Act and who supplies or intends to supply electricity to Non-Domestic Customers”.

⁽¹³⁾ 1983 c. 34. Section 5 was amended by sections 318 and 321(1) of, and Schedule 16 to the Housing and Regeneration Act 2008 (c. 17).

⁽¹⁴⁾ 2011 c. 12 (N.I.).

⁽¹⁵⁾ Published by the Office of National Statistics. For information on how to obtain a hard copy, contact the Office for National Statistics, Classifications and Harmonisation Unit, Government Buildings, Cardiff Road, Newport, South Wales, NP10 8XG. For an electronic copy, see <https://www.ons.gov.uk/methodology/classificationsandstandards/ukstandardindustrialclassificationofeconomicactivities/uksic2007>.

⁽¹⁶⁾ Section 8A was inserted by section 33 of the Utilities Act 2000.

PART 2

Pass-through requirement

Pass-through requirement

- 3.—(1) A relevant intermediary must not—
- (a) reject, or fail to take all reasonable steps in accordance with paragraph (10) to secure, a pass-through amount to which it is entitled pursuant to the operation of these Regulations, or
 - (b) provide a pass-through amount to an excluded end user.
- (2) A relevant intermediary must ensure that as soon as reasonably practicable after a scheme benefit has been provided to it, it provides to each of its end users a just and reasonable pass-through amount in respect of the scheme benefit provided to that relevant intermediary.
- (3) If and to the extent that the relevant intermediary does not pass-through the whole of the scheme benefit provided to it to its end users, it is for the relevant intermediary to demonstrate to end users that the pass-through it has effected is just and reasonable, and in so doing it is entitled to take into account the extent to which its charges to end users reflect the increased cost of energy or energy products (or both) as a result of the energy crisis.
- (4) The pass-through amount must be calculated in accordance with regulation 4.
- (5) Unless the circumstances in paragraph (7) apply, a scheme benefit is provided to a relevant intermediary—
- (a) if such scheme benefit is an ND AFP scheme benefit, when the ND AFP is provided to it by an ND AFP non-domestic electricity supplier pursuant to paragraph 7 of the ND AFP Direction,
 - (b) if such scheme benefit is an ND AFP NI scheme benefit, when the ND AFP NI is provided to it by an ND AFP NI non-domestic electricity supplier pursuant to paragraph 8 of the ND AFP NI Direction, or
 - (c) if the relevant intermediary is also an end user, when a pass-through amount is provided to it by virtue of these Regulations.
- (6) A scheme benefit is deemed to have been provided to a relevant intermediary when such relevant intermediary is notified that it has been identified as an end user for the purpose of these Regulations but the pass-through amount set out in such notification is zero.
- (7) A scheme benefit is not treated as having been provided to a relevant intermediary for the purposes of these Regulations to the extent that the relevant intermediary has notified the person that provided the scheme benefit that it has been provided in error and the relevant intermediary is taking reasonable steps to return such scheme benefit to that person.
- (8) An end user can also be a relevant intermediary in respect of a scheme benefit provided to that end user and vice versa.
- (9) Where a person is an end user, and that person is also a relevant intermediary in respect of some or all of the same energy or energy products (or both), that person must comply with these Regulations.
- (10) To give full effect to the pass-through requirement a relevant intermediary must take all such reasonable steps as may be necessary to secure that it is provided with the scheme benefit to which it is entitled so that it may effect a pass-through to its end users.
- (11) If a scheme benefit has been provided to a relevant intermediary in respect of energy, energy products (or both) supplied or made available to an excluded end user, the relevant intermediary

must notify the person that provided the scheme benefit of this and such scheme benefit is not treated as having been provided to the relevant intermediary for the purposes of these Regulations.

Calculation of pass-through amount

4.—(1) Subject to regulation 3(3), the requirement for a relevant intermediary to provide to end users a pass-through amount that is just and reasonable for the purposes of regulation 3(2) is treated as having been met in any case where—

- (a) the relevant intermediary makes energy or energy products (or both) available through equipment where—
 - (i) tariffs per unit of energy or energy products (or both) used are automatically charged by the equipment, and
 - (ii) the energy or energy products (or both) are paid for by end users at the time that the energy is made available, and
- (b) the relevant intermediary effects a pass-through by, as soon as reasonably practicable after the scheme benefit is provided to the relevant intermediary in accordance with regulation 3(5), adjusting the tariffs charged by the equipment—
 - (i) if there is one end user, to pass on the whole of the scheme benefit to that user, or
 - (ii) if there are multiple end users, to reflect the relevant intermediary's reasonable assessment using best available information of the adjustment required to allocate the scheme benefit between those end users in accordance with one of the approaches described in paragraphs (2)(a) or (b) or (3) below.

(2) Subject to regulation 3(3), where the relevant intermediary was charging end users at the points at which the scheme benefit was provided to it either—

- (a) according to the proportion which each end user's usage represents of the aggregate quantity of energy or energy products (or both) supplied or made available to the relevant intermediary which led to provision of the scheme benefit, or
- (b) according to the proportion each end user pays of the total amount paid by the relevant intermediary in relation to the aggregate quantity of energy or energy products (or both) supplied or made available to the relevant intermediary which led to provision of the scheme benefit,

a pass-through amount is just and reasonable for the purposes of regulation 3(2), if the relevant intermediary applies the same approach, as the case may be, to calculate the pass-through amount for each end user on this basis.

(3) Where paragraph (2) does not apply, in considering what is just and reasonable for the purposes of regulation 3(2), the relevant intermediary must apply the best available information to allocate the benefit amongst end users and in so doing may take into account the basis on which the relevant intermediary was allocating charges amongst end users at the point at which the scheme benefit was provided to it.

(4) A relevant intermediary is not required to pass-through to end users amounts in excess of the scheme benefit provided to it (as adjusted to take account of its own end user usage, where relevant).

(5) When calculating pass-through amounts, a relevant intermediary which is also an end user in respect of a scheme benefit provided to it must not retain more of the scheme benefit for itself than is proportionate to its own usage (or, if it is not practicable to assess the volume of its usage, the proportion of overall charges for energy or energy products (or both) borne by the relevant intermediary and its end users that the relevant intermediary itself bears).

(6) A relevant intermediary is entitled to include energy or energy products (or both) used to provide common services to end users as part of its own usage for the purposes of the calculation in

paragraphs (2) or (3) to the extent that the cost of such energy or energy products (or both) is not or will not be borne by its end users as part of the arrangements in place when the scheme benefit was provided to the relevant intermediary in accordance with regulation 3(5).

Provision of information to end users

5.—(1) Within the period of 30 days beginning with the later of the day on which these Regulations came into force or the day on which the scheme benefit was provided to the relevant intermediary in accordance with regulation 3(5) or was deemed to have been provided to it in accordance with regulation 3(6), the relevant intermediary must take reasonable steps to notify its end users in writing (where possible using the means of communication it customarily uses to communicate with its end users)—

- (a) that the relevant intermediary has either—
 - (i) had a scheme benefit provided to it and has identified the end user as a person entitled to a just and reasonable proportion of such benefit by virtue of the application of these Regulations, or
 - (ii) been notified that it has been identified as an end user for the purpose of these Regulations but the pass-through amount set out in such notification is zero (and in such circumstances the relevant intermediary must also provide to its end users the details in sub-paragraphs (b) and (c) provided to it in the notice from its relevant intermediary and the information set out in sub-paragraphs (f) and (g)),
- (b) the amount of scheme benefit provided to the relevant intermediary and that it is an ND AFP scheme benefit or an ND AFP NI scheme benefit,
- (c) the amount or proportion of scheme benefit provided to the relevant intermediary (if any) which it intends to pass-through to the end user concerned together with supporting details demonstrating why the relevant intermediary considers such pass-through amount to be just and reasonable,
- (d) to the extent applicable, when and how the relevant intermediary will provide the pass-through amount to the end user,
- (e) to the extent applicable, of any steps it is taking to correct an error in the way in which the relevant intermediary has previously passed-through a scheme benefit to an end user,
- (f) how the end user may submit a query to the relevant intermediary about the matters set out in the notice, and
- (g) that if the pass-through amount to which the end user is entitled by virtue of these Regulations is not provided to the end user, the end user is entitled to recover it from the relevant intermediary as a civil debt pursuant to regulation 7(1).

(2) Where the relevant intermediary makes energy or energy products (or both) available through equipment which automatically charges a tariff per unit of energy or energy products (or both) used, paid by end users at the time the energy or energy products (or both) is made available—

- (a) paragraph (1) does not apply, and
- (b) the relevant intermediary must, as soon as reasonably practicable after the scheme benefit was provided to it, notify its end users by notice on or near such equipment in a place in which it will be seen by end users of—
 - (i) the tariff adjustment which the relevant intermediary has applied pursuant to these Regulations to effect the pass-through to end users of the scheme benefit which has been provided to it, and
 - (ii) the contact details of the relevant intermediary which can be used should the end user require further information about its entitlements under these Regulations, including

the ability to query with the relevant intermediary the basis on which the tariffs have been adjusted to reflect the scheme benefit provided to the relevant intermediary.

Effecting the pass-through

6.—(1) Notwithstanding any provision in the contract between the relevant intermediary and the end user at the time the scheme benefit was provided to the relevant intermediary, the relevant intermediary must effect the pass-through so that the pass-through amount is provided to the end user as soon as reasonably practicable.

(2) Where the relevant intermediary makes energy or energy products (or both) available through equipment which automatically charges a tariff per unit of energy or energy products (or both) used, paid by end users at the time that the energy or energy products (or both) is made available, the relevant intermediary must as soon as reasonably practicable make such adjustments to its tariff as is necessary to effect the pass-through required under regulation 3(2).

(3) Without prejudice to paragraph (1), a pass-through can be effected, in pounds sterling or pounds sterling per kWh by—

- (a) application of a credit in the next invoice, statement of account or other similar document provided by the relevant intermediary to the end user,
- (b) a payment in cash or by any other means, including a bank transfer,
- (c) tariff adjustment on tariff equipment,
- (d) adjusting the amount of money taken pursuant to a direct debit or the amount of a standing order,
- (e) set off against an amount or part of an amount which was owed by the end user to the relevant intermediary at the time at which the scheme benefit was provided to the relevant intermediary in accordance with regulation 3(5),

or a combination of the methods set out in this paragraph.

(4) A relevant intermediary has discharged its duty under regulations 3(2), 5(1) or 5(2), and paragraph (1) in respect of an end user if and to the extent it has taken reasonable steps to notify and effect a pass-through of a just and reasonable pass-through amount to that end user but is unable to do so.

(5) An end user has no right to a pass-through amount if the relevant intermediary has discharged its duty under regulations 3(2), 5(1) or 5(2), and paragraph (1) pursuant to paragraph (4) and a period of six months has elapsed after the scheme benefit concerned was provided to the relevant intermediary.

(6) If the contract between the relevant intermediary and the end user expires or is terminated before the pass-through required by these Regulations is effected (such that the full value of the pass-through amount has not been provided to the end user), the relevant intermediary must effect a pass-through to the end user to reflect the end user's entitlement (or remaining entitlement) under these Regulations as soon as reasonably practicable following such expiry or termination.

PART 3

Enforcement

Enforcement

7.—(1) Where a relevant intermediary fails to effect a pass-through to which an end user is entitled by virtue of these Regulations, that end user may, subject to regulation 6(5), recover the relevant pass-through amount from the relevant intermediary as a civil debt.

(2) Where a relevant intermediary fails to effect a pass-through to which an end user is entitled by virtue of these Regulations, the end user may claim interest to be paid by the relevant intermediary on such amount at a rate of 2% per cent per annum over the Bank of England base rate from the date 60 days after the date on which the scheme benefit to which the pass-through relates was provided to the relevant intermediary.

(3) For the purposes of this regulation the “Bank of England base rate” means—

- (a) the rate announced from time to time by the Monetary Policy Committee of the Bank of England as the official dealing rate, being the rate at which the Bank is willing to enter into transactions for providing short term liquidity in the money markets, or
- (b) where an order under section 19 of the Bank of England Act 1998⁽¹⁷⁾ (reserve powers) is in force, any equivalent rate determined by the Treasury under that section.

PART 4

Amendment

Amendment to the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023.

8. In regulation 2 of the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023⁽¹⁸⁾ in the definition of “EBSS AFP NI support payment” omit the words “each EBSS AFP NI scheme month”.

Graham Stuart
Minister of State

22nd February 2023

Department for Energy Security and Net Zero

⁽¹⁷⁾ 1998 c. 11.
⁽¹⁸⁾ S.I. 2023/10.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for pass-through requirements in relation to the Non-Domestic Alternative Fuel Payment in England and Wales, Scotland and Northern Ireland. Pass-through requirements are imposed on a “relevant intermediary” (defined in regulation 2) and establish that they must pass-through an Non-Domestic Alternative Fuel Payment (“ND AFP”) or an Non-Domestic Alternative Fuel Payment Northern Ireland (“ND AFP NI”) to an “end user” (defined in regulation 2) to whom energy or energy products (or both) have been made available. These Regulations apply in respect of relevant intermediaries other than those providing certain types of hospitality accommodation (see the definition of “excluded person” under these Regulations). The Regulations also make an amendment to the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023.

Regulation 3 establishes the requirement for relevant intermediaries to pass-through a just and reasonable amount of the ND AFP or ND AFP NI scheme benefit provided to it to each of its end users.

Regulation 4 provides for the calculation of the pass-through amount and sets out the way in which relevant intermediaries are to determine what is a just and reasonable amount for the purposes of regulation 3.

Regulation 5 sets out the information which relevant intermediaries are required to provide to each of their end users about the ND AFP or ND AFP NI scheme benefit provided to it, the amount or proportion it intends to provide to the end user together with supporting details about how it has calculated that this is a just and reasonable amount.

Regulation 6 makes provision about the way in which the pass-through is to be given effect including that it must be provided to the end user as soon as reasonably practicable after the scheme benefit has been provided to the relevant intermediary.

Regulation 7 provides for unpaid pass-through amounts to be recoverable from the relevant intermediary by the end user as a civil debt.

Regulation 8 makes an amendment to one of the definitions in the Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.